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THE ALL INDIA REPORTER

DONATED

1935

Former ... Journal,
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ALLAHABAD SECTION

WITH PARALLEL REFERENCES TO

(1) I. L. R. 57 ALLAHABAD (2) 1935 ALLAHABAD LAW JOURNAL

(3) 1935 ALLAHABAD LAW REPORTS (4) 16 LAW REPORTER, ALLAHABAD

(5) 1935 ALLAHABAD WEEKLY REPORTER (6) 1935 CRIMINAL CASES

(7) UNPUBLISHED DECISIONS (8) 36 CRIMINAL LAW JOURNAL

(9) 153 TO 158 INDIAN CASES

CITATION : A. I. R. 1935 ALLAHABAD

Printed by D. G. Ranade at the All India Reporter Press, Nagpur

And published by

V. V. CHITALEY, B.A., LL. B.,

AT THE ALL INDIA REPORTER OFFICE

NAGPUR, C. P.

1935

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203	"	"	849	346	1934	*A*	1045	445	1935	"	110	630	"	"	214	787	"	"	292
212	"	"	631	348	"	"	913	455	"	"	99	666	"	"	217	790	"	"	657
219	"	"	795	351	"	"	1065	459	"	"	353	672	"	*PC*	130	797	"	"	411
226	"	"	624	353	"	"	1054	474	"	"	244	678	"	"	185	810	"	"	310
227	"	"	730	357	1935	"	247	482	"	"	34	687	"	*A*	212				
230	"	"	893	374	1934	"	1019	485	1934	"	1043								

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ALJ	AIR			ALJ	AIR			ALJ	AIR			ALJ	AIR			ALJ	AIR		
1	1935	*A*	93	33	1935	*A*	53	63	1935	*A*	214	112	1935	*A*	271	145	1935	*A*	134
4	1934	"	1057	37	"	*PC*	3	66	"	"	212	113	"	"	147	150	"	"	329
13	1935	"	244	40	1934	*A*	1013	68	"	"	28	115	"	"	96	167	"	"	243
18	"	"	79	44	1935	*PC*	5	72	"	"	281	119	1934	"	1009	168	"	"	100
21	"	"	127	46	"	*A*	38	74	"	"	183	123	1935	"	123	170	"	"	279
23	"	"	47	51	"	*PC*	1	78	"	"	102	125	"	"	1	172	1934	"	984
27	"	"	81	54	"	*A*	346	80	"	"	7	133	"	"	207	175	1935	"	160
29	"	"	117	61	"	"	156	108	"	"	236	139	"	"	106				

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ALJ	AIR			ALJ	AIR			ALJ	AIR			ALJ	AIR			ALJ	AIR		
177	1935	*A*	221	383	1935	*A*	359	582	1935	*A*	594	865	1935	*PC*	119	1070	1935	*A*	592
198	"	"	263	385	"	"	717	587	"	"	692	869	"	*A*	817	1072	"	"	781
200	"	"	141	386	"	"	657	591	"	"	765	895	"	"	706	1076	"	"	914
201	"	"	323	390	"	"	436	593	"	*PC*	79	908	"	"	900	1079	"	"	935
209	"	"	210	391	"	"	449	602	"	"	35	910	"	"	862	1083	"	"	968
212	"	"	276	393	"	"	597	603	"	"	62	919	"	"	868	1086	"	"	872
214	"	"	269	395	"	"	608	609	"	"	73	925	"	*PC*	143	1087	"	"	909
217	"	"	792	396	"	"	372	618	"	*A*	579	929	"	*A*	786	1089	1936	"	65
228	"	"	341	398	"	"	407	627	"	"	799	934	"	"	845	1092	1935	*PC*	168
230	"	"	261	400	"	"	278	632	"	"	660	938	"	"	767	1093	"	*A*	979
233	"	"	424	401	"	"	293	635	"	"	760	940	"	"	889	1096	"	"	916
235	"	"	187	403	"	"	502	638	"	"	656	943	"	"	696	1101	"	"	986
242	"	*PC*	21	405	"	"	495	640	"	"	525	946	"	"	742	1108	"	"	938
248	"	*A*	264	408	"	"	503	642	"	"	727	948	"	"	790	1113	"	"	925
249	"	"	204	410	"	"	493	645	"	"	629	950*a*	"	"	896	1114	"	"	930
251	"	*PC*	12	414	"	"	379	647	"	"	616	950*b*	"	"	913	1116	"	"	945
254	"	*A*	206	416	"	"	480	651	"	"	410	952	"	"	630	1118	1936	"	14
255	"	"	463	418	"	"	404	653	"	"	366	953	"	"	626	1119	1935	*PC*	182
257	"	"	217	419	"	"	457	657	"	"	605	955	"	"	642	1124	"	"	185
260	"	"	280	421	"	"	460	660	"	"	655	957	"	"	636	1127	"	*A*	985
261	"	"	470	423	"	"	647	662	"	"	569	960	"	"	882	1129	1936	"	62
270	"	*PC*	9	426	"	"	574	664	"	"	662	962	"	"	738	1131	1935	"	1002
274	"	*A*	272	427	"	"	422	666	"	"	627	963	"	"	750	1133	"	*PC*	187
275	"	"	150	429	"	"	688	668	"	"	691	964	"	"	739	1137	"	*A*	1016
277	"	"	284	432	"	"	754	670	"	"	665	966	"	"	759	1142	"	"	1020
278	"	"	238	436	"	"	435	671	"	"	573	968	"	"	750	1145	"	"	981
279	"	"	411	438	"	*PC*	49	673	"	"	643	969	"	"	814	1147	"	*PC*	139
287	"	"	364	444	"	*A*	481	676	"	"	743	972	"	"	883	1153	"	*A*	1013
289	"	"	606	456	"	"	461	678	"	*PC*	44	973	"	*PC*	169	1154	"	*PC*	122
291	"	"	258	459	"	"	538	681	"	*A*	620	978	"	"	172	1158	"	*A*	982
293	"	"	390	464	"	"	299	690	"	*PC*	95	981	"	*A*	842	1161	"	"	1003
295	"	"	292	470	"	"	499	693	"	*A*	452	983	"	"	740	1163	"	*PC*	180
297	"	"	216	473	"	"	440	695	"	"	285	986	"	"	852	1166	1936	*A*	11
299	"	"	267	474	"	"	910	708	"	"	437	988	"	"	791	1168	"	"	12
301	"	"	148	476	"	"	446	709	"	"	675	989	"	"	843	1169	1935	"	931
304	"	"	58	478	"	"	549	715	"	"	698	990	"	"	770	1174	"	"	924
306	"	"	292	479	"	"	477	724	"	"	398	991	"	"	844	1176	1936	"	212
307	"	"	254	482	"	"	545	729	"	"	303	992	"	"	895	1179	1935	"	1001
309	"	"	519	484	"	"	546	740	"	*PC*	36	994	"	"	908	1184	1936	"	17
311	"	"	273	487	"	"	416	744	"	"	53	995	"	"	873	1186	1935	"	977
315	"	"	748	489	"	"	558	749	"	*A*	891	997	"	"	894	1189	1936	"	21
317	"	"	466	490	"	"	588	759	"	"	425	998	"	"	886	1207	1935	"	1042
321	"	"	369	493	"	"	521	772	"	"	586	1000	"	"	768	1214	1936	"	18
326	"	"	418	496	"	"	542	775	"	*PC*	97	1001	"	"	888	1219	"	"	222
330	"	"	381	498	"	"	667	785	"	"	104	1003	"	"	855	1243	1935	"	898
333	"	"	451	501	"	"	555	793	"	*A*	601	1005	"	*PC*	165	1245	1936	"	3
335	"	"	373	503	"	"	758	797	"	"	778	1010	"	*A*	915	1251	1935	"	1008
337	"	"	265	505	"	"	635	802	"	*PC*	89	1011	"	"	848	1256	1936	"	160
339	"	"	256	507	"	"	448	807	"	*A*	560	1012	"	"	837	1260	"	"	56
341	"	"	405	509	"	"	640	810	"	"	811	1014	"	"	840	1269	1935	"	891
344	"	"	343	511	"	"	690	815	"	"	704	1015	"	"	841	1273	"	"	258
348	"	"	342	513	"	"	464	816	"	*PC*	57	1016	"	"	838	1283	1935	"	1047
349	"	"	408	515	"	"	421	819	"	*A*	666	1019	"	"	970	1286	"	"	853
352	"	"	374	517	"	"	553	821	"	"	575	1021	"	"	620	1288	"	"	492
357	"	"	514	520	"	"	608	824	"	"	737	1022	"	"	834	1289	"	"	453
360	"	"	511	527	"	"	310	826	"	"	578	1025	"	"	763	1291	"	"	259
364	"	"	444	543	"	"	513	828	"	"	774	1028	"	"	766	1294	1936	"	33
367	"	"	490	544	"	"	528	834	"	"	509	1029	"	"	946	1317	"	"	15
370	"	"	757	546	"	"	526	837	"	"	619	1057	"	"	746	1321	"	"	134
372	"	"	476	548	"	"	642	838	"	"	746	1058	"	"	652	1330	"	"	90
374	"	"	378	549	"	"	599	841	"	"	556	1059	"	"	631	1336	"	"	63
376	"	"	455	554	"	"	523	843	"	"	458	1061	"	"	836	1337	"	"	107
377	"	"	565	557	"	"	505	845	"	"	572	1063	"	"	815	1340	"	"	220
379	"	"	716	560	"	"	529	847	"	*PC*	132	1065	"	"	769	1342	"	"	286
381	"	"	443	573	"	"	671	857	"	*A*	723	1067	"	"	745	1359	"	"	13
382	"	"	446	578	"	*PC*	85	863	"	*PC*	117	1069	"	"	638				

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AllLR	AIR			AllLR	AIR			AllLR	AIR			AllLR	AIR			AllLR	AIR		
1	1935	*PC*	1	161	1935	*PC*	36	350	1935	*A*	811	532	1935	*A*	748	725	1935	*A*	912
3	"	*A*	268	164	"	*A*	492	352	"	"	528	534	"	"	729	726	"	"	436
4	"	"	278	165	"	"	463	353	"	*PC*	73	540	"	"	781	727	"	"	285
5	"	"	281	166	"	"	408	359	"	*A*	565	543	"	"	746	735	"	"	418
6	"	"	238	168	"	"	519	360	"	*PC*	93	544*a*	"	"	750	738	"	"	273
7*a*	"	"	292	169	1934	"	846	362	"	"	67	544*b*	"	"	750	741	"	"	366
7*b*	"	"	280	171	"	"	855	366	"	*A*	234	545	"	"	814	744	"	*PC*	143
8	"	"	195	182	1935	"	364	367	"	"	635	546	"	"	815	747	"	*A*	295
11	"	"	186	184	1934	"	1057	369	"	"	649	548	"	"	834	751	"	"	632
12	"	"	183	191	1935	*PC*	44	370	"	"	162	549	"	*PC*	115	753	"	"	382
15	1934	"	976	193	"	*A*	391	382	"	*PC*	85	552	"	"	122	762	"	"	909
17*a*	1935	"	186	200	"	*PC*	53	385	"	*A*	616	555*a*	"	*A*	321	764	"	"	914
17*b*	"	"	160	204	"	"	49	388	"	*PC*	79	555*b*	"	"	760	765	"	"	481
19	1934	"	873	208	"	"	47	394	"	*A*	374	559	"	"	817	773	"	"	910
21*a*	1935	"	206	210	"	*A*	439	397	"	"	597	577	"	"	900	775	"	"	620
21*b*	"	"	204	211	"	"	437	398	"	"	608	578	"	"	855	780	"	"	653
22	1934	"	685	212	"	"	410	399	"	"	606	580*a*	"	"	896	782	"	"	908
24	1935	"	203	213	"	"	455	400	1934	"	872	580*b*	"	"	882	783	"	"	150
25	1934	"	792	214	"	"	443	401	1935	"	647	582	"	"	529	784	"	"	526
26	"	"	986	215	"	"	451	403	"	"	667	590	"	"	889	786	"	"	405
28	"	"	951	216	"	"	504	405	"	"	688	592	"	"	888	788	"	"	638
29	"	"	697	217	"	"	490	407	"	"	717	594	"	"	573	789	"	*PC*	132
30	"	"	984	219	"	"	520	410	"	"	645	595	"	"	575	796	"	"	154
32	"	"	983	221	"	"	55	412	"	"	687	597	"	"	560	799	"	"	175
33	1935	"	207	224	1934	"	954	413	"	"	746	598	"	"	563	804	"	*A*	438
37	1934	"	950	226	1935	"	737	415	"	"	663	600	"	"	559	805	"	"	502
38	"	"	1068	227	"	"	716	417	"	"	692	602	"	"	856	806	"	"	402
39	"	"	1017	228	"	"	758	420	"	"	640	608	"	"	571	809	"	"	678
40	"	"	943	229	"	"	757	421	"	"	657	609	"	"	875	818	"	"	923
41	"	"	946	230	"	"	449	424	"	"	669	616	"	"	373	819	"	"	568
43	"	"	1067	232	"	"	516	426	"	*PC*	57	617	"	"	605	821	"	"	586
44	"	"	836	233	"	"	480	428	"	*A*	662	619	"	"	279	823	"	"	422
45	"	"	883	235	"	"	137	430	"	"	743	620	"	"	210	825	"	"	139
47	"	"	948	237	"	"	28	431	"	"	691	622	"	"	343	826	"	"	411
48	"	"	687	240	"	"	7	433	"	"	643	625	"	"	599	831	"	"	198
49	1935	"	284	260	"	"	477	435*a*	"	"	642	627	"	"	588	837	"	"	592
50	"	"	276	262	"	"	705	435*b*	"	"	666	629	"	"	578	839	"	"	521
51	1934	"	906	264	"	"	27	437	"	"	665	631	"	"	579	840	"	"	513
52	"	"	938	265	"	"	460	438*a*	"	"	642	638	"	"	569	841	"	"	656
54	1935	"	789	266	"	"	503	438*b*	"	*PC*	89	639	"	"	556	843	"	"	424
55	"	"	187	267	"	"	453	442	"	*A*	660	641	"	"	886	844	"	"	143
63	1934	"	768	269	"	"	468	444	"	*PC*	92	643	"	"	369	847	"	"	499
65	1935	"	264	270	"	"	476	445	"	*A*	671	646	"	"	566	849	"	"	742
66	1934	"	573	271	"	"	1	448	"	"	727	648	"	"	378	851	"	"	740
78	"	"	699	278	"	"	495	451	"	*PC*	104	650	"	"	891	852	"	"	421
80	"	"	884	280	"	"	497	455	"	"	97	654*a*	"	"	883	854	"	"	126
81	"	"	810	281	"	"	514	462	"	"	95	668	"	*PC*	125	855	"	"	544
82	"	"	789	283	"	"	47	464	"	*A*	792	666	"	*A*	310	857*a*	"	"	527
85	1935	"	261	285	"	"	511	471	"	"	777	677*a*	"	"	501	857*b*	"	"	639
86	"	"	272	288	"	"	33	473	"	"	774	677*b*	"	*PC*	119	859	"	*PC*	172
87	"	"	265	289	"	"	132	475	"	"	771	680	"	"	117	861	"	"	165
89	1934	"	656	291	"	"	103	478	"	"	799	682	"	*A*	470	864	"	"	146
91	1935	"	267	295	"	"	49	481	"	"	360	688	"	"	691	867	"	"	169
92	"	"	243	296	"	"	121	483	"	"	505	689	"	"	675	870	"	"	168
93	"	*PC*	8	299	"	"	51	485	"	*PC*	108	692	"	"	407	872	"	"	139
94	"	"	12	301	"	"	58	492	"	*A*	556	693	"	"	416	875	"	*A*	493
96	"	"	14	302	"	"	38	493	"	"	546	694	"	"	390	878	"	"	440
98	"	"	16	306	"	"	271	495	"	"	558	696	"	"	895	879	"	"	627
103	"	"	21	307	"	"	545	496	"	"	503	697	"	"	651	881	"	"	608
108	"	*A*	269	308	"	"	53	497	"	"	425	698	"	"	523	886	"	"	452
110	"	*PC*	9	311	"	"	134	506	"	"	754	700	"	"	417	888	"	"	507
113	"	*A*	346	314	"	*PC*	62	509	"	"	739	701	"	"	620	889	"	"	594
118	"	"	323	318	"	*A*	574	510	"	"	738	702	"	"	690	892	"	"	456
124	"	"	303	319	"	"	525	511	"	"	745	703	"	"	630	893	"	"	458
131	1934	"	827	321	"	"	549	512	"	"	759	704	"	"	652	894	"	"	398
133	1935	"	329	324	"	"	572	514	"	"	751	705	"	"	590	897	"	"	441
147	1934	"	732	326	"	"	538	516	"	"	704	707	"	"	723	899	"	"	448
151	"	"	952	330	"	"	221	517	"	"	778	711	"	"	898	900	"	"	212
153	"	"	1019	348	"	*PC*	71	520	"	"	786	713	"	"	706	902	"	"	444
158	"	"	934	345	"	"	59	524	"	"	735	723	"	"	258	904	"	"	466
160	1935	*PC*	35	349	"	*A*	552	526	"	"	698	724	"	"	894				

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AllLR		AIR		AllLR		AIR		AllLR		AIR		AllLR		AIR		AllLR		AIR	
906	1935	*A*	517	948	1935	*PC*	190	1009	1936	*A*	65	1059	1935	*A*	156	1134	1935	*A*	984
907	"	"	259	954	"	*A*	154	1011	1935	"	872	1060	"	"	123	1135	"	"	986
909	"	"	601	955	"	"	509	1012	"	"	868	1061	"	"	263	1138*a*	"	"	942
913	"	"	435	958	"	"	1016	1016	"	"	446	1063	"	"	379	1138*b*	"	"	964
914	"	"	254	960	"	"	562	1017	"	"	852	1064	"	"	147	1140	1936	"	212
915	"	"	655	961	"	"	1003	1018	1936	"	12	1036	"	"	299	1143	1935	"	968
916	"	"	255	962	"	*PC*	180	1019	1935	"	873	1070	"	"	148	1144	"	"	982
917	"	"	256	965	"	"	187	1020	"	"	838	1072	"	"	381	1147	"	"	970
919*a*	"	"	770	967	"	*A*	1001	1023	"	"	903	1073	"	"	542	1151	"	"	985
919*b*	"	"	553	968	"	"	840	1025	"	"	902	1075	"	"	925	1152	"	"	974
921	"	"	457	969	"	"	850	1027	"	"	897	1076	"	"	362	1154	"	"	979
922	"	"	292	971	"	"	1013	1029	"	"	845	1078	"	"	916	1156	"	"	943
923	"	"	629	975	"	"	1018	1032	"	"	763	1082	1936	"	218	1158	"	"	1023
924	"	"	458	977	"	"	1020	1033	"	"	464	1083	1935	"	117	1172	"	"	1037
925	"	"	769	980	"	"	849	1035	1936	"	11	1086	"	"	926	1175	"	*PC*	199
927	"	"	758	981	"	*PC*	185	1036	1935	"	905	1087	1936	"	217	1179	"	*A*	1040
928	"	"	767	983	"	"	182	1039*a*	"	"	915	1088	"	"	215	1180	"	"	1002
929	"	"	768	986	"	*A*	842	1039*b*	"	"	927	1089	1935	"	981	1185	"	"	1011
930	"	"	636	988	"	"	836	1040	"	"	919	1090	"	"	931	1187	1936	"	216
931	"	"	765	989	"	"	837	1041	"	"	920	1094	"	"	910	1188	"	"	220
932	"	"	785	990	"	"	844	1043	"	"	913	1097	"	"	989	1190	1935	"	1047
933	"	"	461	991	"	"	843	1044	"	"	862	1102	"	"	966	1192	"	"	1041
935	"	"	626	992	"	"	841	1050	"	"	359	1104	"	"	938	1193	1936	"	112
937	"	"	404	993	"	"	790	1051	"	"	141	1105	"	"	977	1198	"	"	127
938	"	"	446	994*a*	"	"	791	1052	"	"	216	1107	"	"	946	1199	"	"	221
939	"	"	619	994*b*	"	"	848	1053	"	"	341	1125	"	"	930	1200	"	"	107
940	"	"	765	995	"	"	802	1054	"	"	346	1126	"	"	976	1202	"	"	105
941	"	"	720	1004	1936	"	14	1055	"	"	294	1127	"	"	975	1205	"	"	131
944	"	"	342	1005	1935	"	884	1056	"	"	372	1128	"	"	1009	1209	"	"	117
945*a*	"	"	469	1007	1936	"	62	1057	"	"	278	1131	"	"	1014	1211	1935	"	928
945*b*	"	"	217	1008	"	"	17	1058	"	"	293	1133	"	"	945	1213	1936	"	124
																1220	"	"	1

1935 Allahabad Weekly Reporter=All India Reporter

AWR		AIR		AWR		AIR		AWR		AIR		AWR		AIR		AWR		AIR	
1	1935	*A*	162	101	1935	*PC*	5	205	1935	*A*	443	326	1935	*A*	435	414	1935	*A*	669
27	"	"	238	102	"	"	3	206	"	"	490	328	"	"	457	417	"	"	683
28	"	"	243	105	"	"	14	209	"	"	439	329	"	"	528	419	"	"	757
29	"	"	204	107	"	"	12	210	"	"	717	331	"	"	444	421	"	"	511
30	"	"	284	110	"	*A*	295	213	"	*PC*	49	333	"	"	647	424	"	"	449
31	"	"	206	115	"	"	424	218	"	*A*	329	336	"	"	504	423	"	"	441
32	"	"	280	116	"	"	263	233	"	"	408	337	"	"	466	427	"	"	502
36	"	"	264	118	"	"	273	235	"	"	382	340	"	"	438	429	"	"	501
37	"	"	156	122	"	"	279	244	"	"	519	342	"	"	606	430	"	"	497
38	"	"	272	123	"	"	267	246	"	"	343	344	"	"	411	431	"	"	507
39	"	"	183	125	"	"	217	249	"	"	463	350	"	"	460	433	"	"	690
42	"	"	265	127	"	"	369	250	"	"	748	352	"	"	422	435	"	*PC*	62
45	"	"	271	131	"	"	341	251	"	"	292	354	"	"	574	440	"	"	34
46	"	"	147	133	"	"	216	252	"	"	405	356	"	"	299	442	"	*A*	235
47	"	"	292	134	"	"	363	255	"	"	418	361	"	"	705	453	"	"	545
53	"	"	362	138	"	"	258	258	"	*PC*	53	363	"	"	476	455	"	"	562
57	"	"	282	140	"	"	254	263	"	*A*	390	365	"	"	716	457	"	"	477
59	"	"	214	141	"	"	407	265	"	"	451	366	"	"	410	459	"	*PC*	59
62	"	"	212	142	"	*PC*	35	266	"	"	359	368	"	"	455	463	"	*A*	563
64	"	"	346	145	"	*A*	221	267	"	"	381	369	"	"	910	469	"	"	516
71	"	"	160	162	"	"	470	269	"	"	565	371	"	"	461	472	"	"	469
75	"	"	150	169	"	"	391	270	"	"	645	374	"	"	514	474	"	"	746
76	"	"	142	178	"	"	379	273	"	"	437	376	"	"	737	477	"	"	649
77	"	"	141	180	"	*PC*	21	274	"	"	373	377	"	"	758	479	"	"	448
78	"	"	276	186	"	"	41	275	"	"	792	379	"	"	640	481	"	"	692
80	"	*PC*	1	190	"	*A*	372	285	"	"	425	380	"	"	374	485	"	"	663
82	"	"	9	191	"	*PC*	36	291*n*	"	"	503	384	"	"	608	486	"	"	558
86	"	"	8	195	"	*A*	294	293	"	"	503	385	"	"	440	489	"	"	568
87	"	*A*	269	196	"	"	293	300	"	"	517	386	"	"	446	490	"	"	559
90	"	"	210	197	"	"	346	301	"	"	303	388	"	"	549	493	"	"	458
92	"	"	789	198	"	"	492	312	"	"	446	393	"	"	499	494	"	"	588
93	"	"	261	199	"	"	463	313	"	"	520	396	"	"	481	497	"	"	546
95	"	"	255	200	"	"	256	314	"	"	657	406	"	"	480	501	"	"	685
97	"	"	278	202	"	"	342	318	"	"	398	408	"	"	404	503	"	"	509
98	"	"	402	203	"	"	453	322	"	"	754	411	"	"	493				

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AWR	AIR			AWR	AIR			AWR	AIR			AWR	AIR			AWR	AIR		
505	1935	*A*	416	695	1935	*A*	665	879	1935	*PC*	132	1055	1935	*A*	909	1277	1936	*A*	222
506	"	"	687	696	"	"	691	887	"	*A*	698	1057	"	"	914	1299	1935	*PC*	182
508	"	"	458	698	"	"	743	896	"	"	817	1058	"	*PC*	185	1302	"	"	187
511	"	"	597	702	"	"	655	918	"	"	601	1061	"	"	180	1305	1936	*A*	9
512	"	"	436	703	"	"	586	922	"	"	750	1063	"	*A*	945	1308	"	"	253
514	"	"	456	705	"	"	578	923	"	"	742	1064	"	"	930	1314	"	"	109
515	"	"	566	707	"	"	884	924	"	"	740	1066	"	"	968	1318	"	"	74
518	"	"	495	710	"	"	642	927	"	"	790	1067	"	"	938	1321	"	"	1
520	"	"	378	711	"	"	785	930	"	"	922	1071	"	"	935	1326	1935	*PC*	139
522	"	"	464	715	"	"	662	931	"	"	630	1075	"	"	931	1330	1936	*A*	18
524	"	*PC*	73	717	"	"	771	932	"	"	903	1081	"	"	916	1334	"	"	63
531	"	*A*	259	720	"	"	350	934	"	"	896	1086	"	"	928	1335	"	"	78
534	"	"	179	721	"	"	569	935	"	"	913	1088	"	"	981	1338	"	"	97
536	"	"	671	722	"	"	778	936	"	"	883	1089	"	"	850	1343	"	"	258
540	"	"	452	727	"	"	666	937	"	"	882	1092	"	"	1013	1351	"	"	50
542	"	"	527	728	"	"	774	939	"	"	920	1096	"	"	856	1358	1935	"	976
543	"	"	421	732	"	"	619	942	"	"	814	1105	"	"	1016	1360	"	"	975
545	"	"	667	733	"	"	560	944	"	*PC*	104	1107	"	"	1003	1361	"	"	942
547	"	"	588	735	"	"	720	950	"	"	169	1108	"	"	1001	1362	"	"	964
552*b*	"	*PC*	71	738	"	"	556	954	"	*A*	770	1109	"	"	1002	1364	"	"	974
555	"	*A*	417	742	"	"	572	955	"	"	843	1111	"	"	924	1366	"	"	943
556	"	"	533	743	"	"	620	956	"	"	855	1113	"	"	1013	1368	"	"	966
557	"	"	629	750	"	"	704	957	"	"	915	1118	"	"	982	1369	"	"	967
559	"	"	310	751	"	"	753	958	"	"	768	1121	1936	"	62	1371	1936	"	21
572	"	"	528	753	"	"	729	959	"	"	888	1125	1935	"	979	1389	"	"	69
573	"	"	608	759	"	"	781	961	"	"	1011	1128	"	"	849	1395	1935	*PC*	199
579	"	"	544	763	"	"	636	963	"	"	848	1129	"	"	985	1401	1936	*A*	107
581	"	"	594	765	"	"	738	964	"	"	886	1131	1936	"	17	1405	"	"	83
585	"	"	760	766	"	"	739	966	"	"	840	1133	1935	"	977	1412	"	"	220
588*b*	"	"	571	768	"	"	786	967	"	"	873	1134	1936	"	65	1414	"	"	66
590	"	"	552	772	"	"	626	968	"	"	894	1136	1935	"	925	1416	1935	*PC*	203
591	"	"	616	774	"	"	605	969	"	"	844	1137	"	"	1020	1422	1936	*A*	124
597	"	"	590	777	"	"	579	971	"	"	895	1140	"	"	986	1427	"	"	119
600	"	"	656	785	"	"	592	972	"	"	842	1146	1936	"	14	1432	"	"	239
602	"	"	765	789	"	"	834	974*a*	"	"	791	1149	"	"	12	1453	1935	"	940
604	"	"	525	791	"	"	620	974*b*	"	"	841	1150	"	"	11	1456	1936	"	33
605	"	"	542	792	"	"	696	975	"	"	852	1152	"	"	212	1476	"	"	105
607	"	"	174	795	"	"	638	977	"	"	908	1155	1935	"	946	1479	"	"	127
613	"	"	651	796	"	"	745	978	"	*PC*	117	1177	"	*PC*	165	1480	"	*PC*	5
615	"	*PC*	85	797	"	"	769	980	"	"	119	1181	"	*A*	984	1485	"	*A*	77
619	"	*A*	629	799	"	"	815	983	"	*A*	902	1182	"	"	1014	1486	"	"	157
621	"	"	553	800	"	"	852	985	"	"	905	1185	"	"	1004	1490	"	"	134
623	"	"	59	801	"	"	653	988	"	"	970	1189	"	"	995	1497	"	"	112
624	"	"	555	806	"	"	919	994	"	"	927	1202	"	"	912	1502	"	"	94
625	"	"	526	808	"	*PC*	122	996	"	"	875	1203	"	"	1042	1506	"	"	131
628	"	"	521	812	"	*A*	614	1004	"	"	926	1208	"	"	1008	1510	"	*PC*	24
630	"	*PC*	79	814	"	"	746	1006	"	"	889	1216	1936	"	8	1513	"	*A*	90
637	"	*A*	660	815	"	"	923	1008	"	"	763	1217	1935	"	1041	1517	"	*PC*	20
640*a*	"	"	642	817	"	"	766	1010	"	"	900	1221	"	"	1040	1523	"	*A*	197
640*b*	"	"	727	818	"	"	759	1012	"	"	836	1222	1936	"	13	1526	"	*PC*	1
643	"	"	799	819	"	"	631	1014	"	"	837	1229	1935	"	1023	1530	1934	*A*	818
648	"	*PC*	57	820	"	"	751	1015	"	"	845	1236	"	"	989	1536	"	"	217
651	"	"	92	823	"	"	706	1019	"	"	838	1245	"	"	1037	1547	"	"	587
652	"	*A*	505	833	"	"	675	1021	"	"	868	1248	1936	"	218	1549	"	"	246
654	"	"	599	838	"	"	723	1029	"	*PC*	168	1253	"	"	56	1552	"	"	458
658	"	"	529	843	"	*PC*	95	1030	"	"	143	1261	"	"	215	1553	"	"	585
669	"	"	811	846	"	*A*	632	1034	"	*A*	862	1263	"	"	217	1555	"	"	357
672	"	"	643	849	"	"	750	1042	"	*PC*	172	1264	"	"	160	1557	"	"	388
674	"	"	575	850	"	"	802	1045	"	*A*	777	1268	"	"	3	1558	"	"	851
677	"	*PC*	97	860	"	"	897	1047	"	"	891	1273	"	"	15				
685	"	*A*	627	863	"	"	767	1051	"	"	898	1275	1935	"	1047				
690	"	"	573	864	"	"	735	1052	"	"	853								
691	"	*PC*	89	867	"	"	678	1054	"	"	872								

Law Reporter 16 Allahabad (Criminal)=All India Reporter

LRA	AIR			LRA	AIR			LRA	AIR			LRA	AIR			LRA	AIR		
1	1935	*A*	35	17	1934	*A*	982	30	1934	*A*	1032	49	1935	*A*	608	62	1935	*A*	920
5	1934	"	988	20	"	"	987	34	1935	"	549	51	"	"	922	73	"	"	563
7	1935	"	132	21	"	"	1046	40	1934	"	988	55	"	"	630	82	"	"	477
13	1934	"	976	23	"	"	1067	42	1935	"	466	58	"	"	903	86	"	"	913
15	"	"	978	25	"	"	1025	46	"	"	438								

Law Reporter 16 Allahabad (Revenue)=All India Reporter.

LRA	AIR			LRA	AIR			LRA	AIR			LRA	AIR			LRA	AIR		
20	1935	*A*	65	131	1935	*A*	92	183	1935	*A*	514	227	1935	*O*	253	257	1935	*A*	562
38	"	*O*	208	140	"	"	187	190	"	"	481	234	"	"	304	267	"	"	635
46	1934	*A*	704	155	"	*O*	82	209	"	*O*	272	240	"	*A*	469	269	1936	*O*	193
89	1935	"	93	176	"	*A*	292	216	"	*A*	545	243	"	"	746				
113	"	"	119	177	"	*O*	88	221	"	"	499	250	"	*PC*	59	286	1935	"	289

16 Unpublished Decisions=All India Reporter.

UD	AIR			UD	AIR			UD	AIR			UD	AIR			UD	AIR		
66	1935	*A*	292	159	1935	*PC*	36	273	1935	*A*	594	371	1935	*O*	423	519	1936	*O*	13
67	"	"	271	196	"	*A*	514	278	"	"	571	424	1936	"	117	521	"	"	145
69	"	"	150	199	"	"	481	279	"	"	526	433	1935	"	462	563	"	*A*	200
70	"	"	265	200	"	"	545	282	"	"	629	437*a*	"	*A*	759	567	"	"	14
73	"	*O*	88	202	"	"	562	285	"	"	608	437*b*	"	"	766	570	1935	"	984
74	"	"	82	204	"	"	499	294	1930	*O*	221	439	"	"	923	572	"	"	1018
80	"	"	90	208	"	"	469	318	1935	*A*	553	441	"	"	751	575	"	*O*	515
112	"	*A*	453	209	"	"	588	321*a*	"	"	569	479	"	"	631	580	1936	"	113
115	"	"	346	212	"	"	568	321*b*	"	"	662	481	"	"	966	617	"	*A*	222
116	"	"	492	216	"	"	746	322*a*	"	"	774	482	"	"	942	645	"	"	13
117	"	"	446	219	"	"	635	322*b*	"	"	666	484	"	"	843	646	1935	"	1040
119	"	"	503	221	"	*PC*	59	325	"	"	642	486	"	"	975	648	"	"	938
121	"	"	342	222	"	*O*	253	326	"	"	505	488	"	"	790	651	1936	"	215
122	"	"	422	224*a*	"	"	385	329	"	"	619	490	"	"	976	657	"	"	15
125	"	"	256	224*b*	"	"	289	330	"	"	771	493*a*	"	"	974	659	1935	"	1047
127	"	"	460	225	"	"	272	334	"	"	560	493*b*	"	"	964	662	1936	*O*	74
130	"	"	293	226	1936	"	193	337	"	"	720	494	"	"	943	664	"	"	79
132	"	"	382	229	1935	"	304	341	"	"	556	498	"	"	967	666	"	"	65
143	"	*O*	251	250	"	"	325	343	"	"	785	500	1936	"	64	670	"	"	83
145	"	"	131	252	"	"	409	345	"	"	753	502	1935	"	845	691*b*	"	"	106
148	"	"	268	256*a*	"	"	366	347	"	"	704	507	"	"	945	694*a*	"	"	201
150	"	"	229	256*b*	"	"	309	351	"	"	636	509	"	"	912	694*b*	"	*A*	220
154	"	"	252	263	"	*A*	528	353	"	"	739	510	"	*O*	433	697	"	"	265
157*a*	"	"	231	265	"	"	448	356	"	"	729	512	"	"	441	699	"	"	124
				267	"	"	544												
158*a*	"	*A*	463	270	"	"	649	364	"	"	781	514	"	"	449	700	"	"	119
158*b*	"	*PC*	49	271	"	"	555	369	"	*O*	372	517	"	"	459	701	"	"	127

TABLE No. II

Showing seriatim the pages of the ALL INDIA REPORTER 1935 ALLAHABAD, with corresponding references of OTHER REPORTS, JOURNALS AND PERIODICALS.

N. B.—Column No. 1 denotes pages of A. I. R. 1935 ALLAHABAD.

Column No. 2 denotes corresponding references of OTHER JOURNALS.

A. I. R. 1935 Allahabad=Other Journals.

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1	4 *A W R*	1155	31	1934*All L R* 997	38	155 *I C* 33	53	1935*All L R* 308
	1935*Cr C*	1		1934*A L J* 1149		36 *Cr L J* 620		155 *I C* 44
	1935*A L J*	125	33	4 *A W R* 958	41	4 *A W R* 988	55	1934*A L J* 946
	1935*All L R*	271		1935*All L R* 288		152 *I C* 503		4 *A W R* 1406
	154 *I C*	955		154 *I C* 1013		1934*All L R* 1011		1935*Cr C* 36
7	4 *A W R*	1028	34	4 *A W R* 890	43	4 *A W R* 860		154 *I C* 638
	1935*A L J*	80		152 *I C* 397		1934*A L J* 1013		1935*All L R* 221
	1935*All L R*	240		1934*All L R* 999		152 *I C* 387		36 *Cr L J* 554
	154 *I C*	788		1934*A L J* 1181		1934*All L R* 994	58	4 *A W R* 1342
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27	4 *A W R*	1025	35	152 *I C* 496		1935*A L J* 23		1935*All L R* 301
	1935*All L R*	264		1934*All L R* 1007		1935*All L R* 283		154 *I C* 1070
	154 *I C*	920		1934*A L J* 1157		154 *I C* 1007	59	152 *I C* 619
28	4 *A W R*	1299		1935*Cr C* 22	49	4 *A W R* 607		1935*Cr C* 38
	1935*A L J*	68		36 *Cr L J* 102		1934*All L R* 295		36 *Cr L J* 128
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	36 *Cr L J*	560		57 *All* 488		1935*All L R* 299		4 *A W R* 252
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31	4 *A W R*	884		1935*A L J* 46	53	4 *A W R* 1335		15 *LRACr* 161
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60	1934*All L R* 905
	35 *Cr L J* 1485
	21 *AICrR* 299
	1935*Cr C* 102
	56 *All* 990
63	152 *I C* 550
	4 *A W R* 949
	1934*All L R* 1015
	1934*A L J* 1234
	36 *Cr L J* 117
	1935*Cr C* 105
65	4 *A W R* 1001
	18 *R D* 592
	152 *I C* 663
	1934*All L R* 1023
	1934*A L J* 1229
	16*LRARev* 20
67	4 *A W R* 699
	152 *I C* 541
	1934*All L R* 1017
73	1934*A L J* 632
	4 *A W R* 770
	152 *I C* 19
	1934*All L R* 965
76	4 *A W R* 346
	15 *LRARev* 552
	152 *I C* 25
	1934*All L R* 979
	1934*A L J* 1247
	18 *R D* 441
79	4 *A W R* 935
	152 *I C* 737
	1934*All L R* 1031
	1935*A L J* 18
	36 *Cr L J* 144
	15 *LRACr* 185
	1935*Cr C* 107
81	4 *A W R* 744
	152 *I C* 199
	1934*All L R* 959
	1935*A L J* 27
83	4 *A W R* 683
	18 *R D* 479
	152 *I C* 192
	1934*All L R* 953
	57 *All* 387
86	4 *A W R* 1288
	152 *I C* 934
	1934*All L R* 1079
	36 *Cr L J* 205
	1935*Cr C* 51
90	4 *A W R* 1117
	152 *I C* 929
	1934*All L R* 1077
	1934*A L J* 1233
92	152 *I C* 939
	1934*All L R* 1084
	4 *A W R* 1460
	18 *R D* 706
	16 *LRARev* 131
93	152 *I C* 925
	1934*All L R* 1075
	1935*A L J* 1
	18 *R D* 703
	16 *LRARev* 89
	57 *All* 568
	4 *A W R* 1452
96	1935 *A L J* 115
	4 *A W R* 1261
	1934*All L R* 1072
	152 *I C* 921

A.I.R.	Other Journals.
99	4 *A W R* 848
	1934*All L R* 992
	152 *I C* 384
	1934*A L J* 1211
	57 *All* 455
100	1935*A L J* 168
	4 *A W R* 1205
	1934*All L R* 1055
	152 *I C* 814
	57 *All* 602
102	1935*A L J* 78
	1934*All L R* 1078
	4 *A W R* 1253
	152 *I C* 932
103	1935*Cr C* 89
	4 *A W R* 1419
	1935*All L R* 291
	154 *I C* 1019
	36 *Cr L J* 612
106	1935*A L J* 139
	4 *A W R* 1392
	152 *I C* 817
	1934*All L R* 1057
110	1934*A L J* 1006
	4 *A W R* 900
	152 *I C* 1008
	1934*All L R* 1086
	57 *All* 445
117	4 *A W R* 1280
	1935*A L J* 29
	57 *All* 573
	1935*All L R* 1083
	159 *I C* 193
119	4 *A W R* 1191
	152 *I C* 1015
	1934*A L J* 1205
	1934*All L R* 1092
	18 *R D* 630
	16 *LRARev* 113
	57 *All* 445
121	1935*Cr C* 109
	4 *A W R* 1413
	1935*All L R* 296
	154 *I C* 1059
	36 *Cr L J* 630
123	1935*A L J* 123
	4 *A W R* 1277
	1935*All L R* 1060
	159 *I C* 44
125	4 *A W R* 1366
126	4 *A W R* 1331
	157 *I C* 677
	1935*All L R* 854
127	4 *A W R* 997
	152 *I C* 508
	18 *R D* 590
	1934*All L R* 1014
	1935*A L J* 21
	15 *LRARev* 689
129	4 *A W R* 754
	1934*All L R* 989
	152 *I C* 370
	1934*A L J* 1185
	57 *All* 434
132	1935*Cr C* 185
	4 *A W R* 1171
	16 *LRACr* 7
	1935*All L R* 289
	154 *I C* 1015
	36 *Cr L J* 617
134	1935*A L J* 145

A.I.R.	Other Journals.
134	4 *A W R* 1178
	1935*All L R* 311
	155 *I C* 89
	57 *All* 580
137	4 *A W R* 1186
	1934*A L J* 1183
	1935*All L R* 235
	154 *I C* 746
	57 *All* 426
139	4 *A W R* 585
	157 *I C* 532
	1935*All L R* 825
140	4 *A W R* 1120
141 (1)	1935*A L J* 200
	1935*A W R* 77
	1935*All L R* 1051
	158 *I C* 1114
141 (2)	4 *A W R* 1267
142	1935*A W R* 76
143	4 *A W R* 974
	157 *I C* 615
	1935*All L R* 844
147	1935*A L J* 113
	1935*A W R* 46
	1935*All L R* 1064
	159 *I C* 64
148	1935*A L J* 301
	4 *A W R* 1477
	1935*All L R* 1070
	159 *I C* 70
150	1935*R D* 68
	1935*A W R* 75
	1935*A L J* 275
	157 *I C* 364
	1935*All L R* 783
	16 *U D* 69
151	3 *A W R* 316
	18 *R D* 94
	15 *LRARev* 107
	154 *I C* 331
152	3 *A W R* 315
	18 *R D* 94
	15 *LRARev* 144
	154 *I C* 383
153	4 *A W R* 1255
	57 *All* 655
	1936*All L R* 63
	160 *I C* 170
154	3 *A W R* 361
	158 *I C* 193
	1935*All L R* 954
155 (1)	3 *A W R* 318
	18 *R D* 90
	15 *LRARev* 90
	154 *I C* 386
155 (2)	4 *A W R* 846
156	1935*A W R* 37
	1935*A L J* 61
	1935*All L R* 1059
	159 *I C* 40
157	3 *A W R* 405
160	153 *I C* 469
	1935*A W R* 71
	1935*All L R* 17
	1935*A L J* 175
	1935*Cr C* 212
	36 *Cr L J* 356
162	1935*A W R* 1
	1935*Cr C* 214
	1935*All L R* 370
	155 *I C* 369

A.I.R.	Other Journals.
162	36 *Cr L J* 684
174	153 *I C* 73
	1934*All L R* 1100
	1935*A W R* 607
179	1934*All L R* 1167
	153 *I C* 422
	1935*A W R* 534
180	153 *I C* 465
	1935*All L R* 17
	4 *A W R* 1450
181	4 *A W R* 1154
	1934*All L R* 1147
	153 *I C* 351
	36 *Cr L J* 325
	1935*Cr C* 226
182	1934*All L R* 1158
	153 *I C* 410
	4 *A W R* 1465
183	153 *I C* 577
	1935*A L J* 74
	1935*All L R* 12
	1935*A W R* 39
186	1935*All L R* 11
	153 *I C* 574
	4 *A W R* 1441
187	4 *A W R* 1208
	153 *I C* 708
	1935*All L R* 55
	1935*A L J* 235
	18 *R D* 635
	16 *LRARev* 140
	57 *All* 588
195	1935*All L R* 8
	153 *I C* 572
	4 *A W R* 1471
198	4 *A W R* 1079
	157 *I C* 540
	1935*All L R* 831
203	1935*All L R* 24
	153 *I C* 545
	4 *A W R* 1458
204	153 *I C* 477
	1935*A W R* 29
	1935*All L R* 21
	1935*A L J* 249
205	1934*A L J* 1177
	4 *A W R* 1605
	155 *I C* 156
206	153 *I C* 476
	1935*A W R* 31
	1935*All L R* 21
	1935*A L J* 254
207	153 *I C* 599
	1935*A L J* 133
	4 *A W R* 1142
	1935*All L R* 33
	57 *All* 638
210	1935*A W R* 90
	1935*A L J* 209
	156 *I C* 754
	1935*All L R* 620
212	1935*A W R* 62
	1935*A L J* 66
	1935*Cr C* 255
	157 *I C* 990
	1935*All L R* 900
	36 *Cr L J* 1253
	57 *All* 687
214	153 *I C* 428
	1934*All L R* 1164

A. I. R. 1935 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
214	1935*A W R*	59	256	1935*A L J*	339	279	1935*A W R*	122	329	1935*A L J*	150
	1935*A L J*	63		157 *I C*	1096		156 *I C*	751		153 *I C*	1078
	1935*Cr C*	257		1935*All L R*	917		1935*All L R*	619		1935*A W R*	218
	36 *Cr L J*	340		16 *U D*	125	280	153 *I C*	510		1935*All L R*	133
	57 *All*	660	258	1935*A W R*	138		1935*A W R*	32		57 *All*	85
216	1935*A L J*	297		1935*A L J*	291		1935*All L R*	7	341	1935*A W R*	131
	1935*A W R*	133		157 *I C*	170		1935*A L J*	260		1935*A L J*	228
	1935*Cr C*	259		57 *All*	751	281	153 *I C*	505		1935*Cr C*	354
	1935*All L R*	1052		1935*All L R*	723		1935*All L R*	5		1935*All L R*	1053
	158 *I C*	1116	259	1935*A W R*	531		1935*A L J*	72		158 *I C*	1118
217	1935*A W R*	125		157 *I C*	1052		4 *A W R*	1468		57 *All*	778
	1935*A L J*	257		1935*All L R*	907	282	1934*All L R*	1163	342	1935*A W R*	202
	1935*Cr C*	260		1935*A L J*	1291		153 *I C*	425		1935*R D*	92
	158 *I C*	129	261	1935*A W R*	93		1935*A W R*	57		1935*A L J*	348
	36 *Cr L J*	1290		153 *I C*	765		1935*Cr C*	268		158 *I C*	4
	1935*All L R*	945		1935*A L J*	230		36 *Cr L J*	346		1935*All L R*	944
	57 *All*	666		1935*All L R*	85	284	1935*A W R*	30		16 *U D*	121
219	1935*A I C*	367		57 *All*	714		1935*All L R*	49	343	1935*A L J*	344
	4 *A W R*	940	263	1935*A W R*	116		153 *I C*	684		1935*A W R*	246
	1934*All L R*	987		1935*A L J*	198		1935*A L J*	277		156 *I C*	801
	57 *All*	400		1935*All L R*	1061	285	1935*A W R*	442		1935*All L R*	622
	1934*A L J*	1152		159 *I C*	48		1935*A L J*	695	346 (1)	1935*A W R*	197
	15 *L R A Cr*	189	264	1935*A W R*	36		157 *I C*	192		1935*R D*	89
	36 *Cr L J*	68		1935*All L R*	65		1935*All L R*	727		16 *U D*	115
	1935*Cr C*	262		153 *I C*	763	292 (1)	153 *I C*	511		1935*All L R*	1054
221	1935*A L J*	177		1935*A L J*	248		1935*A W R*	47		158 *I C*	1121
FB	1935*A W R*	145	265	1935*A W R*	42		1935*All L R*	7	346 (2)	1935*A W R*	64
	1935*All L R*	330		1935*R D*	34		1935*R D*	18		1935*A L J*	54
	155 *I C*	156		153 *I C*	898		1935*A L J*	206		153 *I C*	999
	57 *All*	605		1935*A L J*	337		16 *L R A Rev*	176		1935*Cr C*	413
234	4 *A W R*	492		1935*All L R*	87		16 *U D*	66		36 *Cr L J*	438
	1934*A L J*	1260		16 *U D*	70	292 (2)	1935*A W R*	251		1935*All L R*	113
	1935*All L R*	366	267	1935*A W R*	123		1935*A L J*	295		57 *All*	717
	155 *I C*	86		153 *I C*	907		158 *I C*	35	350	1934*All L R*	215
236	4 *A W R*	1229		1935*A L J*	299		57 *All*	787		147 *I C*	334
	1934*All L R*	1124		1935*Cr C*	267		1935*All L R*	922		1935*A W R*	720
	153 *I C*	172		36 *Cr L J*	446	293	1935*A L J*	401	351	1934*A L J*	597
	1935*A L J*	108		1935*All L R*	91		1935*A W R*	196		150 *I C*	868
238	153 *I C*	508	268	153 *I C*	497		1935*R D*	88		1934*All L R*	725
	1935*A W R*	27		1935 *All L R*	3		16 *U D*	130		4 *A W R*	760
	1935*All L R*	6		4 *A W R*	1484		1935*All L R*	1058	353	1934*A L J*	989
	1935*A L J*	278	269	1935*A W R*	87		159 *I C*	39		4 *A W R*	802
239	3 *A W R*	397		153 *I C*	984	294	1935*A W R*	195		153 *I C*	65
	1934*A L J*	230		1935*A L J*	214		1935*Cr C*	327		1934*All L R*	1094
	56 *All*	711		1935*All L R*	108		1935*All L R*	1055		57 *All*	459
	15 *I C*	390	271	1935*A W R*	45		158 *I C*	1123	359	1935*A W R*	266
243	1935*A W R*	28		1935*A L J*	112		27 *Cr L J*	9		1935*A L J*	383
	1935*A L J*	167		1935*R D*	40	295	1935*A W R*	110		1935*All L R*	1050
	153 *I C*	910		1935*All L R*	306	*Sp Tr*	157 *I C*	220		158 *I C*	1113
	1935*All L R*	92		155 *I C*	37		1935*All L R*	747	360	4 *A W R*	111
	57 *All*	658		16 *U D*	67	299	1935*A L J*	464		155 *I C*	933
244	4 *A W R*	1121	272	1935*A W R*	38		1935*A W R*	356		1935*All L R*	481
	1934*All L R*	1120		153 *I C*	869		1935*All L R*	1066	362	1935*Cr C*	362
	153 *I C*	163		1935*A L J*	274		159 *I C*	66		1935*A W R*	53
	1935*A L J*	13		1935*All L R*	86	303	1935*A W R*	801		1935*All L R*	1076
	57 *All*	474	273	1935*A W R*	118		153 *I C*	1068		159 *I C*	115
247	4 *A W R*	727		1935*A L J*	311		1935*All L R*	124		37 *Cr L J*	32
	1934*A L J*	1018		157 *I C*	202		1935*A L J*	729	364	1935*A L J*	287
	152 *I C*	487		1935*All L R*	738	310	1935*A W R*	559		1935*All L R*	182
	1934*All L R*	1001	276	1935*A W R*	78		1935*A L J*	527		154 *I C*	292
	57 *All*	357		1935*All L R*	50		156 *I C*	1088		4 *A W R*	1446
254	1935*A W R*	140		153 *I C*	686		57 *All*	810	366	1935*A W R*	134
	1935*A L J*	307		1935*A L J*	212		1935*All L R*	666		1935*R D*	366
	157 *I C*	1088	278 (1)	153 *I C*	502	321	4 *A W R*	1404		1935*Cr C*	384
	57 *All*	754		1935*All L R*	4	**FB**	156 *I C*	243		1935*A L J*	653
	1935*All L R*	914		4 *A W R*	1483		1935*All L R*	555		157 *I C*	205
255	1935*A W R*	95	278 (2)	1935*A W R*	97	322	4 *A W R*	79		1935*All L R*	741
	157 *I C*	1092		1935*A L J*	400	323	4 *A W R*	1352		36 *Cr L J*	1103
	1935*All L R*	916		1935*All L R*	1057		1935*A L J*	201			
256	1935*A W R*	200		159 *I C*	37		153 *I C*	1058	369	1935*A L J*	321
	1935*R D*	77	279	1935*A L J*	170		1935*All L R*	118		1935*A W R*	127

A. I. R. 1935 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
369	1935*Cr C*	387	411	157 *I C*	533	443	1935*All L R*	214	461	1935*All L R*	933
	156 *I C*	908		57 *All*	797	444	1935*A W R*	331	463	1935*A L J*	255
	1935*All L R*	643		1935*All L R*	826		1935*A L J*	364		1935*A W R*	199
	36 *Cr L J*	1019	416	1935*A W R*	505		157 *I C*	1000		1935*R D*	75
372	1935*A L J*	396		1935*A L J*	487		1935*All L R*	902		1935*All L R*	165
	1935*A W R*	190		157 *I C*	47		57 *All*	745		154 *I C*	305
	1935*All L R*	1056		1935*All L R*	693	446 (1)	1935*R D*	91		16 *U D*	158
	159 *I C*	35	417	1935*A W R*	555		1935*A W R*	312	464	1935*A L J*	513
373	1935*A L J*	335		157 *I C*	118		1935*A L J*	382		1935*A W R*	522
	1935*A W R*	274		1935*All L R*	700		16 *U D*	117		1935*All L R*	1033
	156 *I C*	745	418	1935*A W R*	255		158 *I C*	903		158 *I C*	1003
	1935*All L R*	616		1935*A L J*	326		1935*All L R*	1016	466	1935*A L J*	317
374	1935*A L J*	352		157 *I C*	14	446 (2)	1935*A L J*	476		1935*A W R*	337
FB	1935*A W R*	380		1935*All L R*	735		1935*A W R*	386		1935*Cr C*	507
	1935*All L R*	394	421	1935*A W R*	543		1935*Cr C*	575		16 *LRACr*	42
	155 *I C*	487		1935*A L J*	515		158 *I C*	101		157 *I C*	1044
378	1935*A L J*	374		157 *I C*	675		1935*All L R*	938		1935*All L R*	904
	1935*A W R*	520		1935*All L R*	852		36 *Cr L J*	1302		36 *Cr L J*	1286
	156 *I C*	939	422	1935*R D*	127	448	1935*A L J*	507	468	154 *I C*	933
	1935*All L R*	648		1935*A W R*	352		1935*R D*	212		1935*All L R*	269
	57 *All*	737		1935*A L J*	427		1935*A W R*	479		1935*A W R*	249
379	1935*A L J*	414		157 *I C*	530		157 *I C*	986	469	1935*R D*	181
	1935*A W R*	178		1935*All L R*	823		1935*All L R*	899		1935*A W R*	472
	1935*All L R*	1063		16 *U D*	122		16 *U D*	265		158 *I C*	6
	159 *I C*	51	424	1935*A W R*	115	449	1935*A L J*	391		1935*All L R*	945
381	1935*A L J*	330		1935*A L J*	233		1935*A W R*	424		16 *U D*	208
	1935*A W R*	267		157 *I C*	614		1935*All L R*	230		16 *LRARev*	240
	1935*All L R*	1072		1935*All L R*	843		154 *I C*	724	470	1935*A L J*	261
	159 *I C*	147	425	1935*A W R*	285	451	1935*A L J*	333		1935*A W R*	162
382	1935*A W R*	235	SB	155 *I C*	1043		1935*A W R*	265		157 *I C*	33
	1935*R D*	111		1935*All L R*	497		154 *I C*	523		1935*All L R*	682
	157 *I C*	261		1935*A L J*	759		1935*All L R*	215		57 *All*	690
	1935*All L R*	753	435	1935*A W R*	326	452	1935*A W R*	540	476	154 *I C*	935
	16 *U D*	132		1935*A L J*	436		1935*A L J*	693		1935*All L R*	270
390	1935*A W R*	263		157 *I C*	1084		157 *I C*	928		1935*A L J*	372
	1935*A L J*	293		57 *All*	781		1935*All L R*	886		1935*A W R*	363
	157 *I C*	51		1935*All L R*	913	453	154 *I C*	931	477	1935*A L J*	479
	1935*All L R*	694	436	1935*A L J*	350		1935*All L R*	267		1935*All L R*	260
391	1935*A W R*	169		1935*A W R*	512		1935*R D*	73		154 *I C*	812
	154 *I C*	437		1935*Cr C*	493		1935*A W R*	203		1935*A W R*	457
	1935*All L R*	193		157 *I C*	178		16 *U D*	112		1935*Cr C*	511
	1935*A L J*	749		1935*All L R*	726		1935*A L J*	1289		36 *Cr L J*	569
398	1935*A W R*	318		36 *Cr L J*	1094	455	1935*A W R*	363		16 *L R A Cr*	82
	1935*A L J*	724	437	1935*A W R*	273		154 *I C*	520	480	154 *I C*	744
	157 *I C*	1021		154 *I C*	516		1935*A L J*	376		1935*All L R*	2 3
	1935*All L R*	894		1935*All L R*	211		1935*All L R*	213		1935*A W R*	406
402	1935*A W R*	98		1935*A L J*	708	456	1935*A W R*	514		1935*A L J*	416
	157 *I C*	429	438	1935*A W R*	340		157 *I C*	1017	481	1935*A W R*	396
	1935*All L R*	806		1935*Cr C*	529		1935*All L R*	892		1935*R D*	133
404	1935*A L J*	418		16 *LRACr*	46	457	1935*A L J*	419		1935*A L J*	444
	1935*A W R*	408		157 *I C*	422		1935*A W R*	328		157 *I C*	333
	158 *I C*	100		1935*All L R*	804		158 *I C*	33		1935*All L R*	765
	1935*All L R*	937		36 *Cr L J*	1145		1935*All L R*	921		16 *LRARev*	190
405	1935*A W R*	252	439	1935*All L R*	210	458 (1)	1935*A W R*	493		16 *U D*	199
	1935*A L J*	341		1935*A W R*	209		157 *I C*	1019		57 *All*	757
	157 *I C*	409		154 *I C*	513		1935*All L R*	893	490	1935*A W R*	206
	1935*All L R*	756		1935*Cr C*	530	458 (2)	1935*A W R*	508		1935*A L J*	367
407	1935*A W R*	141		36 *Cr L J*	526		1935*Cr C*	486		1935*All L R*	217
	1935*A L J*	398	440	1935*A L J*	473		1935*A L J*	843		154 *I C*	631
	157 *I C*	46		1935*A W R*	385		158 *I C*	38		1935*Cr C*	522
	1935*All L R*	692		1935*Cr C*	531		1935*All L R*	924		36 *Cr L J*	545
408	1935*A W R*	233		157 *I C*	901		36 *Cr L J*	1294	492	1935*A W R*	198
	1935*All L R*	166		1935*All L R*	878	460	1935*All L R*	265		1935*R D*	90
	154 *I C*	308		36 *Cr L J*	1231		154 *I C*	703		1935*All L R*	164
	1935*A L J*	349		57 *All*	785		1935*A L J*	421		154 *I C*	305
410	1935 *A W R*	366	441	1935*A W R*	426		1935*A W R*	350		16 *U D*	116
	154 *I C*	517		157 *I C*	983		16 *U D*	127		1935*A L J*	1288
	1935*All L R*	212		1935*All L R*	897		1935*R D*	125	493	1935*A L J*	410
	1935*A L J*	651	443	1935*A W R*	205	461	1935*A L J*	456		1935*A W R*	411
411	1935*A L J*	279		154 *I C*	521		1935*A W R*	371		157 *I C*	897
	1935*A W R*	344		1935*A L J*	381		158 *I C*	53		1935*All L R*	875

A. I. R. 1935 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals		A.I.R.	Other Journals	
495	1935*A L J*	405	517	1935*Cr C*	543	549	1935*A W R*	388	569	1935*R D*	262
	1935*A W R*	518		157 *I C*	1049		1935*A L J*	478		156 *I C*	894
	1935*All L R*	278		1935*All L R*	906		1935*All L R*	321		1935*All L R*	638
	154 *I C*	963		36 *Cr L J*	1285		155 *I C*	119		16 *U D*	321
	57 *All*	740	519	1935*A L J*	309		36 *Cr L J*	636	571	1935*A W R*	588
497	1935*A W R*	430		1935*A W R*	244		1935*Cr C*	567		1935*R D*	236
	1935*All L R*	280		1935*All L R*	168		16 *LRACr*	34		156 *I C*	784
	154 *I C*	1002		154 *I C*	310	552	1935*A W R*	590		1935*All L R*	608
499	1935*A W R*	393	520	1935*All L R*	219		155 *I C*	185		16 *U D*	278
	1935*R D*	143		1935*A W R*	313		1935*All L R*	349	572	1935*All L R*	324
	1935*A L J*	470		154 *I C*	635		36 *Cr L J*	639		155 *I C*	124
	157 *I C*	665		1935*Cr C*	544		1935*Cr C*	570		1935*A W R*	742
	1935*All L R*	847		36 *Cr L J*	551	553	1935*A W R*	621		1935*A L J*	845
	16 *LRACr*	221	521	1935*A L J*	493		1935*A L J*	517	573	1935*A W R*	690
	16 *U D*	204		1935*A W R*	628		1935*R D*	256		1935*A L J*	671
501	1935*A W R*	429		1935*Cr C*	546		157 *I C*	1119		1935*Cr C*	594
	157 *I C*	30		157 *I C*	557		1935*All L R*	919		156 *I C*	593
	1935*All L R*	677		1935*All L R*	839		16 *U D*	318		1935*All L R*	594
502	1935*A L J*	403		36 *Cr L J*	1199	555	1935*A L J*	501		36 *Cr L J*	950
	1935*A W R*	427	523	1935*A L J*	554		1935*A W R*	624	574	1935*A W R*	354
	157 *I C*	426		1935*A W R*	329		1935*R D*	249		1935*A L J*	426
	1935*All L R*	805		157 *I C*	116		155 *I C*	1031		155 *I C*	95
503 (1)	1935*A W R*	291		1935*All L R*	698		1935*All L R*	492		1935*All L R*	318
SB	165 *I C*	1054	525	1935*All L R*	319		16 *U D*	271	575	1935*A W R*	674
	1935 *All L R*	496		155 *I C*	97	556	1935*A W R*	738		156 *I C*	595
503 (2)	1935*A W R*	299		1935*A W R*	604		1935*R D*	286		1935*A L J*	821
	1935*R D*	93		1935*A L J*	640		156 *I C*	897		36 *Cr L J*	955
	1935*A L J*	408	526	1935*A L J*	546		1935*A L J*	841		1935*All L R*	595
	1935*All L R*	266		1935*A W R*	625		1935*All L R*	639	578	1935*A W R*	705
	154 *I C*	927		1935*R D*	251		16 *U D*	341		156 *I C*	813
	16 *U D*	119		157 *I C*	405	558	1935*A W R*	486		1935*A L J*	826
504	154 *I C*	628		1935*All L R*	784		1935*A L J*	489		1935*All L R*	629
	1935*A W R*	336		16 *U D*	279		155 *I C*	1034	579	1935*A L J*	618
	1935*Cr C*	510	527	1935*A W R*	542		1935*All L R*	495		1935*A W R*	777
	36 *Cr L J*	549		157 *I C*	693	559	1935*A W R*	490		1935*Cr C*	598
	1935*All L R*	216		1935*All L R*	857		156 *I C*	606		156 *I C*	849
505	1935*A L J*	557	528	1935*A W R*	572		1935*All L R*	600		1935*All L R*	631
FB	1935*A W R*	652		155 *I C*	230	560	1935*A W R*	733		36 *Cr L J*	1013
	1935*R D*	274		1935*A L J*	544		1935*R D*	277	586	1935*A W R*	703
	155 *I C*	943		1935*R D*	219		156 *I C*	599		1935*A L J*	772
	1935*All L R*	483		1935*All L R*	352		1935*A L J*	807		157 *I C*	526
	16 *U D*	326		16 *U D*	263		1935*All L R*	597		1935*All L R*	821
507	1935*A W R*	431	529	1935*A L J*	560		16 *U D*	334	588	1935*A W R*	494
	1935*All L R*	888	**FB**	1935*A W R*	658	562	1935*A W R*	455		1935*R D*	193
	157 *I C*	1010		156 *I C*	362		1935*R D*	163		1935*A L J*	490
509	1935*A W R*	503		1935*All L R*	582		158 *I C*	231		156 *I C*	810
	1935*A L J*	834	538	1935*A L J*	459		1935*All L R*	960		1935*All L R*	627
	158 *I C*	197	**FB**	1935*A W R*	547		16 *U D*	202		16 *U D*	209
	1935*All L R*	955		1935*All L R*	326		16 *LRARev*	257	590	1935*A W R*	597
511	1935*A L J*	360		155 *I C*	131	563	1935*A W R*	463		1935*Cr C*	595
	1935*A W R*	421		1935*Cr C*	560		1935*Cr C*	590		157 *I C*	147
	154 *I C*	1009	542	1935*A L J*	496		156 *I C*	602		1935*All L R*	705
	1935*All L R*	285		1935*A W R*	605		1935*All L R*	598		36 *Cr L J*	1095
513	1935*A L J*	543		1935*All L R*	1073		36 *Cr L J*	964	592	1935*A W R*	785
	1935*A W R*	556		159 *I C*	151		16 *L R ACr*	73		1935*Cr C*	638
	157 *I C*	609	544	1935*R D*	227	565	1935*A W R*	269		157 *I C*	545
	1935*All L R*	840		1935*A W R*	579		1935*A L J*	377		1935*All L R*	837
514	1935*A L J*	357		157 *I C*	690		155 *I C*	249		1935*A L J*	1070
	1935*A W R*	374		1935*All L R*	855		1935*All L R*	359		36 *Cr L J*	1196
	1935*R D*	131		16 *U D*	267	566	1935*A W R*	515	594	1935*A W R*	581
	154 *I C*	1004	545	155 *I C*	38		1935*Cr C*	592		1935*R D*	229
	1935*All L R*	281		1935*A W R*	453		156 *I C*	914		1935*A L J*	582
	16 *LRARev*	183		1935*R D*	159		1935*All L R*	646		157 *I C*	1013
	16 *U D*	196		1935*All L R*	307		36 *Cr L J*	1031		1935*All L R*	889
516	1935*All L R*	232		1935*A L J*	482	568	1935*A W R*	489		16 *U D*	273
	1935*A W R*	469		16 *LRARev*	216		1935*R D*	205	597	1935*A L J*	393
	154 *I C*	740		16 *U D*	200		157 *I C*	522		1935*A W R*	511
	1935*Cr C*	542	546	1935*A W R*	497		1935*All L R*	819		1935*All L R*	397
	36 *Cr L J*	558		1935*A L J*	484		16 *U D*	212		155 *I C*	492
517	1935*A W R*	300		155 *I C*	1037	569	1935*A W R*	721		1935*Cr C*	622
				1935*All L R*	493		1935*A L J*	662		36 *Cr L J*	777

A. I. R. 1935 Allahabad=Other Journals.—(*Contd.*)

AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
599	1935*A L J*	549	630	1935*A W R*	931	652	1935*Cr C*	652	687	1935*A W R*	506
FB	1935*A W R*	654		1935*All L R*	703		1935*A W R*	800		1935*All L R*	412
	156 *I C*	805		1935*A L J*	952		157 *I C*	146		155 *I C*	563
	1935*All L R*	625		16 *L R A Cr*	55		1935*All L R*	704	688	1935*A L J*	429
601	1935*A L J*	793		36 *Cr L J*	1102		36 *Cr L J*	1098		1935*A W R*	417
	1935*A W R*	918	631	157 *I C*	39		1935*A L J*	1058		1935*All L R*	405
	157 *I C*	1080		1935*A W R*	819	653	1935*Cr C*	653		155 *I C*	550
	1935*All L R*	909		1935*All L R*	686		1935*A W R*	901	690	1935*A L J*	511
605	1935*A L J*	657		1935*R D*	374		157 *I C*	354		1935*A W R*	433
FB	1935*A W R*	774		1935*A L J*	1059		1935*All L R*	780		157 *I C*	122
	156 *I C*	748		16 *U D*	479		36 *Cr L J*	1139		1935*All L R*	702
	1935*All L R*	617	632	157 *I C*	256	655	1935*Cr C*	655	691	1935*All L R*	431
606	1935*A L J*	289		1935*A W R*	846		1935*A W R*	702		1935*A L J*	668
	1935*A W R*	342		1935*All L R*	751		1935*A L J*	660		155 *I C*	657
	1935*All L R*	399	635	1935*A W R*	501		157 *I C*	1091		1935*A W R*	696
	155 *I C*	495		1935*R D*	196		36 *Cr L J*	1292		1935*Cr C*	788
608 (1)	1935 *A W R*	384		1935*A L J*	505		1935*All L R*	915		36 *Cr L J*	823
	1935*A L J*	395		1935*All L R*	367	656	1935*A L J*	638	692	1935*All L R*	417
	1935*All L R*	398		155 *I C*	358		1935*A W R*	600		155 *I C*	596
	155 *I C*	490		16 *U D*	219		157 *I C*	610		1935*A L J*	587
	1935*Cr C*	605		16 *LRARev*	267		1935*All L R*	841		1935*A W R*	481
	36 *Cr L J*	781	636	1935*R D*	314	657	1935*A W R*	314	696	1935*A W R*	792
	16 *LRACr*	49		1935*A W R*	763		1935*A L J*	386		1935*A L J*	943
608 (2)	1935*A W R*	573		1935*A L J*	957		155 *I C*	605	698	156 *I C*	23
	1935*A L J*	520		158 *I C*	47		1935*All L R*	421	**FB**	1935*A L J*	715
	1935*R D*	220		1935*All L R*	930		36 *Cr L J*	782		1935*All L R*	526
	157 *I C*	920		16 *U D*	351		1935*Cr C*	665		1935*A W R*	887
	1935*All L R*	881	638	1935*Cr C*	643		57 *All*	790	704	155 *I C*	1103
	16 *U D*	285		1935*AWR*	795	660	1935*A W R*	637		1935*R D*	300
614	1935*Cr C*	636		157 *I C*	413		1935*A L J*	632		1935*A W R*	750
	1935*A W R*	812		1935*All L R*	788		155 *I C*	676		1935*All L R*	516
	160 *I C*	525		1935*A L J*	1069		1935*All L R*	442		1935*A L J*	815
	1936*All L R*	146		36 *Cr L J*	1142	662	1935*A L J*	664		16 *U D*	347
616	1935*A W R*	591	639	1935*A W R*	557		1935*All L R*	428	705	1935*A W R*	361
	1935*All L R*	385		157 *I C*	696		1935*R D*	263		154 *I C*	816
	155 *I C*	416		1935*All L R*	857		1935*A W R*	715		1935*All L R*	262
	1935*A L J*	647	640	1935*A W R*	379		155 *I C*	634	706	1935*A W R*	823
619	1935*A W R*	732		1935*A L J*	509		16 *U D*	321	**FB**	157 *I C*	157
	1935*R D*	276		155 *I C*	602	663	155 *I C*	593		1935*A L J*	895
	1935*A L J*	837		1935*All L R*	420		1935*All L R*	415		1935*All L R*	713
	158 *I C*	105	642 (1)	1935*A L J*	548		1935*A W R*	485	716	1935*A W R*	365
	1935*All L R*	939		1935*A W R*	640	665	1935*Cr C*	664		1935*A L J*	379
	16 *U D*	329		155 *I C*	668		1935*All L R*	437		1935*All L R*	227
620 (1)	1935*Cr C*	640		1935*All L R*	435		1935*A L J*	670		154 *I C*	713
	1935*A W R*	791	642 (2)	1935*A W R*	710		155 *I C*	662	717	1935*A W R*	210
	157 *I C*	119		155 *I C*	658		1935*A W R*	695		1935*A L J*	385
	1935*All L R*	701		1935*All L R*	438		36 *Cr L J*	826		1935*All L R*	407
	36 *Cr L J*	1102		1935*R D*	282	666	1935*All L R*	435		155 *I C*	560
	1935*A L J*	1021		1935*A L J*	955		1935*R D*	265		36 *Cr L J*	773
620 (2)	1935*A L J*	681		16 *U D*	325		155 *I C*	667		1935*Cr C*	919
FB	1935*A W R*	743	643	1935*A W R*	672		1935*A W R*	727		1935*R D*	283
	157 *I C*	347		155 *I C*	661		1935*A L J*	819	720	1935*A W R*	735
	1935*All L R*	775		1935*A L J*	673		16 *U D*	322		158 *I C*	109
626	1935*A W R*	772		1935*All L R*	433	667	155 *I C*	546		1935*All L R*	941
	1935*A L J*	953	645	1935*A W R*	270		1935*All L R*	403		16 *U D*	337
	158 *I C*	97		1935*All L R*	410		1935*A L J*	498	723	1935*A W R*	838
	1935*All L R*	935		155 *I C*	571		1935*A W R*	545	**FB**	157 *I C*	150
627	1935*A W R*	685	647	1935*A W R*	333	669	1935*All L R*	424		1935*A L J*	857
	1935*A L J*	666		1935*A L J*	423		155 *I C*	631		1935*All L R*	707
	1935*Cr C*	641		1935*All L R*	401		1935*A W R*	414		1935*A W R*	640
	157 *I C*	915		155 *I C*	541	671	1935*All L R*	445	727	1935*A L J*	642
	1935*All L R*	879		1935*Cr C*	650		155 *I C*	684		155 *I C*	673
	36 *Cr L J*	1260		36 *Cr L J*	763		1935*A W R*	536		1935*All L R*	448
629	1935*A W R*	619	649	1935*A W R*	477		1935*A L J*	573		1935*A W R*	753
	1935*R D*	239		1935*R D*	210	675	1935*A L J*	709	729	1935*R D*	303
	1935*A L J*	645		1935*All L R*	369	**FB**	1935*A W R*	833		156 *I C*	53
	158 *I C*	36		155 *I C*	365		157 *I C*	41		1935*All L R*	534
	1935*All L R*	923		16 *U D*	270		1935*All L R*	689		16 *U D*	356
	16 *U D*	282	651	1935*A W R*	613	678	1935*A W R*	867		155 *I C*	1118
630	1935*Cr C*	642		157 *I C*	112		157 *I C*	511	735	1935*All L R*	524
	157 *I C*	123		1935*All L R*	697		1935*All L R*	809			

A. I. R. 1935 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals.		A.I.R.	Other Journals.		A.I.R.	Other Journals.		A.I.R.	Other Journals.	
735	1935*A W R*	864	754	1935*A W R*	322	778	1935*A L J*	797	836	1935*All L R*	988
737	1935*A W R*	376		1935*A L J*	432	781	1935*R D*	310	837	1935*A W R*	1014
	1935*All L R*	226		155 *I C*	1056		1935*A W R*	759		1935*A L J*	1012
	154 *I C*	711		1935*All L R*	506		156 *I C*	45		158 *I C*	525
	1935*A L J*	824	757	1935*A L J*	370		1935*All L R*	540		1935*All L R*	989
738	1935*A W R*	765		1935*A W R*	419		1935*A L J*	1072	838	1935*A W R*	1019
	155 *I C*	1067		1935*All L R*	229		16 *U D*	304		1935*A L J*	1016
	1935*All L R*	510		154 *I C*	718	785	1935*A W R*	711		158 *I C*	911
	1935*A L J*	962	758	1935*A W R*	377		1935*R D*	299		1935*All L R*	1020
739	1935*R D*	316		1935*All L R*	228		158 *I C*	50	840	1935*A W R*	966
	1935*A W R*	766		1935*A L J*	503		1935*All L R*	932		1935*A L J*	1014
	155 *I C*	1063		154 *I C*	716		16 *U D*	343		1935*All L R*	968
	1935*All L R*	509	759	155 *I C*	1092	786	1935*A W R*	768		158 *I C*	421
	1935*A L J*	964		1935*R D*	345		156 *I C*	177	841	1935*A W R*	974
	16 *U D*	353		1935*All L R*	512		1935*All L R*	520		1935*A L J*	1015
740	1935*A W R*	924		1935*A W R*	818		1935*A L J*	929		1935*All L R*	992
	1935*A L J*	983		1935*A L J*	966	789	153 *I C*	704		158 *I C*	618
	157 *I C*	673		16 *U D*	437		1935*A W R*	92	842	1935*A W R*	972
	1935*All L R*	851	760	1935*A W R*	585		1935*All L R*	54		1935*A L J*	981
742	1935*A L J*	946		1935*A L J*	635	790	1935*A L J*	948		158 *I C*	516
	1935*A W R*	923		156 *I C*	281		1935*A W R*	927		1935*All L R*	986
	157 *I C*	668		1935*All L R*	555		1935*R D*	389	843	1935*A W R*	955
	1935*All L R*	849	763	1935*A W R*	1008		16 *U D*	488		1935*R D*	390
743	1935*A W R*	698		1935*A L J*	1025		1935*All L R*	993		1935*A L J*	989
	155 *I C*	638		158 *I C*	999		158 *I C*	620		16 *U D*	484
	1935*A L J*	676		1935*All L R*	1032	791	1935*A W R*	974		158 *I C*	529
	1935*All L R*	430	765	1935*A W R*	602		1935*A L J*	988		1935*All L R*	991
	36 *Cr L J*	816		1935*A L J*	591		1935*All L R*	994	844	1935*A W R*	969
	1935*Cr C*	887		158 *I C*	106		158 *I C*	621		1935*A L J*	991
745	155 *I C*	1070		1935*All L R*	940	792	1935*A L J*	217		158 *I C*	526
	36 *Cr L J*	860	766	1935*R D*	360		1935*A W R*	275		1935*All L R*	990
	1935*All L R*	511		1935*A W R*	817		155 *I C*	791	845	1935*A L J*	934
	1935*Cr C*	888		158 *I C*	49		1935*All L R*	464		1935*A W R*	1015
	1935*A W R*	796		1935*A L J*	1028		57 *All*	727		1935*R D*	415
	1935*A L J*	1067		1935*All L R*	931	799	1935*A W R*	643		16 *U D*	502
746(1)	156 *I C*	39		16 *U D*	437		1935*A L J*	627		158 *I C*	888
	1935*All L R*	543	767	1935*A W R*	863		1935*All L R*	478		1935*All L R*	1029
	1935*Cr C*	875		1935*A L J*	938		155 *I C*	928	848	1935*A W R*	963
	1935*A W R*	814		158 *I C*	43	802	1935*A W R*	850		1935*A L J*	1011
	36 *Cr L J*	893		1935*All L R*	928		1935*All L R*	995		1935*All L R*	994
	1935*A L J*	1057	768	1935*A W R*	958		158 *I C*	626		158 *I C*	623
746(2)	1935*A W R*	474		1935*A L J*	1000	811	155 *I C*	188	849	1935*A W R*	1128
	1935*R D*	182		158 *I C*	45		1935*A W R*	669		158 *I C*	447
	1935*All L R*	413		1935*All L R*	929		1935*All L R*	350		1935*All L R*	980
	155 *I C*	569	769	1935*A W R*	797		1935*A L J*	810	850	1935*Cr C*	1020
	1935*A L J*	838		1935*Cr C*	922		1935*Cr C*	913		1935*A W R*	1089
	16 *U D*	216		158 *I C*	89	814	156 *I C*	101		158 *I C*	424
	16 *LRARev*	243		36 *Cr L J*	1296		1935*All L R*	545		1935*All L R*	969
748	1935*A W R*	250		1935*A L J*	1065		1935*Cr C*	916		36 *Cr L J*	1362
	1935*A L J*	315		1935*All L R*	925		36 *Cr L J*	907	852	1935*A W R*	975
	156 *I C*	59	770	1935*A W R*	954		1935*A W R*	942		1935*A L J*	986
	1935*All L R*	532		1935*A L J*	990		1935*A L J*	969		158 *I C*	904
750(1)	156 *I C*	43		157 *I C*	1099	815	156 *I C*	163		1935*All L R*	1017
	1935*All L R*	544		1935*All L R*	919		1935*All L R*	546	853	1935*A W R*	1052
	1935*A W R*	922	771	1935*A W R*	717		1935*Cr C*	917		1935*A L J*	1286
	1935*A L J*	968		1935*R D*	259		36 *Cr L J*	918	855	156 *I C*	556
750(2)	156 *I C*	42		1935*All L R*	475		1935*A W R*	799		1935*All L R*	578
	1935*All L R*	544		155 *I C*	829		1935*A L J*	1063		1935*A W R*	956
	1935*A W R*	849		16 *U D*	330	817	156 *I C*	494		1935*A L J*	1003
	1935*A L J*	963	774	1935*A W R*	728	**FB**	1935*All L R*	559	856	156 *I C*	609
751	155 *I C*	1097		1935 *R D*	267		1935*A W R*	896		1935*All L R*	602
	1935*R D*	342		1935*All L R*	473		1935*A L J*	869		1935*A W R*	1096
	1935*All L R*	514		155 *I C*	824	834	1935*A W R*	789	862	1935*A L J*	910
	1935*A W R*	820		1935*A L J*	828		156 *I C*	186		1935*A W R*	1084
	1935*O W N*	943		16 *U D*	322		1935*All L R*	548		1935*All L R*	1044
	16 *U D*	441	777	155 *I C*	800		36 *Cr L J*	912		158 *I C*	1106
753	1935*A W R*	751		1935*All L R*	471		1935*Cr C*	980	868	1935*A L J*	919
	1935*R D*	301		1935*A W R*	1045		1935*A L J*	1022		1935*A W R*	1021
	158 *I C*	42	778	1935*A W R*	722	836	1935*A W R*	1012		158 *I C*	753
	1935*All L R*	927		155 *I C*	1106		1935*A L J*	1061		1935*All L R*	1012
	16 *U D*	345		1935*All L R*	517		158 *I C*	519			

A. I. R. 1935 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
872	1935*A W R* 1054	903	1935*Cr C* 1054	925	1935*All L R* 1075	966	159 *I C* 298
	1935*A L J* 1086		16 *L R A Cr* 58		159 *I C* 154		1935*All L R* 1103
	158 *I C* 762		158 *I C* 919		37 *Cr L J* 29	967	1935*R D* 410
	1935*All L R* 1011		1935*All L R* 1023		1935*A W R* 1136		16 *U D* 498
873	1935*A W R* 967	905	1935*A W R* 985	926	1935*A W R* 1004		1935*A W R* 1369
	1935*A L J* 995		1935*Cr C* 1056		1935*Cr C* 1140	968	1935*A W R* 1066
	158 *I C* 908		1935*All L R* 1036		1935*All L R* 1086		1935*A L J* 1083
	1935*All L R* 1019		158 *I C* 1010		159 *I C* 198		1935*Cr C* 1198
875	156 *I C* 736	908	157 *I C* 362	927	1935*A W R* 994		1935*All L R* 1143
	1935*All L R* 609		1935*A W R* 977		1935*All L R* 1039		159 *I C* 531
	1935*A W R* 996		1935*All L R* 782		158 *I C* 1016		37 *Cr L J* 131
882	156 *I C* 357		1935*A L J* 994	928	1935*A W R* 1086	970	1935*A W R* 998
	36 *Cr L J* 925	909	157 *I C* 273		1935*All L R* 1211		1935*A L J* 1019
	1935*A W R* 937		1935*All L R* 762		159 *I C* 900		1935*Cr C* 1193
	1935*All L R* 580		1935*A W R* 1055	930	1935*A W R* 1064		37 *Cr L J* 135
	1935*Cr C* 1046		1935*A L J* 1087		1935*A L J* 1114		1935*All L R* 1147
	1935*A L J* 960	910	1935*A W R* 369		1935*All L R* 1125		159 *I C* 621
883	156 *I C* 948		1935*All L R* 773		159 *I C* 409	974	1935*R D* 402
	1935*All L R* 654		1935*A L J* 474		37 *Cr L J* 85		16 *U D* 493
	1935*A W R* 936		157 *I C* 343	931	1935*A W R* 1075		1935*A W R* 1364
	1935*Cr C* 1033	912	157 *I C* 177		1935*A L J* 1169		159 *I C* 642
	1935*A L J* 972		1935*All L R* 725		1935*Cr C* 1177		1935*All L R* 1152
	36 *Cr L J* 1035		1935*A W R* 1202		159 *I C* 26	975	1935*R D* 398
884	1935*A W R* 707		1935*R D* 421		1935*All L R* 1090		16 *U D* 486
	1935*All L R* 1005		16 *U D* 509		37 *Cr L J* 39		1935*A W R* 1360
	158 *I C* 689	913	1935*A L J* 950	935	1935*A W R* 1071		1935*All L R* 1127
886	156 *I C* 904		1935*A W R* 935		1935*A L J* 1079		159 *I C* 352
	1935*All L R* 641		19 5*Cr C* 1129		1935*Cr C* 1181	976	1935*R D* 396
	1935*A W R* 964		1935*All L R* 1043		160 *I C* 162		16 *U D* 490
	1935*A L J* 998		158 *I C* 1049		1936*All L R* 59		1935*A W R* 1358
888	156 *I C* 387		16 *LRACr* 86	938	1935*A W R* 1067		1935*All L R* 1126
	1935*All L R* 592	914	157 *I C* 277		1935*R D* 491		159 *I C* 411
	1935*A W R* 959		1935*All L R* 764		1935*Cr C* 1184	977	1935*Cr C* 1197
	1935*A L J* 1001		1935*A W R* 1057		1935*A L J* 1108		1935*A L J* 1186
889	156 *I C* 389		1935*A L J* 1076		1935*All L R* 1104		1935*All L R* 1105
	1935*All L R* 590	915	1935*A W R* 957		159 *I C* 306		159 *I C* 308
	1935*A L J* 940		1935*A L J* 1010		16 *U D* 648		37 *Cr L J* 62
	1935*A W R* 1006		1935*All L R* 1029		37 *Cr L J* 56		1935*A W R* 1133
891	156 *I C* 912		158 *I C* 1014	940	1935*Cr C* 1186	979	1935*A W R* 1125
	1935*All L R* 650	916	1935*A W R* 1081		1935*All L R* 1094		1935*A L J* 1093
	1935*A W R* 1047		1935*Cr C* 1133		159 *I C* 287		1935*All L R* 1154
	1935*A L J* 1269		1935*A L J* 1096		1935*A W R* 1453		159 *I C* 644
894	157 *I C* 172		159 *I C* 183		37 *Cr L J* 46	981	1935*A W R* 1088
	1935*A W R* 968		1935*All L R* 1078	942	1935*R D* 399		1935*A L J* 1145
	1935*All L R* 724		37 *Cr L J* 35		16 *U D* 482		1935*Cr C* 1200
	1935*A L J* 997	919	1935*A W R* 806		1935*A W R* 1361		159 *I C* 22
895	157 *I C* 111		1935*Cr C* 1136		1935*All L R* 1138		1935*All L R* 1089
	1935*All L R* 696		1935*All L R* 1040		159 *I C* 517		37 *Cr L J* 44
	1935*A W R* 971		158 *I C* 1041	943	1935*R D* 403	982	1935*A W R* 1118
	1935*A L J* 992	920	1935*A W R* 939		16 *U D* 494		1935*A L J* 1158
896	156 *I C* 542		1935*Cr C* 1137		1935*A W R* 1366		1935*All L R* 1144
	1935*All L R* 580		16 *LRACr* 62		1935*All L R* 1156		159 *I C* 616
	36 *Cr L J* 967		1935*All L R* 1041		159 *I C* 647	984	1935*A W R* 1181
	1935*A W R* 934		158 *I C* 1047	945	1935*R D* 433		1935*R D* 472
	1935*A L J* 950	922	16 *LRACr* 51		16 *U D* 507		16 *U D* 570
897	1935*A W R* 860		1935*A W R* 930		1935*A W R* 1063		1935*All L R* 1134
	158 *I C* 885		1935*Cr C* 1139		1935*A L J* 1116		159 *I C* 447
	1935*All L R* 1027		160 *I C* 382		1935*All L R* 1133	985	1935*A W R* 1129
898	157 *I C* 154		1936*All L R* 117		159 *I C* 446		1935*A L J* 1127
	1935*All L R* 711	923	1935*R D* 361	946	1935*A L J* 1029		1935*All L R* 1151
	1935*A W R* 1051		1935*A W R* 815	**FB**	1935*A W R* 1155		159 *I C* 630
	1935*A L J* 1243		1935*O W N* 794		1935*All L R* 1107	986	1935*A W R* 1140
900	156 *I C* 541		157 *I C* 521		159 *I C* 387		1935*A L J* 1101
	1935*All L R* 577		1935*All L R* 818	964	1935*R D* 400		1935*Cr C* 1207
	1935*A L J* 908		16 *U D* 439		16 *U D* 493		1935*All L R* 1135
	1935*A W R* 1010	924	1935*A W R* 1111		1935*A W R* 1362		159 *I C* 513
902	1935*A W R* 983		1935*A L J* 1174		1935*All L R* 1138		37 *Cr L J* 110
	1935*Cr C* 1053		160 *I C* 321		159 *I C* 521	989	1935*A W R* 1236
	158 *I C* 881		1936*All L R* 103	966	1935*R D* 408		1935*Cr C* 1219
	1935*All L R* 1025	925	1935*Cr C* 1140		16 *U D* 481		159 *I C* 290
903	1935*A W R* 932		1935*A L J* 1113		1935*A W R* 1368		1935*All L R* 1097

A. I. R. 1935 Allahabad=Other Journals—(*Concld.*)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
989	37 *Cr L J* 49	1008	1935*A L J* 1251	1018	158 *I C* 434	1037	159 *I C* 653
995	1935*A W R* 1189		1935*All L R* 1128		1935*R D* 461	1040	1935*A W R* 1221
	159 *I C* 977		159 *I C* 433		16 *U D* 572		1935*R D* 480
	1936*All L R* 19	1011	1935*A W R* 961		1935*All L R* 975		159 *I C* 680
1001	1935*A W R* 1108		1935*All L R* 1185	1020	1935*A W R* 1137		1935*All L R* 1179
	158 *I C* 238		159 *I C* 723		158 *I C* 438		16 *U D* 646
	1935*All L R* 967	1013	1935*A W R* 1092		1935*All L R* 977	1041	1935*A W R* 1217
	1935*A L J* 1179		158 *I C* 428		1935*Cr C* 1254		1935*All L R* 1192
1002	1935*A W R* 1109		1935*All L R* 971		1935*A L J* 1142		159 *I C* 788
	1935*A L J* 1131		1935*A L J* 1153		36 *Cr L J* 1377	1042	1935*A W R* 1203
	1935*All L R* 1180		36 *Cr L J* 1365	1023	1935*A W R* 1229		1935*A L J* 1207
	159 *I C* 683		1935*Cr C* 1282	SB	1935*Cr C* 1225		159 *I C* 989
1003	1935 *A W R* 1107	1014	1935*A W R* 1182		1935*All L R* 1158		1936*All L R* 11
	158 *I C* 232		1935*All L R* 1131		159 *I C* 561	1047	1935*A W R* 1275
	1935*All L R* 961		159 *I C* 441		37 *Cr L J* 117		1935*R D* 516
	1935*A L J* 1161	1016	1935*A W R* 1105	1037	1935*A W R* 1245		1935 *A L J* 1283
1004	1935*A W R* 1185		158 *I C* 202		1935*Cr C* 1239		1935*All L R* 1190
	159 *I C* 984		1935*All L R* 958		37 *Cr L J* 139		159 *I C* 734
	193[illegible]*All L R* 16		1935*A L J* 1137		1935*All L R* 1172		16 *U D* 659
1008	1935*A W R* 1208	1018	1935*A W R* 1113				

LIST OF CASES OVERRULED
in
A. I. R. 1935 ALLAHABAD

Dwarka Singh v. Ramanand Upadhia, (1919) 41 All 592=17 A L J 711= 1919 All 232=51 I C 275.	Impliedly Overruled in 1935 P C 132.
Ishri Prasad Singh v. Lallijas Kunwar, (1900) 22 All 294=1900 A W N 82.	" " " 1935 P C 132.
M. B. Singh & Co. v. Sircar & Co., (1930) 52 All 459=1930 A L J 590=1930 All 392=127 I C 581.	Overruled in 1935 All 946 (FB).
Ram Baran Rai v. Kamla Prasad, (1910) 32 All 594=7 A L J 802=6 I C 698.	" " 1935 P C 57.

THE
ALL INDIA REPORTER
1935
ALLAHABAD HIGH COURT

* * A. I. R. 1935 Allahabad 1

THOM AND HARRIS, JJ.

An Advocate of Allahabad, In the matter of.

Miscellaneous Case No. 435 of 1934, Decided on 9th October 1934.

*** * (a) Contempt of Court—Aspersion need not be against particular Judge as to particular case.**

Proceedings for contempt can lie even where the aspersion on the Court is not against a particular Judge or Bench and in connexion with a particular case: *Case law considered.* [P 2 C 2]

(b) Contempt of Court—Particular type unprecedented, still contempt can be punished.

To scandalise the Court is a contempt and hence any publication which scandalises the Court and lowers its prestige is clearly a contempt, even though there is no record that similar publications have been held by the Courts in the past to constitute contempt. [P 3 C 1]

(c) Contempt of Court—Punishment for—Court has inherent power—It is not restricted by Criminal P. C., S. 194.

The inherent power of the Court to punish for contempt of Court is a power which is essential in the interests of the administration of justice and that power is not restricted in any degree by the provisions in the Criminal Procedure Code relating to proceedings which may be instituted with the sanction of the Government where the Courts or His Majesty's Judges have been defamed. [P 3 C 2]

*** * (d) Contempt of Court—Publication held amounted to contempt of Court of which High Court was bound to take cognizance for purposes of administration.**

An article headed as "A scandalous situation—The Bar Council Election," was published in a newspaper of which the persons proceeded against were the author, the editor and publisher respectively. The passage referred to in the notices was as follows:

"In this connection it is amusing to note that when a comparatively undeserving lawyer is raised to the Bench, which is a fairly frequent occurrence in our judicial history, it is generally claimed, etc."

Held: that the words in the passage convey unwarranted and defamatory aspersion on the character and ability of a number of Judges of the High Court who have recently been elevated to the Bench. The remarks of the writer of the article could not in any sense be regarded as legitimate criticism of the High Court or of any of the Judges of the High Court in the discharge of their duties. It was nothing more or less than an insulting reference to the character and capacity of His Majesty's Judges in an article in which any reference to the High Court was entirely out of place. The passage in respect of which notice to the opposite parties had been issued constituted a contempt of Court of which the High Court in the interests of the administration was bound to take cognizance. [P 6 C 1, 2]

(e) Contempt of Court—Proceedings for—Object is not to vindicate character of particular Judge but to protect administration of justice.

Proceedings for contempt are not brought to vindicate the character of any particular Judge or Judges who have been assailed, but to protect the administration of justice. The question of sensitiveness does not arise. The only question which the Court has to decide is whether the published article lowers or tends to lower the dignity and prestige of the High Court. [P 6 C 2]

Government Advocate—for the Crown.

Tej Bahadur Sapru, P. N. Sapru, T. N. Sapru, S. N. Verma and *G. S. Pathak*—for Opposite Parties.

Order.—On 27th August 1934, this Court directed notices to issue to Mr. Kapil Deo Malaviya, Advocate, Allahabad, Mr. C. Y. Chintamani, Chief Editor, Leader Newspaper, Allahabad, and Mr. Krishna Ram, printer and publisher of the Leader Newspaper, Allahabad, to show cause why they should not be convicted and punished for the offence of contempt of the High Court committed by the publication of a passage in an article written by Mr. Kapil Deo Malaviya and published in the Leader on 10th June 1934. The particular passage appeared in an article headed as "A scandalous situation: The Bar Council Election," of which Mr.

Malaviya is the author. The passage referred to in the notices is as follows:

"In this connection it is amusing to note that when a comparatively undeserving lawyer is raised to the Bench, which is a fairly frequent occurrence in our judicial history, it is generally claimed, etc."

It is not disputed that Mr. Kapil Deo Malaviya is the author of the article in which this passage appears nor is it denied that the article was published in the Leader newspaper on 10th June 1934. Learned counsel for Mr. Malaviya, Mr. Chintamani and Mr. Krishna Ram moved the Court to discharge the notices to his clients. In support of this motion he contended that: (1) Inasmuch as the passage in respect of which notices were issued is not a reflection upon the conduct of a particular Judge or Bench in connexion with the trial of a particular case it does not amount to a contempt of Court as that offence has been defined by the Courts. (2) The article does not overstep the bounds of legitimate criticism of the conduct of a Judge or the Court and does not therefore amount to contempt of Court. (3) Even if the passage in respect of which notice has issued does technically amount to contempt of Court in respect that if contains a reflection upon a Judge or a number of Judges of the High Court, the reflection is so mild and the article itself so innocuous that the Court should not exercise its summary powers for the purpose of punishing so minor a delinquency.

We shall deal with the contentions of learned counsel in order. In support of his contention that the Court has no jurisdiction to convict for contempt of Court where the aspersion which is alleged to amount to contempt, is not a reflection upon a particular Judge or a particular Bench in connexion with the conduct of a particular case, learned counsel relied strongly upon two cases: one reported in (1893) A C 138 (1), the other in (1899) A C 549 (2). We have considered the decisions in these two cases and we are clearly of opinion that they do not support the contention of learned counsel. In (1893) A C 138 (1), it is obvious from a consideration of the report that the publication, which it was alleged amounted to a contempt, was in fact an attack upon the Chief Justice of the colony in his personal capacity. It appears that the Chief Justice had written an article in a newspaper upon a question which was engaging public attention. This article drew a reply from one Mr. Moseley. In the course of the argument before the Judicial Committee, according to the report, Lord Watson, who was one of the members of the Committee remarked:

"The substantial question is: Does the letter refer to him in his official capacity."

The Judicial Committee were of the opinion that the attack upon the Chief Justice was not upon him in his official capacity and they accordingly held that Mr. Moseley was not guilty of contempt of Court. In (1899) A C 549 (2), it was decided that contempt of Court may be committed by publication of scandalous matter in respect of a Court after the adjudication as well as during the pendency of a case before it. The Judicial Committee held upon a consideration of the facts of the case that there had been no contempt of Court, inasmuch as Macleod, against whom contempt proceedings had been directed, had not published the article in which the alleged contempt appeared. Learned counsel for the opposite parties however relied upon certain observations by Lord Morris who delivered the opinion of the Court and which are clearly obiter. Especially did he rely upon the following passage:

"It is a summary process and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have become obsolete in this country."

The concluding observation of Lord Morris on which counsel specially relied is obiter and is as clearly erroneous. The decision in Macleod's case was in the year 1899. In the following year in the case of 2 Q B 36 (3), proceedings were taken against the person who had scandalised the Court. Since 1900 there have been a number of cases where proceedings against persons who have scandalised the Court have been instituted. We are of opinion therefore that these cases upon which learned counsel relied are no authority for the proposition that proceedings for contempt do not lie where the aspersion on the Court is not against a particular Judge or Bench and in connexion with a particular case.

1. In the matter of Special reference from the Bahama Islands, (1893) A C 138.
2. Mcleod v. St. Aubin, (1899) A C 549=68 L J P C 137=15 T L R 487=48 W R 173 =81 L T 158.
3. R v. Gray, (1900) 2 Q B 36=69 L J Q B 502 =16 T L R 305=64 J P 484=48 W R 474 =82 L T 534.

Learned counsel in support of his contention relied further upon the fact that there is no record of any case in which proceedings for contempt were instituted in respect of a general reflection on the character and capacity of a Court. We are unable to say definitely whether the claim that there is no record of such cases is strictly accurate, but assuming that it is, we are of opinion that it does not in any way advance the case of the opposite parties. Cases of general attack upon the character and capacity of the Court in the very nature of things must be few and far between. Most offences of contempt of Court have been, as is to be expected, committed by parties who have considered themselves to have been aggrieved by the conduct and decision of a particular Court or Bench in a particular case. Because a particular type of contempt of Court is unusual or unprecedented it does not follow that the Court has no power to punish such a contempt if it is committed. It is true that the power to punish for contempt of Court is a drastic power exercisable summarily and should not therefore be resorted to lightly, but to argue that, because a particular act has not been punished in the past as contempt where there is no proof that the act has ever been committed or, at any rate, formed the subject of proceedings, it may not be punishable as contempt when the act has been committed and brought to the notice of the Court, is clearly to confuse the principle with the application of the principle. Once it is conceded that to scandalise the Court is a contempt, then any publication which scandalises the Court and lowers its prestige is clearly a contempt, even though there is no record that similar publications have been held by the Courts in the past to constitute contempt. As we have already observed general aspersions upon the character and the capacity of the Court must be comparatively rare and the absence of any report of such cases in our view affords no support for the contention of learned counsel for the oppo- Judges have been defamed.

Learned counsel further contended that the remedy where a Court and not a particular Judge has been defamed should not be by way of proceedings for contempt of Court, but by criminal proceedings at the instance of the Government Advocate under the provisions of S. 194, Criminal P. C. We are unable to agree with this contention. The fact that proceedings may be directed against a person who has defamed the Courts generally is no reason for holding that he may not be proceeded against for contempt of Court. Criminal proceedings as well as contempt proceedings lie against a person who has committed contempt of Court by indulging in illegitimate criticism of the conduct of a particular Judge, and we see no reason in principle for holding that where a Court generally has been defamed proceedings for contempt of Court do not also lie against the delinquent. We would further observe in this connexion that proceedings under S. 194, Criminal P. C., are initiated by the representative of a Government with the previous sanction of the Governor-General in Council or the Local Government. It is for the Government to decide whether such proceedings be instituted or not. If the contention of learned counsel for the opposite parties is sound then the High Court would be powerless to protect itself in a case where the grossest allegations against the Courts had been made, but where the Government refused, it might well be for purely political considerations, to sanction a prosecution. We are clearly of the opinion that the inherent power of the Court to punish for contempt of Court is a power which is essential in the interests of the administration of justice and that that power is not restricted in any degree by the provisions in the Criminal Procedure Code, relating to proceedings which may be instituted with the sanction of the Government where the Courts or His Majesty's Judges have been defamed.

In our opinion the law upon this matter is not in doubt. It has been clearly enunciated in a number of decisions to many of which we were referred by learned counsel for the opposite parties and by the learned Government Advocate. We do not consider it necessary in this judgment to cite all these cases. We will refer however to one or two authorities which, in our opinion, put the question as to the power of the Court to punish for contempt, where a general aspersion is made upon the Court, beyond all question. In 2 Q B D 36 (3), it was held that the publication in a newspaper of an article containing scurrilous abuse of a Judge, with reference to his conduct as a Judge in a judicial proceeding which had terminated, is a contempt of Court punishable by the Court on summary process. In the course

of his judgment in this case Lord Russel of Killowen, C. J., stated:

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower its authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as 'scandalising a Court or a Judge.' That description "of that class of contempt has to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen . . . . . We have therefore to deal with it as a case of contempt, and we have to deal with it brevi manu. This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction the history, purpose, and extent of which are admirably treated in the opinion of Wilmot, C. J., then Wilmot, J., in his Opinions and Judgments."

It will be observed that in this judgment the statement of law by Lord Chancellor Hardwicke and Wilmot, C. J., is approved. According to Lord Chancellor Hardwicke one species of contempt is "scandalising the Court." According to Wilmot, C. J., libel upon a Court is:

"a reflection upon the King and telling the people that the administration of justice is in weak or corrupt hands."

In 1 K B 32 (4), it was held that the King's Bench Division of the High Court in England has power to punish by attachment contempts of inferior Courts. In the course of the judgment which was delivered by Wills, J., the statement of the law by Wilmot, C. J., was approved. In the judgment at p. 40 the following exposition of the law appears:

"What then is the principle which is at the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders?"

It will be found to be, not for the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the Tribunal be undermined or impaired. See the judgment prepared by Wilmot, C. J., in Rex v. Almon (1765), but not delivered because the case was allowed to drop: Wilmot's Opinions, p. 256. The word "authority" is used by him to express "deference and respect which is paid" to the Judges of a Court and their acts "from an opinion of their justice and integrity. . . . . ." A considerable part of the undelivered judgment of Wilmot, C. J., to which we have referred is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a Tribunal which exists for their good alone. He adds that such conduct is pre-eminetly the proper subject of a summary jurisdiction. Attacks upon the Judges, he says:

"excite in the minds of the people a general dissatisfaction with all judicial determinations . . . . . and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be 'universally thought so are both absolutely necessary for giving justice that free, open, and unimpaired current which it has for many ages found all over this kingdom.' With a few verbal alterations those eloquent words will apply with equal force to writings the direct tendency of which is to prevent a fair and impartial trial, or at least one that can be so considered from being had in Courts of inferior jurisdiction which have not the power of protecting themselves from such encroachments upon their independence."

It is clear from the quotation we have given from the judgments in 2 Q B 36 (3) and 1 K B 32 (4), that the Courts in England have approved of the statement of the law by Wilmot, C. J. Learned counsel for the opposite parties contended that Wilmot, C. J.'s statement of law was not based upon authority, and in support of this argument he quoted from Professor Holdsworth's History of England, Vol. 3, at p. 374. We have not the slightest doubt that when Wilmot, C. J., recorded his decision in the case of Rex v. Almon, he was stating what was regarded by the Courts at that time to be the law of contempt. Learned counsel did not indicate what authority for the considered statement of the law by Wilmot, C. J., would have given that statement greater weight. The earliest judicial interpretation of the principles of the Common law must always be open to the criticism that

4. King v. Davies, (1906) 1 K B 32=75 L J K B 104=22 T L R 97=54 W R 107=93 L T 772.

it is not based on authority. Subsequent acceptance is not of less importance than prior authority and Wilmot, C. J.'s enunciation of the law of contempt has more than once been approved by high judicial authority. Learned counsel for the opposite parties in support of his argument quoted the observation of an eminent lawyer to the effect that the language in which Wilmot, C. J.'s opinion is couched is somewhat archaic. This, in our view, does not detract from the authority of the principles enunciated. It is true that the language used by Wilmot, C. J., may be described as somewhat archaic. So may the language of Magna Charta.

We would refer finally to a Full Bench decision of this Court, namely, 1926 All 623 (5). In this case the decision of the Court was that any conduct that tends to bring the authority of a Court into disrespect or which amounts to a false and scandalous attack upon the administration of justice or an insult offered to the Judge or the dignity of the Court, even though it may be after the termination of a pending case, amounts to a contempt of Court; that contempt is not confined to cases which directly interfere with the administration of justice in a pending case, that the High Court as a Court of record and as the protector of public justice throughout its jurisdiction has power to deal with all contempts directed against the administration of justice, whether those contempts are committed in face of the Court or outside it, and independently of whether the particular Court is sitting or not sitting, and whether those contempts relate to proceedings directly concerning itself or whether they relate to proceedings concerning an inferior Court, and in the latter case whether those proceedings might or might not at some stage come before the High Court.

We are therefore clearly of opinion that neither on general principle nor in a recorded decision is there any support for the contention of the learned counsel for the opposite parties that the Court is not empowered to punish for contempt where the alleged contempt consists of a general defamation or aspersion of the Court and not of a particular Judge in regard to his conduct of a particular case. Learned counsel has been unable to cite one single relevant authority in support of his argument, nor has he been able to suggest any cogent reason for differentiating between the cases of a defamation of a particular Judge or a particular Bench and the defamation of the Court generally. The distinction which he has attempted to draw is in our judgment clearly illogical and unsound. Learned counsel for the opposite parties contended in the second place that the article in which the offending passage appears was not intended to convey any aspersion upon the High Court or any of the Judges of the High Court and that, in fact, it does not amount to a contempt of Court. We have already quoted authority for the proposition that no Judge or Court is immune from criticism. A reasonable argument or expostulation against an act of the Court as contrary to law or the public good is permissible under the law. The main question for consideration therefore is whether the article in question contains an unwarranted defamation of the High Court likely to lower its prestige in the eyes of the public and to shake their confidence in its capacity to administer justice.

In the article which is headed "A scandalous situation—The Bar Council Election" Mr. Kapil Deo Malaviya criticised the failure of the members of the Bar in the past to elect responsible and capable persons to represent them on the Bar Council. Why he should have made any reference to the High Court in the course of his argument, it is somewhat difficult to understand. Upon the face of it it would appear that Mr. Malaviya in the course of the article has gone out of his way to make a deliberately offensive observation as to the constitution of the High Court. It was contended by learned counsel for Mr. Malaviya that reference to the High Court in the article was made for the purpose of pointing the argument of the writer as to the necessity of selecting more desirable persons from the Bar to the Bar Council. But the offending passage in our opinion clearly conveys that in recent years lawyers lacking in capacity or character or in both have been elevated to the High Court Bench. The expression used is "a comparatively undeserving lawyer" and the suggestion is that the claim alleged to have been put forward by members of the Bar in the past that they could have selected better Judges is absurd in view of the fact that they have been content to allow themselves to be represented on

5. In re Abdul Hasan Jauhar, 1926 All 623= 97 I C 108=48 All 711 (SB).

the Bar Council by persons who were unfit for their responsibilities. Learned counsel has argued that all that the passage implies is that if the selection of Judges had been left to the Bar Council they would have selected lawyers whose qualifications were more outstanding. We are unable to accept the contention. The expression "a comparatively undeserving lawyer" is a particularly offensive one. It connotes a lawyer who is lacking either in capacity or in character or in both, and to say that the elevation of such lawyers to the High Court Bench is a fairly frequent occurrence in our judicial history, is clearly to defame the High Court and to injure its prestige in such a way as to shake the public confidence in its ability to administer justice. We are unable to accept the innocent interpretation which learned counsel has suggested. We are clearly of opinion that the words in the passage convey unwarranted and defamatory aspersion on the character and ability of a number of Judges of the High Court who have recently been elevated to the Bench. The remarks of the writer of the article cannot in any sense be regarded as legitimate criticism of the High Court or of any of the Judges of the High Court in the discharge of their duties. The passage in question does not contain a fair criticism or comment. It is nothing more or less than an insulting reference to the character and capacity of His Majesty's Judges in an article in which any reference to the High Court was entirely out of place. That the reference amounts to contempt of Court we have not the slightest doubt.

Learned counsel for the opposite parties contended finally that the Court should not attach undue importance to the article in which the offending passage appears. Even though, he argued, there was technically a contempt of Court, it was of such a mild nature as to be beneath the notice of the Court, which could safely ignore such references and rely upon public opinion to vindicate its reputation. The article in question was written by an advocate of standing and repute practising in the Allahabad High Court and it may reasonably be assumed therefore that special importance and significance are attached by the public reading the article to his opinions. It is admitted that the "Leader" has a wide circulation in this and other provinces. That the article was widely read we have no doubt. It is impossible to say what the exact effect of the article has been, but we are of opinion that it tends to lower the High Court in the eyes of the public. Learned counsel has urged that the Court should not be over-sensitive in the matter and that the article could not have done any damage to the prestige of the Court as a very large proportion of the population of the province in which the Court administers justice is illiterate and could not have read the article. We would repeat that proceedings for contempt are not brought to vindicate the character of any particular Judge or Judges who have been assailed, but to protect the administration of justice. The question of sensitiveness does not arise. The only question which the Court has to decide is whether the published article lowers or tends to lower the dignity and prestige of the High Court. Of that in our judgment there can be no doubt. The fact that a large proportion of the population who resort to the Court for the decision of their disputes are illiterate is of little importance. Once the impression gains ground that the High Court is to a certain extent composed of lawyers who are deficient in character or capacity that impression will soon be conveyed to the section of the populace which is illiterate. We have given careful consideration to all that learned counsel has urged in defence of his clients and with some knowledge of the conditions which exist and of the effect that such an article is likely to produce in the minds of the public, we are clearly of opinion that the passage in respect of which notice to the opposite parties has been issued constitutes a contempt of Court of which the High Court in the interests of the administration is bound to take cognizance.

Mr. Chintamani and Mr. Krishna Ram have filed affidavits in which they candidly state that they had no intention of defaming the High Court and that had they thought that the article in question contained passages which might be construed as contempt of Court they would not have published it. No doubt Mr. Chintamani and Mr. Krishna Ram, not unreasonably, relied upon the fact that the article in question was written by an advocate of standing at the Bar. Mr. Malaviya has also filed an affidavit which is not so candid as that of Mr. Chintamani and Mr K.rishna Ram. In his affidavit Mr. Malaviya contends that he had no intention of writing anything and had

not written anything which would defame the High Court.

Although affidavits have been filed by each of the three opposite parties, they have made no apology or expression of regret that the article had been written and published, if in the judgment of the Court it did amount to contempt of Court. This, in our opinion, is to be deplored. The Court cannot compel a party against whom proceedings have been instituted for contempt of Court to apologise, and the opposite parties are within their rights in adopting the attitude which they have done. We are constrained however to express our opinion that it is a matter for regret that an apology has not been tendered in this instance. The article in which the offending paragraph appears was written by an advocate practising in this High Court. In our opinion an advocate should be as solicitous and jealous of the dignity and reputation of the Court in which he practises as the Judges themselves. As a lawyer practising in the High Court what he writes about the High Court must inevitably attract attention. In the present instance Mr. Malaviya has gone out of his way to make a highly improper, unwarranted and offensive reference to the High Court. The fact that he has refused to apologise will not lessen the effect of his offence. Mr. Malaviya cannot be compelled to make amends by way of apology, but we are of opinion that in the attitude he has adopted he has not observed the high traditions of the Bar.

In the circumstances we are prepared to take a lenient, view of the conduct of Mr. Chintamani and Mr. Krishna Ram. They have clearly stated that they had no intention of publishing anything which was derogatory of the High Court. Their respondibility in connexion with the offence committed is less than that of the author of the article in question. We are of opinion that in the case of Mr. Chintamani and Mr. Krishna Ram a warning by this Court is sufficient in the circumstances. We hold that they are guilty of contempt of Court. We consider it unnecessary to inflict punishment. But we order them each to pay Rs. 100 towards the Government's costs in these proceed;ngs.

We cannot take so lenient a view of the conduct of Mr. Malaviya. We convict him of contempt of Court and we sentence him to a fine of Rs. 150. Mr. Malaviya will further pay Rs. 100 towards the costs of the Government in connexion with these proceedings. In default of the payment of fine and the costs within a period of one month from this date we sentence Mr. Malaviya to a term of one month's simple imprisonment.

R.K. *Order accordingly.*

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* A. I. R. 1935 Allahabad 7

NIAMATULLAH, J.

On difference between

KING AND IQBAL AHMAD, JJ.

Thomas Bear & Sons (India)—Plaintiff—Appellant.

v.

Prayag Narain—Defendant—Respondent.

First Appeal No. 400 of 1930, Decided on 14th September 1934, from decision of Addl. Dist. Judge, Cawnpore, D/- 11th April 1933.

(a) Trade-mark—Cases have to be decided according to rules of justice, equity and good conscience—English law may be applied with modification.

There is no statutory law in India on the subject of trade-marks. Cases of this description have to be decided according to rules of justice, equity and good conscience. Conditions peculiar to this country may however necessisate acceptance of the English law with certain modifications. [P 23 C 1, 2]

*** (b) Trade-mark—Plaintiff having reputation for his goods through certain trade-mark—He can restrain defendant from using trade-mark not only for the same goods as plaintiff's but also to cognate classes of goods—Similarity of mark, commercial connexion between plaintiff's and defendant's goods and surrounding circumstances must be considered—Inference from above should not be speculative but must be probable.**

The plaintiffs, whose goods have acquired a reputation in the market through a trade-mark or name with which their goods have become associated, have a right to restrain the defendant from using a trade-mark or name which is identical with or similar to that of the plaintiffs, and such right extends not only to the particular goods sold by the plaintiffs, but also to the cognate classes of goods, provided that the cumulative effect of the similarity of the mark, the commercial connexion between the plaintiffs' goods and those of the defendant and surrounding circumstances is such as to lead the unwary customers to mistake the defendant's goods for those of the plaintiffs. The raw material with which the articles in question are prepared, any affinity in the process employed in manufacturing them, in fact that the production of one can result from a slight extension of the business of the other, the habits and notions of the customers of the two, and the uses made of the article afford indicia of more or less cogency for determining whether the

customers of the defendant's goods are likely to mistake them for those of the plaintiffs. Direct evidence establishing the fact that such impression was created in the past in the minds of certain persons is also of value. The inference to be drawn from all circumstances should not be speculative, but probable. The difficulty of a case like this arises mainly from the fact that the Court has to record a finding not in respect of what has happened, but in respect of what is likely to happen : *English cases considered.*

[P 25 C 1, 2]

(c) Trade-mark—Unwary customer— Standard is that of an average man exercising ordinary caution.

The standard to be borne in mind is neither that of a person who is devoid of all sense of discrimination nor of persons who are very careful observers of things around them. It is that of an average man exercising ordinary caution.

[P 25 C 2]

K. N. Katju and *A. P. Pandey* — for Appellant.

S. N. Sen and *M. L. Agarwalla* — for Respondent.

King, J.—This appeal arises out of a suit for a permanent injunction restraining the defendant from selling chewing tobacco contained in tins or packets bearing the trade-mark of an elephant which is a colourable imitation of the plaintiff's trade-mark.

The plaintiff is a firm styled "Thomas Bear & Sons (India) Limited." The plaintiff's case is that the plaintiff company, or its predecessor in business, have been carrying on the business of manufacturing and selling cigarettes and tobacco for many years and have been doing extensive business in India. All the goods sold by the company bear the design of an elephant which is the trade-mark of the company. In particular, the company has since the year 1922 been selling in India a brand of cigarettes called the "elephant" cigarettes and a brand of tobacco known as "Virginia Bird's eye" in tins and packets bearing the elephant trade-mark. The defendant has recently started the sale of chewing tobacco manufactured by him at Cawnpore and this tobacco is sold in tins bearing a label on which the picture of an elephant and the name "elephant" is prominently displayed and therefore resembles the plaintiff's trade-mark. The plaintiff contends that purchasers are likely to be deceived by the picture of the elephant on the defendant's tins and will suppose that the defendant's goods are manufactured or sold by the plaintiff, and that the plaintiff's business, goodwill and reputation are likely to sustain injury.

The principal defences are that the defendant sells only chewing tobacco and does not deal in cigarettes or any sort of smoking tobacco and therefore the plaintiff has no right to obtain an injunction. It is also pleaded that the appearance of the label and design on the defendant's tobacco tins are quite different from the get up and label of the plaintiff's tins, so customers are not likely to be deceived. The defendant also denied that the plaintiff firm acquired any proprietary right in the elephant trade-mark in respect of their goods.

The learned Additional District Judge has discussed the facts and the law very fully. He found that the plaintiff company and their predecessors have been using the trade-mark of an elephant in respect of their cigarettes and tobacco since a long time and had acquired a right of property in respect of the trade-mark "elephant" in respect of their cigarettes and "Virginia Bird's eye" tobacco. He held however that chewing tobacco was goods of a very different class from smoking tobacco, and he was not satisfied that chewing tobacco and smoking tobacco were so similar that they could be classified in one class and therefore the plaintiff could not claim an injunction in respect of the trade-mark used by the defendant only in connexion with chewing tobacco. He also held that even if chewing tobacco and smoking tobacco can be held to belong to the same class, even so, the plaintiff was not entitled to an injunction, because the trade-mark used by the defendant was not a colourable imitation of the plaintiff's trade-mark. On these grounds he dismissed the plaintiff's suit.

The learned counsel for the plaintiff has strenuously contended that the learned Additional District Judge has taken a wrong view in holding that the plaintiff had acquired a right to use his elephant trade-mark only in connexion with the sale of cigarettes and smoking tobacco and not in connexion with chewing tobacco. He also argues that the trade-mark used by the defendant is sufficiently similar to the plaintiff's trade-mark to be likely to deceive ordinary unwary and illiterate purchasers.

The law on the subject of trade-marks in India has been discussed and laid down by a Bench of this High Court in the 1927 All 81 (1), and by a learned Judge of the Bombay High

1. Swadeshi Mills Co. Ltd. v. Juggi Lall Kamalpat Cotton Spinning and Weaving Co., 1927 All 81=99 I C 353=49 All 92=24 A L J 975.

Court in 1926 Bom 200 (2). In the Allahabad case it was held that if the goods of a manufacturer from the mark of device he has used, have become known in the market by a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much an invasion of right of that rival as the actual copy of his device. It was also held that no general rule can be laid down as to what is or is not a mere colourable variation. All that can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution. It was also pointed out that in a country like India, where there is no statute for registering trade marks, a right to a trade-mark is acquired by user. In the Bombay case it was held that in India, where there was no Registration Act, giving the right of property in trade-marks by registration, the only right of action a trader or manufacturer has is the common law right of action which entitles him to an injunction restraining the use of the trade-mark belonging to him if such use is calculated to pass off the defendant's goods as the goods of the plaintiff's.

It appears that in India the rules of the common law of England applicable to trade-marks should be followed by the Courts in this country as being rules of justice, equity and good conscience. Even in England, where provision is made by statute law for the registration of trade-marks, the Courts also give protection to unregistered trade-marks:

"It is well settled that, if the use by the defendant upon his goods of an unregistered trade-mark belonging to the plaintiff is calculated to pass off or cause to be passed off the defendant's goods as the goods of the plaintiff, an injunction may be granted to restrain such use, and this whether the use be deliberately fraudulent and intended by the defendant to be deceptive, or not. (Kerly on Trade-marks, Edn. 6, p. 12). The test of infringement laid down in all the cases is that the defendant's acts shall be calculated to pass off goods as the plaintiff's which are not his. (Kerly, p. 34). The question which has always been regarded as the test of infringement is, 'will the use of the trade-mark by the defendant lead purchasers to mistake his goods for those of the plaintiff ?' (Kerly, p. 36)."

Learned counsel for the respondent accepts the findings of the trial Court and argues in support of its conclusions. I think there is no dispute regarding the principles of law which are to be applied to a case of this sort. We have to ascertain whether the plaintiff has by user established a right to use his trade-mark in connexion with a certain class of goods which would include chewing tobacco and if so, whether the defendant by using a trade-mark similar to the plaintiff's in connexion with the sale of chewing tobacco is likely to lead purchasers to mistake his goods for those of the plaintiff.

I think the trial Court is undoubtedly right in finding that the plaintiff firm has acquired a proprietary right in respect of its elephant trade-mark with reference to its cigarettes and "Virginia Bird's eye" tobacco. The main question seems to be whether the plaintiff's right to the use of its trade-mark does not extend also to other articles dealt with in the tobacco trade, such as chewing tobacco. In my opinion the trial Court was not right in finding that the plaintiff's right to use its trade-mark was confined only to the sale of cigarettes and "Virginia Bird's eye" tobacco. If the plaintiff's right is strictly limited in this manner, then apparently it would be open to any other person engaged in the tobacco trade to use an exact imitation of the plaintiff's trade-mark in connexion with the sale of any smoking tobacco other than "Virginia Bird's eye" smoking tobacco and certainly in connexion with the sale of cigars or biris. It is not very clear whether the learned Additional District Judge would have refused an injunction if the defendant had been selling a smoking tobacco, other than "Virginia Bird's eye" smoking tobacco, under the plaintiff's trade-mark. But it seems certain that according to his view the plaintiff would not be entitled to an injunction if the defendant had sold cigars in tins bearing an exact imitation of the plaintiff's trade mark. If the plaintiff raised an objection to such use of his trade-mark, he would be met by the answer:

"you do not sell cigars of any description, therefore you have not acquired any proprietary right in your trade-mark with reference to cigars."

It is true that chewing tobacco is in some respects more unlike smoking tobacco than cigars are unlike cigarettes, because cigars and cigarettes are both consumed by smoking, whereas chewing tobacco is consumed by chewing. It appears to me however that the view taken by the Court below would apply to the case of cigars or biris just as much as to the case of

2. A. J. Von Wulfing v. D. H. Jivandas & Co. 1926 Bom 200=93 I C 857=50 Bom 402.

chewing tobacco and in view of the authorities to which I shall presently refer, I do not think that this view can be correct. It is true that the right to use a trade-mark can only apply to goods of a particular class. In the present case it has been proved that the elephant trade-mark is used by different firms in connexion with goods of a very different nature such as buttons, combs or sacking, which have nothing whatever to do with the tobacco trade and of course the plaintiff has no objection to the use of an elephant trade-mark in connexion with such goods as are not dealt with in the tobacco trade. In my opinion, smoking tobacco and chewing tobacco are sufficiently similar to be regarded as belonging to one class for the purpose of acquiring a right to a trade-mark. In England, the law relating to trade-marks is to be found mainly in the Trade Marks Act, 1905. Under that Act, certain rules have been made called the Trade Mark Rules 1920. Under those Rules, articles of merchandise have been classified into 50 classes for the purpose of registration of trade-marks. Class 45 includes "tobacco, whether manufactured or unmanufactured." It appears therefore that in England, for the purpose of the registration of trade-marks, all classes of tobacco, whether smoking tobacco or chewing tobacco or cigarettes or cigars, etc., would be classified under one head and a trade-mark could be registered in respect of the entire class.

A survey of the authorities also shows clearly that when a person has established a right to use a trade-mark in respect of a certain class of goods, this right is not confined only to goods which are precisely similar to the goods which he makes or sells. In some cases indeed, the right to use the trade-mark has been held to extend to goods of a very different nature from the goods sold by the proprietor of the trade-mark. The case of 15 A C 252 (3), seems to go further than any other case in the protection of a trade name. The principles applicable to trade names are similar to those applicable to trade-marks. In that case, Mr. Dunn applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade-mark for baking powder. Mr. Eno, who had for many years used the words "Fruit Salt" as his trade-mark for a powder used in producing an effervescing drink, opposed the application. This case gave rise to great conflict of judicial opinion. Kay, J., decided in favour of Mr. Eno and refused the application for registration. His decision was reversed by the Court of appeal, but their decision in turn was reversed by the House of Lords by a majority of three learned Judges to two. It would certainly seem that there is little similarity between Eno's Fruit Salt and a Baking powder. Any one who wished to purchase an effervescing aperient drink would certainly not accept any sort of baking powder as a substitute. Conversely any one who wished to buy baking powder for baking bread or cakes would never be put off with a bottle of Eno's Fruit Salt. The majority of their Lordships however took the view that the words "Fruit Salt" were associated in the public mind with Eno's Fruit Salt and if Mr. Dunn sold his baking powder under the name of "Fruit Salt Baking Powder," then people might suppose that Eno's Fruit Salt was one of the principal ingredients of the baking powder and therefore if a batch of "Fruit Salt" baking powder proved unsatisfactory, then it might injuriously affect the reputation of Eno's Fruit Salt. On these grounds their Lordships refused the application for registration. This certainly seems to be an extreme case and it shows to what length the Courts in England can go in protecting a right in trade-marks when there is any possibility of the public being deceived by a similarity between two trade-marks or trade-names.

It must be noted however that in that case Mr. Dunn was the applicant for registration and the burden was on him to show that there was no possibility or at least probability of deception or confusion. In the present case, the burden is on the plaintiff to show that the use of the symbol of an elephant on the defendant's goods is likely to deceive the ordinary unwary purchaser.

The case of 2 Ch D 10 (4), was also a question of registration. Registration was opposed by a firm which manufactured all sorts of India rubber goods except boots and shoes and who had registered a trade-mark of which the distinctive part was a Maltese cross, in class 40 for:

"goods manufactured from India rubber and gutta-percha not included in other classes but not including dress shields or gussette webs and

3. Eno v. Dunn, (1890) 15 A C 252=39 W R 161=63 L T 6.

4. *In re*, Gutta Percha and India Rubber Co. of Toronto, (1909) 2 Ch D 10=78 L J Ch 427=26 R P C 428=100 L T 756.

not including any goods of a like kind to any excluded goods."

The applicant applied to register, in class 38, two trade-marks of which the distinctive feature was a Maltese cross, one for "boots and shoes made wholly or party of India rubber" and the other for:

"India rubber footwear included in this class but not including gaiters or leggings or any goods of the like kind."

Although the opposing company did not manufacture or deal in boots or shoes or footwear nevertheless it was held that their trade-mark was for the same description of goods as were to be sold under the applicants' proposed marks and the latter were calculated to deceive and therefore registration should be refused. From this case it is clear that the mere fact that the opposing company did not make boots and shoes or footwear whereas the applicants wished their trade-mark to be used only in connexion with boots and shoes or footwear was not considered to be of much importance. This case seems to be some authority for the view that it is immaterial whether the plaintiff in the present case does or does not sell chewing tobacco provided that chewing tobacco can fairly be held to belong to the same class as the goods which he does sell under his elephant trade-mark.

Another registration case is 10 T L R 175 (5). In that case Turney & Sons applied to register for rum a trade-mark consisting of a diamond with a smaller diamond superposed and other matter, the outer diamond being coloured red. This was opposed by a firm as owners of a diamond trade-mark registered for beer on the ground that the trade-mark applied for would cause confusion and deceive the trade and the public into believing that the applicants' goods marked with their mark were goods emanating from or in some way connected with the opponents. The application was refused, and on appeal it was held that whether beer and rum are or not the "same description" of goods still, even if they are not, there was such a probability of deception that the Court ought not to say that the mark must be registered. In that case it must be admitted that there is very little similarity between rum and beer. Rum certainly could not be mistaken for beer and vice versa. The only similarity is that they are both intoxicating liquors and are both goods dealt with in the liquor trade. I think there is at least as great a similarity between smoking tobacco and chewing tobacco as there is between rum and beer. The last registration case that may be mentioned is 4 Ch D 278 (6). In that case, the owners of a trade-mark of the "Golden Fleece" which they used for spirits were successful in preventing the registration of a similar mark of a Golden Fleece for Australian Champagne on the ground that it was claculated to deceive. It was held that although wine and spirits are different goods they might fairly be held to be goods of the same description; and even if they were not of the same description they were sufficiently similar to induce the public to believe them to be the goods of the same firm if they were sold under similar trade-marks. It is true that in that case there was no question of an injunction to restrain the Australian company from using the Golden Fleece trade-mark on their Champagne, but Lord Justice Cotton observed that he desired to hold out no encouragement to them to believe that if they did so use the trade-mark, they would not be restrained.

I now turn to some cases in which an injunction was sought to restrain the defendants from using trade-marks similar to the plaintiffs. These cases are more directly in point. The case already referred to in 1927 All 81 (1), was a suit for an injunction restraining the defendants from using the lotus trade-mark (Kamalchap) on their goods. That case can however be distinguished because the defendants were manufacturing cotton goods of the same sort as the plaintiffs' cotton goods, and were thus directly competing with the plaintiffs.

The case most directly in point is the O. O. C. J. C. S. No. 159 of 1909 (7), decided by the Madras High Court on 23rd November 1910. In that case, the plaintiffs sued to restrain the defendants from passing off their goods as the goods of the plaintiffs' by using on them the "scissors" mark which had become identified with the goods manufactured and sold by the plaintiffs, namely packets of cigarettes bearing the brand of "scissors." The in-

5. *Re* Turney & Sons Trade-Mark, (1894) 10 T L R 175.

6. *In re*, The Australian Wine Importers Ltd., (1889) 41 Ch D 278=58 L J Ch 380=37 W R 578=60 L T 436.

7. British American Tobacco Co. (India), Ltd. v. Ismail Saib, O O C J C S No. 159 of 1909.

teresting point in that case is that the defendants were not selling cigarettes, but were selling only biris (or "beedies"), whereas the plaintiffs were selling only cigarettes and not biris. It was argued therefore that although the defendants sold their biris in packets bearing the scissors brand, nevertheless, the plaintiffs had no cause of action to restrain them from doing so. It was conceded that cigarettes and biris are dissimilar in appearance and in many other respects. No one asking for a cigarette could be put off with a biri and vice versa. Nevertheless it was held that the plaintiff had a right to restrain the defendant from selling his biris in packets bearing the scissors brand. The learned Judge found it difficult to say whether the use of the scissors label on the defendant's biris would attract custom from the "scissors" cigarettes to the "scissors" biris. But he pointed out that there was another aspect of the case.

"But we have further to consider that the sale of the scissors brand of cigarettes depends a great deal upon the reputation of that brand, and is likely to decline if that reputation is in any way affected and it seems to me that the plaintiffs are justified in being apprehensive that if those beedies are widely sold under the scissors brand and are in consequence believed to be the manufacture of the plaintiffs that might affect the reputation of the brand and adversely influence their sales."

This is precisely the argument advanced by the learned advocate for the appellant in this case. The defendant is not directly competing with the plaintiff in the present case, because the defendant is only selling chewing tobacco which the plaintiff does not sell. But the plaintiff is apprehensive that if the public considered the plaintiff to be responsible for the chewing tobacco, on account of the elephant trade-mark, then the plantiff's reputation might suffer if the chewing tobacco happens to be of inferior quality. The case law has been fully discussed in this case and it seems to me very directly in point.

Another suit for injunction is the 1 Ch D 248 (8). In that case the plaintiffs had for many years manufactured and sold tyres for cycles and motor-cycles under the name of "Warwick" and by the year 1905, that name was distinctive and meant to the trade and to the public tyres of their manufacture. In 1905 they transferred their business with the exclusive right to manufacture and sell Warwick tyres to the Dunlop Company for a term of years. The plantiffs never manufactured or sold tyres for motor cars. The defendants manufactured and sold only tyres for motor cars, and began to sell them under the name of "Warwick Motor tyres." In that case it was held that the use of the name "Warwick" in connexion with the sale of the defendants' motor tyres was calculated to lead the public to believe that the defendants' motor tyres were tyres of the plaintiffs' manufacture. Here we must note that the plaintiffs had never manufactured tyres for motor cars, but they were nevertheless held entitled to restrain the defendants from manufacturing and selling tyres for motor cars under the name of "Warwick Motor tyres." That case therefore also seems to be clearly in point.

I would also refer to the case of 15 R P C 105 (9). The Eastman Company had for many years used the word "Kodak" in connexion with their goods and especially for photographic cameras. The Company had made a speciality of cameras suitable to bicyclists, and of appliances for fixing the same to bicycles and had largely advertised "Bicycle Kodaks." The defendant company had obtained registration of the word "Kodak" as a trademark in class 22, for bicycles and other vehicles included in that class; and their company was registered as the "Kodak Cycle Company Limited." The plaintiff company sued to restrain the defendant from carrying on business under the name of Kodak Cycle Company Limited and from passing off their goods as the goods of the plaintiffs and from infringing the trade-mark of the plaintiff. It was held that the word "Kodak" had become identified with the plaintiff company's goods and the evidence showed a close connexion between the bicycle and photgraphic trades. It was found that the defendants were trying to get the benefit of the reputation of the plaintiff company and the trade-mark must be expunged as being calculated to deceive, and the defendants were restrained from trading under the name "Kodak Cycle Company." At first sight there would seem to be no connexion between a photographic camera and a bicycle, but nevertheless, the Court held that the use of the word "Kodak" in connexion

8. Warwick Tyre Co. Ltd. v. New Motor and General Rubber Co. Ltd., (1910) 1 Ch D 248=79 L J Ch 177=27 R P C 161=101 L T 889.

9. Eastman Photographic Materials Co. v John Griffith's Cycle Corporation, (1898) 15 R P C 105.

with bicycles was calculated to lead the public to suppose that the Cycle Company had some connexion at least with the plaintiff company which sold "Kodak."

The case of 3 Ch D 39 (10), seems at first sight to favour the defendant's contention. In that case, the finding was that there was no infringement of a registered trade-mark. The plaintiff had registered a trade-mark for all classes of tobacco whether manufactured or unmanufactured, but his registered device consisted of a shield with three crowns and the word "Mixture" underneath. Since registration the plaintiff had used this trade-mark solely on packages containing cut tobacco. The defendant had used a trade-mark consisting of a shield with three crowns, without the word "Mixture" underneath, on cigar boxes. It was held that the whole trade-mark including the word "Mixture" was quite inapplicable to cigars and it had not been copied by the defendant and although the plaintiff used part of his registered trade-mark, namely, the shield with three crowns without the word "Mixture" on cigars which he also sold, he had not registered that mark of three crowns only. The learned Judge observed that the plaintiff was really attempting to sue upon an unregistered trade-mark which he could not do "by reason of the Act of Parliament." That case was not an action for passing off nor is there any question of this suit being barred by an Act of Parliament and I agree with the remark of Wallis, J., in the British American Tobacco Company case, that the ruling is distinguishable.

It appears to me from a review of these authorities that the right acquired by the plaintiff in respect of his elephant trade-mark should not be confined strictly to cigarettes and to Virginia Birds eye smoking tobacco, or even to cigarettes and all kinds of smoking tobacco only, but should be held to extend to all preparations of tobacco. It is true that the plaintiff company is not at present selling cigars or biris but I think that if another tobacco company started selling cigars or biris under a trade-mark similar to the elephant trade-mark, the plaintiff company would have a right to restrain the other company from using their trade-mark in connexion with the sale of such goods. The same argument seems applicable to the case of chewing tobacco. Some point has been made by the trial Court of the popular Indian belief that chewing tobacco is manufactured and used only in India and not in other countries. This belief is of course erroneous. I have no hesitation in accepting Mr. Gracie's testimony that chewing tobacco is largely used in England and the U. S. A. and that the Imperial Tobacco Company, have for many years been importing chewing tobacco into India. But if the belief were material, then I think it would have to be taken into account even if it were erroneous. The question we have to decide is, in one view, a psychological question. The plaintiff company sells cigarettes and smoking tobacco in tins bearing the picture of an elephant. The public therefore associate the elephant brand with the plaintiff's goods. If a customer sees a tin of chewing tobacco also bearing the picture of an elephant, would he. by the association of ideas, be likely to suppose that the chewing tobacco was also manufactured or selected or sold by the plaintiff ? We may assume that the ordinary Indian customer would be under the erroneous belief that chewing tobacco is only manufactured in India. But this seems to be quite beside the point. It would be open to the plaintiff to start a factory for chewing tobacco in India. Many factories for the manufacture of cigarettes have arleady been started in India and there is no reason why the plaintiff firm should not manufacture chewing tobacco in India whether from imported tobacco or from tobacco grown in India. So even if the customer wrongly believed that chewing tobacco was only made in India he might reasonably believe that a tin of chewing tobacco bearing the elephant trade-mark was manufactured or sold by the plaintiff company. In my view, the plaintiff's right to use his trade-mark extends to all preparations of tobacco and the Court below was wrong in confining the right to cigarettes and Virginia Birds Eye smoking tobacco only.

The next question is whether the defendant's trade-mark is a colourable imitation of the plaintiff's. The Court below has given a detailed description of the two trade-marks and has pointed out certain differences. It is noted, for instance, that in the plaintiff's trade-mark, the elephant is either black or red and that its trunk is curled inwards whereas in the defendant's trade-mark, the elephant is white and its trunk is projecting forwards. In

10. Hargreave v. Freeman, (1891) 3 Ch D 39= 61 L J Ch 23= L T 487.

my opinion, these minor differences are not of any great importance. It is clear that the plaintiff does not attach much importance to the colour of his elephant, which is sometimes black and sometimes red, and I do not think that the ordinary purchaser would attach much importance to the position of the elephant's trunk. The point is that in each case, the main symbol is an elephant and I think the colour and position and shape of the elephant are questions of minor importance. To my mind, persons who are accustomed to associate the elephant trade-mark with plaintiff's goods would be likely to assume, on seeing the elephant mark on the defendant's goods, that they were the goods of the plaintiff. They would not attach much importance to the differences of colour ,etc., even if they happened to notice the differences. It is true that the letter press is also different, but this again does not seem to be of much importance, especially in a country like India, where the great majority of persons of the class who use chewing tobacco are likely to be illiterate. In the "Kamlachap" case, the difference in the letter press accompanying the lotus brand was considered to be unimportant.

Looking at the case as a whole I think that the plaintiff has substantiated his right to restrain the defendant from selling his goods under the trade-mark of an elephant which is likely to be mistaken for the plaintiff's trade-mark. As regards damages, only Rs. 100 has been claimed as nominal damages. No damages have been proved, but the Court below has quoted authority for the view that if the plaintiff has proved that his right of trade-mark has been infringed, then nominal damages can be allowed, even though they are not proved. I agree with the Court below that nominal damages amounting to Rs. 100 should be allowed. It seems to me unnecessary however to grant the ancillary relief claimed, of delivery to the plaintiff for destruction of all the tins and packets and labels bearing the device of the elephant which are in the possession of the defendant. I think the plaintiff's purpose will be sufficiently served if the defendants is prevented from using any colourable imitation of the plaintiff's trade-mark in the future.

I would accordingly allow this appeal and set aside the decree of the Court below and decree a permanent injunction in the terms prayed for, and a sum of Rs. 100 as nominal damages. The plaintiff should also receive his costs in both Courts.

Iqbal Ahmad, J.—I regret I am unable to agree with my learned brother. There is no controversy about the law applicable to the case, nor is there much dispute as regards the facts. But the difficulty in such cases arises in the application of the law to given set of facts, and the difference of opinion between my learned brother and myself has been occasioned by that difficulty:

"It is well settled that, if the use by the defendant upon his goods of . . . . . trade-mark belonging to the plaintiff is calculated to pass off or cause to be passed off the defendant's goods as the goods of the plaintiff, an injunction may be granted to restrain such use: Kerly on Trade-marks, p. 12)."

It is equally well settled that:

"in cases of this description the probability of misleading not experts or persons who know the real facts, but ordinary or unwary customers, is the mischief to be guarded against: 2 Ch D 54, (11)."

The cardinal question for decision therefore in cases in which plaintiff seeks to restrain the defendant from using a mark or design on the ground that the mark or design is a colourable imitation of the mark or design in which the plaintiff has acquired a right of property must always be:

"will the use of the trade-mark by the defendant lead purchasers to mistake his goods for those of the plaintiff, (Kerly p. 36)."

The answer to this question must primarily depend on the degree of similarity between the trade-mark of the plaintiff and the mark used by the defendant. It is obvious that in the determination of this question decided cases can never be a safe guide, and every case of alleged infringement of the plaintiff's mark or design must be decided on its own facts and circumstances. The best test is to lay the plaintiff's mark and the defendant's mark side by side and then to decide by comparing the two whether the defendant's mark is or is not a colourable or an approximate imitation of the plaintiff's mark:

"No general rule can be laid down as to what is or is not a mere colourable variation. All that can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution, 1927 All. 81 (1), p. 975."

In the determination of this question many considerations must enter into the mind and it is impossible to enumerate those considerations. The points of similarity between the two marks and the essential points of difference bet-

11. Powell v. Birmingham Venegar Brewery Co., (1896) 2 Ch D 54.

ween them must be given due weight and the conclusion must be arrived at on a consideration of the colour, shape, form and design of the two marks. If on a consideration of all the circumstances the conclusion arrived at is that the defendant's mark is not a colourable imitation of the plaintiff's mark, and is not calculated to deceive average customers, an injunction cannot be granted to the plaintiff to restrain the defendant from using the mark used by him. If on the other hand it is found that the get-up of the two marks is similar, the second important question that arises for consideration in such cases is whether the goods manufactured or sold by the defendant are similar to the plaintiff's goods.

The right of property in a particular trade-mark is confined to goods of similar description to which the mark has been attached, and the use of a trade-mark, identical with the mark in which the plaintiff has acquired a right of property, on goods of a description other than that to which the mark of the plaintiff is attached does not constitute an infringement of the plaintiff's right. The reason is obvious. If the goods in which the plaintiff deals are different from the goods to which the defendant attaches the mark, the unwary purchaser is not likely to be misled into the belief that the defendant's goods are the goods of the plaintiff's manufacture. The use of a trade-mark in connexion with goods of a particular description for an appreciable length of time leads to the association of that mark with those goods in the market, and thus the public is led into the belief that similar goods to which that mark is attached are goods of the person whose mark they bear. But if the same mark is attached to goods of a different description there is not the likelihood or the probability of the purchaser being deceived. The authorities on the point have been noted by the learned Judge of the Court below in his judgment: vide pp. 34 to 36 of the printed record and it is unnecessary for me to notice those authorities.

It follows that in case of alleged infringement of a trade-mark, if it is found that the goods manufactured or sold by the defendant are of a description other than the goods in which the plaintiff deals, the plaintiff is not entitled to an injunction restraining the defendant from attaching to his goods trade-mark similar to the trade-mark in which the plaintiff has acquired a right of property. Even in England where there is a specific statute for registration of trade-marks and where, by the Trade Mark Rules, 1920, goods have been classified into 50 classes for the purpose of registration of trade-marks, it has been consistently held that the registered proprietor's right is limited, and the registration restricts his right to the exclusive use of the trade-mark substantially to the kinds of goods upon which he actually uses the mark, and that he is not entitled to restrain others from using the same mark in respect of other goods. The law on the subject is summed up in Kerly at pp. 118 and 119, and is as follows:

"A trade-mark may be registered for certain only of the goods comprised in a class and it will then, of course, be protected as to those goods only. Many of the classes comprise a number of very different kinds of goods; for example, class 6, 'machinery of all kinds, and parts of machinery, except agricultural and horticultural machines included in class 7,' comprises both engine-boilers and sewing machines. Registration in a class does not however confer on the registered proprietor any right to sue for infringement of the mark in regard to goods of kinds other than those for which he uses his mark. Thus, where the owner of a mark comprising the word Neptune, who had used it only for iron sheets, although class 5, for which it was registered, included also wire, brought an action against a person who had registered and used a mark comprising the same word for wire, the Court of appeal refused to grant an injunction, and they ordered the register to be rectified by restricting the registration of the plaintiff's mark to iron sheets only .... Cotton, L. J., stated that, in his opinion, it was not the intention of the Act (of 1875) that a man registering a trade-mark for an entire class, and using it only for one article in that class, should be able to claim for himself the exclusive right to use the mark for every article in the class, and with this opinion the other Lord Justices agreed."

In the case before me it has been found by the learned Judge of the Court below that the plaintiff company has been using the trade-mark "elephant" for sufficiently long time and that it "has acquired a right of property in respect of trade-mark "elephant," in respect of its cigarettes and "Virkinia Bird's Eye Tobacco" and no exception has been taken to this finding by the learned counsel for the defendant-respondent. In view of this finding of the Court below and the observations made above, the two questions that arise for consideration in this appeal are:

(1) Is the mark used by the defendant on packets and tins of chewing tobacco sold by him a colourable imitation of the plaintiff's mark, and (2) is

chewing tobacco an article of merchandise of similar description as cigarettes or "Virginia Bird's Eye Tobacco" so as to mislead a purchaser into the belief that the chewing tobacco is also the manufacture of the plaintiff company ?

If the answer to either of these questions is in the negative the appeal must fail. I first proceed to deal with the second question formulated above.

It is true that by the English Trade Mark Rules, 1920, "tobacco, whether manufactured or unmanufactured" has been classified under one class, class 45 but this classification is wholly irrelevant for the decision of the second question noted above. In the first place the rights of industrial property in India are governed by the laws of India and are in no way affected by the laws of England: vide 1926 Bom 200 (2). In the second place the classification of goods by the Trade Mark Rules, 1920. can by no means be an infallible guide for the determination of the question whether or not a particular article is similar to or of the same description as another, though both may have been classified by the Rules of 1920, in the same class. That this is so is put beyond doubt by a reference to the classification of goods by the rules, e. g., in class 2 we find "chemical substances used for agricultural, horticultural, veterinary and sanitary purposes." To my mind it is impossible to argue that chemical substances used for agriculture are articles of the same description as chemicals used for veterinary and sanitary purposes, or that a person who registers a trade-mark in England for some chemical substance used for agricultural purposes has the right to prevent the use of the same mark in connexion with chemical substances used for horticultural, veterinary and sanitary purposes. The chemical substance used for one purpose specified in class 2 must necessarily be different from the chemical substance used for other purposes specified in that class. A perusal of the various classes specified in the third schedule of the Trade Mark Rules leads to the same conclusion. It follows that the mere fact that the plaintiff company has secured registration with respect to goods in class 45 is no warrant for holding that it is entitled to restrain the defendant from using its mark to chewing tobacco unless it is found as a fact that chewing tobacco is an article of so similar a description that the goods bearing the defendant's mark may be taken for the manufacture of the plaintiff.

In my judgment chewing tobacco is an article of a description totally different from the cigarettes and the smoking tobacco manufactured by the plaintiff company. Cigarettes and tobacco manufactured by the plaintiff are articles that are consumed by smoking whereas chewing tobacco is used mostly for chewing with betels. Mohammad Yakub, plaintiff's witness, admitted that:

> " chewing tobacco manufactured in India and smoking tobacco manufactured by foreign companies materially differ in quality, kind and stuff and one cannot be mistaken for the other."

He however added that if the elephant mark is found on the label of the packets or tins of chewing tobacco the people would conclude that the goods are the manufacture of the plaintiff company as "they cannot know what is contained inside." I am not prepared to attach any weight to this portion of the statement of Mohammad Yakub, as no one who goes to buy cigarettes or smoking tobacco purchases a tin of the same without making sure of the fact that the contents of the tin are or are not cigarettes or smoking tobacco. Similarly, Mr. Gracie, another witness for the plaintiff, stated that smoking tobacco manufactured by the plaintiff company differs from the chewing tobacco manufactured by the defendant in quality and appearance. It is evident from the evidence of these witnesses that chewing tobacco and smoking tobacco are different stuffs and that there is great dissimilarity between the appearance and the use of the two. It may be that tobacco leaf is used both for preparing smoking and chewing tobacco, but this does not necessarily lead to the conclusion that one article is of a similar description as the other. Steel is used for the manufacture of needles, pen-knife, surgeon's knife, swords, revolvers, guns. rifles, railway engines, steam boats, etc. Surely it cannot be said that needle or a pen-knife is an article of a similar description as the other articles enumerated above. Again cotton is used for preparation of durries, long cloth, etc., but no one would characterize the two goods as goods of similar description. It follows that the mere fact that the same material has been used for manufacturing two different articles cannot be a warrant for holding that the articles so manufactured are articles of similar description. Much depends on the method and process of manufacture, the nature of

the article manufactured, the use for which it is prepared and the class of customers who buy the same. The process of preparing chewing tobacco is essentially different from the process adopted in the preparation of tobacco leaf used in cigarettes and pipes. Chewing tobacco is an article different in nature from smoking tobacco. In India chewing tobacco is of four different kinds:

(1) Surti, (2) Zarda, (3) Qiman and (4) Goli. Even the most overcareless purchaser can never mistake either of these species of chewing tobacco with leaf used for smoking. They are so dissimilar from each other that no one can be misled to believe that one is the same stuff as the other. It has already been observed that smoking tobacco and chewing tobacco are used for totally different purposes. The class of customers who buy the two articles is also not the same. I think it is correct to say that chewing tobacco prepared in India is used by Indians alone, whereas the sale of cigarettes and "Virginia Bird's Eye Tobacco" is not confined only to Indians. Further, chewing tobacco is used by millions of men in villages who use Indian tobacco for smoking purposes and majority of them do not use cigarettes or smoking tobacco prepared in foreign countries. No Indian who purchases chewing tobacco in the market has the remotest idea that the tobacco is the manufacture of a foreign country. It is no doubt a fact that chewing tobacco is also used by few people in England, but the chewing tobacco used in England is not consumed in India. The chewing tobacco sold in the Indian market and used by Indians is the produce of an indigenous trade and it is universally known that it is manufactured in India and by Indian firms alone. But it is contended that the plaintiff company may take to the manufacture of chewing tobacco in India and in that case there would be the risk of chewing tobacco prepared by the defendant being mistaken for chewing tobacco manufactured by the plaintiff. The answer to this contention is that cases of alleged infringement of trade-marks have to be decided on existing and proved facts and not on hypothetical suppositions of a problematic nature. If the plaintiff company proceeds to manufacture chewing tobacco in India and affixes the elephant labels to packets and tins of the same, the defendant may very well seek to restrain the plaintiff company from doing so on the ground that so far as chewing tobacco is concerned the defendant has acquired a right of property in elephant trademark. The fact remains that the plaintiff has not upto this day acquired a right of property in Elephant trademark with respect to chewing tobacco. It has been stated above that the test in such cases is whether the defendant by placing the goods in the market is leading the ignorant, illiterate and unwary public into the belief that the goods are the goods of the plaintiff, and in my judgment chewing tobacco is so materially different from the goods of the plaintiff company that there is not the remotest possibility of one being confused with or mistaken for the other.

Before proceeding to deal with the decisions to which reference has been made by the learned counsel for the parties, I may note that it appears from the judgment of the Court below (p. 36), that it was not argued in that Court on behalf of the plaintiff company that cigarette is an article of the same class as chewing tobacco and the case of the plaintiff company was pressed only as regards "Virginia Bird's Eye Tobacco."

The decision nearest in point is the case of 3 Ch D 39 (10). The plaintiff in that case had registered as his trademark for the whole of class 45, i. e., "tobacco whether manufactured or unmanufactured", a device consisting of (inter alia) a shield with three crowns, and the word "Mixture" underneath; since registration the plaintiff used this trade-mark solely on packages containing cut tobacco; subsequently the plaintiff used the shield and three crowns without the word "Mixture," a trade term not appropriate to cigars, on boxes of cigars. The defendants, cigar manufacturers, labelled their boxes with a device consisting of a shield and three crowns. On an application for an injunction to restrain this infringement it was held:

" that registration of a trade-mark for an entire class, followed by user on one description of goods only, did not give the exclusive right to the use of such trade-mark for all descriptions of goods in that class, and that under the circumstances the plaintiff was not entitled to an injunction."

In that case it was observed that:

" a man registering a trade-mark for the entire class, and yet only using it for one article in that class,"

is not entitled to claim for himself the exclusive right to use it for every article in the class. There is nothing on the record to show with respect

to what article of class 45 the predecessor of the plaintiff company had the "elephant" trade-mark registered in England. It may very well be that the registration was confined only to cigarettes and smoking tobacco. Further the evidence adduced by the plaintiff company falls short of proving that elephant trade-mark has been used by the plaintiff company in connexion with chewing tobacco, and as such, the plaintiff company is not entitled to the injunction prayed for in the present suit.

I do not for a moment underrate the importance of industrial and trade security and am alive to the imperative necessity of protecting a dealer, whose goods by the mark that they bear have acquired a particular reputation in the market, for being subjected "to invasion at the hands of an unscrupulous rival." But it is of equal importance that a firm or company that has acquired a right of property in a particular trade-mark with respect to particular goods should not be allowed to restrain others from using that mark on goods of a different description and thus jeopardize freedom of trade and stifle the industry of the country. It is to be remembered that in the absence of statutory law on the subject cases of alleged infringement of trade-marks have to be decided in India according to justice, equity and good conscience" and I consider it unjust to restrain the defendant from using his mark on goods which have not been manufactured so far by the plaintiff company.

I find from the sale-deed printed at p. 49 of the record that Thomas Bear and Sons Ltd., a company incorporated in England, assigned to the Indian company certain trade-marks, etc. in consideration of Rs. 16 lakhs. The English company was competent to do so in view of the provisions of S. 22, Trade Marks Act, 1905. but the right to assign the use of a trade-mark registered under the Act, is confined by that section to the goods for which the trade-mark was registered. The absence of evidence on the point as to with respect to what particular description of goods in class 45 the English company had the elephant trade-mark registered leads me to suspect that the registration was not as regards chewing tobacco.

I have given my reasons for holding that chewing tobacco cannot be confused with tobacco leaf used for smoking and there is no risk of deception. The right claimed by the plaintiff company in the present suit to the exclusive use of the elephant trade-mark must, then, be based either on the assignment evidenced by the sale-deed mentioned above, or on the fact that the mark has been used by the plaintiff company on chewing tobacco for such a length of time as to give it a right of property in that mark with respect to chewing tobacco. If the right claimed by the plaintiff company is on the basis of assignment in its favour the short answer to the claim is that, as it is not proved in the present case that the registration secured by Thomas Bear and Sons, Ltd., was also with respect to chewing tobacco, the plaintiff company cannot, by the assignment in its favour, become entitled to the use of the elephant trade-mark with respect to chewing tobacco. If on the other hand the claim of the plaintiff company is based on user, the claim must equally fail as there is no evidence of user of the mark with respect to chewing tobacco by the plaintiff company.

The case of 15 A C 252 (3), relied upon by the learned counsel for the plaintiff-appellant is in my judgment clearly distinguishable. In that case Mr. Dunn applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade-mark for Baking Powder. Mr. Eno who had for many years used the words "Fruit Salt" as his trade-mark for a powder used in producing an effervescinc drink, opposed the application. The case gave rise to great conflict of judicial opinion and it was ultimately held by the majority of the House of Lords that:

" upon the evidence the proposed words were as a matter of fact calculated to deceive the public, that the case therefore fell within S. 73, of the Patents, Designs, Trade-marks Act 1883, and that the trade-mark ought not to be registered."

The decision turned on the determination of the question whether the use of the words "Fruit Salt" which Mr. Eno applied to register were or were not calculated to deceive the public. The question to be decided therefore was essentially a question of fact and the decision on a question of fact in one particular case can never be a guide for the decision of a similar question of fact in another case. It was observed by Lord Watson in that case that:

" there would be a supposed connextion between the two articles in the minds of many persons, who would naturally assume that the baking powder had been manufactured with the appellant's fruit salt, and purchase it in that belief;

so that a batch of badly made baking powder might seriously injure the credit of the effervescing powder."

In the case before me there is no such risk. Howsoever bad the stuff manufactured by the defendant may be, no purchaser of the chewing tobacco can ever by any stretch of imagination conceive for a moment that, simply because the elephant trade-mark is affixed to the packet or tin containing the chewing tobacco, the same has been prepared from the smoking tobacco manufactured by the plaintiff company. As such there is no question of the Elephant trade-mark affixed by the defendant to the tobacco prepared by him of being calculated to deceive the public into the belief that the tobacco has been prepared from the goods manufactured by the plaintiff.

It must be remembered that Elephant trade-mark (Hathi marka), is not a mark used solely by the plaintiff company on the goods manufactured or sold by it. It appears on the other hand that the Elephant trade-mark is used in connexion with various goods such as kerosene oil, buttons, combs, sackings, etc., and the learned Judge of the Court below was right in observing that "no one can have a monopoly of the symbol of an Elephant." The symbol of Elephant on goods of merchandise is so common that no customer in the Indian market is likely to particularly associate chewing tobacco with the goods manufactured by the plaintiff company. It is to be noted that the English decisions under the Trade Marks Act, are not not a safe guide for the decision of cases in which an injunction is prayed for on the ground of an alleged infringement of the plaintiff's right as to a particular trade-mark. That this is so is put beyond doubt by the following observations of Lords Watson in Eno's case:

"These prohibitory clauses cast upon the applicant the duty of satisfying the Comptroller of the Court, that the trade-mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There, the onus of showing that his trade-mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is in petitorio, and must justify the registration of his trade-mark by showing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, in dubio, his application ought to be disallowed."

In the suit giving rise to the present appeal the burden of proving that the defendant's trade-mark was calculated to mislead the public was on the plaintiff-appellant and unless the plaintiff company satisfactorily discharged that burden it was not entitled to the reliefs prayed for by it. Similarly the decision in 2 Ch D 10 (4), has no application to the present case. In that case the Gutta Percha Company applied to register two trade-marks in class 38

"(articles of clothing, such as . . . . . boot and shoes . . . . .)"

the one for

"boots and shoes made wholly or partly of India Rubber,"

and the other for

"India rubber footwear included in this class but not including gaiters or leggings and not including any goods of a like kind to gaiters or leggings."

The distinctive part of each mark was a Maltese cross. The Gutta Percha Company carried on business in Canada as manufacturers of all kinds of rubber goods, and the trade-marks were registered in Canada for all their rubber goods. The application was opposed by Leyland Company who had on the register since 1899, in class 40, a mark consisting of a Maltese cross resembling the appellant's proposed mark, for:

"goods manufactured from India rubber and gutta-percha not included in other classes but not including dress shields or gussette web's and not including any goods of a like kind to any excluded goods."

The Leyland Company did not as a matter of fact manufacture or deal in boots or shoes. The applicant company had done some business in England in goloshes and rubber-soled tennis shoes and sand shoes, but declined to undertake not to sell other rubber goods though they wished to confine the trade-mark in England to boots and shoes. In the words of Cozens Hardy, M. R., the question raised in the case was:

"a question of some importance as to the construction and effect of Ss. 11 and 19, Trade-Marks Act 1905."

It is unnecessary to observe that the decision of the case before me has nothing to do with the construction of those sections. The application of the Gutta Percha Company was refused on two grounds: (1) that the proposed trade-mark of the applicant company might lead to the belief that the boots and shoes made by it were the manufacture of Leyland Company, or it might lead to the belief that the mark indicates the quality of the rubber and that the boots and shoes which are stamped with that mark are made with rubber for the quality of which the

Leyland Company are responsible; and, (2) that the applicant company head their invoices with a statement of all the various goods made of rubber sold in America and this was calculated to deceive the public.

The second ground assigned by Buckley, L. J., for holding that the marks sought to be registered by the Gutta Percha Company were calculated to deceive has no application to the present case. There is no question of any heading being put on their invoices by the defendant-respondent which may lead to the belief that the chewing tobacco prepared by it is made by the plaintiff company. I have already detailed the reasons for holding that there is not the likelihood of an average purchaser of chewing tobacco harbouring the belief that the tobacco is manufactured by a company which puts in the Indian Market cigarettes and smoking tobacco of a foreign manufacture. Similarly there is no question of any body being misled into the belief that the chewing tobacco made by the defendant is prepared with some stuff for the quality of which the plaintiff company is responsible.

Reliance was also placed on behalf of the plaintiff-appellant on the case of 10 T L R 175 (5). That case again was a case under the Trade Marks Act. Turney and Sons applied to register, for rum, a trade-mark similar to a trade-mark that another person had registered for beer, and the application was refused on the ground that the trade-mark applied for would cause confusion and deceive the trade and the public into believing that the appellant goods were goods emanating from or in some way connected with the goods of the person who had registered the mark for beer. It was held in that case that:

" whether beer and rum are or are not the same description of goods, still, even if they are not, there was such a probability of deception that the Court ought not to say that the mark must be registered."

It is to be observed that in cases under the Trade Marks Act, the discretion is vested by the Act, in the comptrollar and Courts to allow or to refuse registration, and an invariable feature of the cases arising under the Act is that, in order to avoid confusion, the English Courts have been universally cautious in allowing registration. Cases of alleged infringement of trade-marks in India however have to be decided on a totally different basis. Unless the plaintiff succeeds in conclusively proving that the mark used by the defendants is calculated to deceive the public, a specific relief by way of an injunction must be refused. Apart from this both rum and beer are alcoholic drinks and the similarity of mark put on both is easily calculated to lead a purchaser to believe that both are manufactured by one and the same firm. There is no such similarity between chewing tobacco and smoking tobacco.

The decision in 41 Ch D 278 (6), turned on the provisions of particular sections of the Patents, Designs and Trade Marks Act, 1883. In that case one Mason successfully opposed the application of the Australian Wine Importers Company for the registration of a trade-mark consisting of an oblong label, cross which ran a diagonal line bearing the words "Golden Fleece." Mason had on the register of trade-marks similar trade-marks for spirits. Mason dealt in rum and whisky. The Australian Wine Importers, Ltd.. applied to have the trade-mark registered as a trade-mark in respect of wines. The application was refused on the ground that there was a possibility of deception. In my judgment the dissimilarity between spirits and wines is not of such a degree as the dissimilarity between chewing and smoking tobacco. Spirits and wines are both intoxicating drinks and usually, at any rate in India, are sold by one and the same shop-keeper. On the other hand more often than not a shop-keeper who deals in cigarettes and smoking tobacco (not Indian smoking tobacco), does not sell chewing tobacco. Cotton, L. J., observed that the spirits and wines "are goods which are generally sold by the same persons and they are both alcoholic." In the case of the Australian Wine Importers, Ltd., the difference between cases of registration and action to prevent the use of trade-mark was again emphasized and it was observed that:

" If there is possibility of that kind of deception the Comptroller ought . . . . . to say that the mark cannot come upon the register. It is not at all the same question as though the spirit merchants were now bringing an action against the applicants to prevent their using the trade-mark. That is quite a different matter. Probably he might not succeed; it might be said to him 'you shall not have an injunction; the Court will not interfere by its extraordinary jurisdiction in your favour, because you are only using the mark for spirits;' but does it follow that, because he could not get an injunction, the other man is entitled to put the trade-mark upon the register? In my opinion it does not follow at all, and I have said so many times. In my opinion the Com-

ptroller ought to exercise his discretion in a wide and comprehensive way : vide pp. 281 & 282 of the report."

The observations quoted above fully justify the contention that the cases under the English Trade Marks Act, have no application to cases of infringements of trade-marks arising in India. The words, "the same description of goods" find a place in the Trade Marks Act, and in cases of registration of trade-marks the English Courts have to construe those words. But in cases of the description giving rise to the present appeal the question for consideration is not whether the defendant's goods are goods "of the same description" as the plaintiff's, but whether the goods of the defendant and the plaintiff are of so similar a description as to be calculated to lead to deception if sold with identical trade-marks.

I now proceed to deal with cases in which injunction restraining the defendant from using a trade-mark similar to the plaintiff's mark was prayed for and granted. In the case of 1 Ch D 248 (8), the plaintiffs who manufactured and sold tyres for cycles and motor cycles under the name of "Warwick" were held entitled to an injunction restraining the defendant company from selling motor tyres under the name of "Warwick motor tyres" on the ground that the use of the word "Warwick" was calculated to lead the public to believe that the defendant's motor tyres were tyres of the plaintiff's manufacture. The case is clearly distinguishable. There is practically no difference between a motor cycle tyre and tyres for motor cars. Both are made of the same material, the process of manufacture is the same, the ultimate shape of both is identical and both are used for the same purpose, viz., to ensure acceleration and smooth running of vehicles. The only difference is that in the case of motor cycles the vehicle consists of 2 or 3 wheels whereas in the case of motor cars the number of wheels is 4.

Further there was no evidence in that case that the word "Warwick" was used in connexion with any other article of merchandise in the British market. On the other hand, in the case before me, as has already been pointed out, there is evidence to show that the words "Hathi marka" are associated with numerous articles of merchandise in the Indian market.

The case of 15 R P C 105 (9), has similarly no application to the facts of the case before me. In that case the plaintiff company invented and had for some years used the word "Kodak" in connexion with their goods, especially for cameras. The company had specialized in cameras suitable for bicycles and the appliances for fixing the same to bicycles and had advertised bicycle "Kodaks." The defendant company applied for and obtained registration of the word "Kodak" as a trade-mark for bicycles and other vehicles included in class 22. The plaintiff company then commenced an action to restrain the defendant from infringing the trade-marks of the plaintiff company and it was held that the word "Kodak" had become identified with the plaintiffs' goods and as the evidence showed a close connexion between the bicycle and photographic trades the plaintiffs were entitled to an injunction to restrain the defendants from trading under the name "Kodak Cycle Company, Ltd." and from selling their goods as "Kodak." The plaintiff company in that case had largely advertised "Bicycle Kodaks," and therefore the cycle to which the word "Kodak" was attached could easily be believed to be the manufacture of the plaintiff company. It is unnecessary to emphasize that every case is an authority for the proposition that it actually decides, and the decision of the question whether a particular article is likely to be mistaken for the article manufactured by a particular company must necessarily depend on the similarity or dissimilarity between the two articles, and the facts and circumstances of each particular case.

The last case on which reliance has been placed on behalf of the plaintiff-appellant is an unreported decision of the Madras High Court in O. O. C. J. C. S. No. 159 of 1909 (7). In that case an injunction was granted restraining the defendants from selling their beedies bearing the scissors brand imitated from the brand used by the plaintiffs on their Scissors Cigarettes. The learned Judge who decided that case observed that cigarettes and beedies are in many respects closely allied and in some respects different and "as to their comparative use, it is clear that they are dealt with by the same people." It is unnecessary for me to say whether or not I am prepared to agree with that decision as in my judgment that decision is of no help in the present case. It is distinguishable on the ground that beedies and cigar-

ettes are articles that are consumed by smoking whereas chewing tobacco is not so consumed. For the reasons given above my answer to the second question formulated above is in the negative.

I am also in agreement with the Court below in holding that the trade-mark used by the defendant is not a colourable imitation of the plaintiff's mark. The only resemblance between the two marks is that both bear the symbol of an Elephant, but, barring this resemblance, there is no other point of similarity between the two marks. The learned Judge of the Court below has noticed in detail the points of dissimilarity between the two marks and it is unnecessary for me to reiterate those points in my judgment. As a number of trade-marks attached to different articles of merchandise sold in the Indian market bear the symbol of Elephant, that symbol, by itself, cannot lead a purchaser of chewing tobacco to believe that the mark on the packet or the tin of chewing tobacco is necessarily the mark of the plaintiff company. If the trade-mark of the plaintiff company is put side by side with the defendant's trade-mark it is at once apparent that the two marks are different in practically every respect. The colour, the shape, the form, the character in which the words are written, the get up of the label and the design of the two marks are palpably different. In considering the question whether the defendant's mark is a colourable imitation of the plaintiff's mark it is not permissible, in my judgment, to ignore the matters noted above and to take into account the solitary fact that both the marks have the picture of an Elephant printed on them.

It is true that in "passing off" actions and in actions for infringement of trade-marks all that is necessary for the plaintiff to prove is that the mark used by the defendant is likely to deceive purchasers of the class who buy the goods bearing the plaintiff's mark and it is not necessary to prove actual deception. But it cannot be disputed that the best possible proof of the fact, that the defendant's mark is such an imitation of the plaintiff's mark as is calculated to lead to deception, is evidence of the fact that some purchasers of the defendant's goods purchased the same in the belief that it was manufactured by the plaintiff. It appears from the evidence of Prag Narain, defendant, that he has been manufacturing and selling chewing tobacco since 1926. Thousands of persons must have purchased the chewing tobacco of the defendant in Cawnpore, but not one witness has come forward on behalf of the plaintiff to testify to the fact that, by the existence of the Elephant mark on the chewing tobacco sold by the defendant, he was led to believe that the tobacco was the manufacture of the plaintiff company. In considering the question whether or not the defendant's mark is such an imitation of the plaintiff's mark as is likely to deceive an unwary purchaser, I must give due weight to the fact that no evidence of actual deception was adduced by the plaintiff, and this possibly was due to the fact that no one was actually deceived.

In my judgment the burden that lay on the plaintiff-appellant was not discharged and the learned Judge of the Court below was right in dismissing the suit. Accordingly I would affirm the decision of the Court below and dismiss this appeal with costs.

(As the Judges differed in opinion on two essential points, it was referred to a third Judge, Niamatullah, who agreed with the opinion of Iqbal Ahmad, J.).

Niamatullah, J.—This is a reference under Cl. 27, Letters Patent. of this High Court in an appeal arising from a suit brought by the plaintiff company, Thomas Bear & Sons, Ltd., the appellants for an injunction restraining the defendant-respondent from using the symbol of an Elephant on tins and packets of chewing tobacco sold by him. The plaintiffs also claimed damages amounting to Rs. 100.

The plaintiff company are the manufacturers and sellers of cigarettes, and, tobacco known as "Virginia Bird's Eye," smoked in pipes of the European style. The packets and tins containing respectively the cigarettes and the tobacco manufactured by the plaintiffs have the picture of an Elephant on them. It is no longer in dispute that the plaintiff company have acquired a right in the trade-mark of Elephant for their cigarettes and tobacco, having used the same for a considerably long time. The defendant has been manufacturing and selling chewing tobacco since 1926. He sells in small packets tobacco manufactured for use with chuna only. That sold by him in tins is meant for use as an addition to "pan." Both contain certain ingredients which impart fragrance to the weed. The packets and tins in which the defendant sells his

tobacco are quite unlike those in which the plaintiffs sell their articles. The only common feature is that the defendant's packets and tins also have the figure of an Elephant on the label, though its colour and the posture are different in the two. The learned District Judge has noted in detail the difference between the two disigns, and I shall refer to this aspect of the case later.

The plaintiffs' case is that the adoption by the defendant of the Elephant trade-mark for chewing tobacco is an invasion of the plaintiff's right in the trade-mark of an Elephant by which their goods are known in the market. The defendant's reply is that the plaintiffs can claim exclusive right to the use of the Elephant trade-mark only for cigarettes and the "Virginia Bird's Eye Tobacco," but cannot extend it to other articles and to chewing tobacco. The learned District Judge of Cawnpore accepted the defence and dismissed the plaintiffs' suit. On appeal to this Court the two learned Judges who constituted the Bench hearing the case differed in their conclusions. King, J., who was in favour of decreeing the suit, was of opinion that the plaintiffs' trade-mark extends to chewing tobacco. Iqbal Ahmad, J., agreed with the Additional District Judge in holding that it was restricted to cigarettes and smoking tobacco and did not entitle the plaintiffs to an injunction restraining others from using the Elephant trade-mark for chewing tobacco. The learned Judges formulated two questions for reference to a third Judge. They are as follows:

" (1) Does the plaintiffs' right in respect of his elephant trade-mark apply only to cigarettes and smoking tobacco or does it extend also to chewing tobacco? (2) Is the defendant's trade-mark a colourable imitation of the plaintiffs' trade-mark, so that ordinary or unwary customers are likely to mistake the defendant's goods for the goods of the plaintiff ?"

It will be seen that the answer to the first question largely depends upon the answer to the second. I propose to consider the latter first. There is no statutory law in India on the subject of trade-marks. Cases of this description have to be decided according to rules of justice, equity and good conscience. English law on the subject may be applied not because it is applicable as such in India, but because it embodies rules of justice, equity and good conscience. Conditions peculiar to this country may however necessitate acceptance of the English law with certain modifications. In England there is now the Trade Marks Act of 1905, under which trade-marks are registered for specified classes of goods. Though the provisions of that enactment are based on decisions given before the Act was passed, the decisions under the Act should be applied with caution, as they are not infrequently based on the terms of the statute rather than on the broad principles of justice, equity and good conscience, which influenced the decisions before the Act. For this reason I do not propose to discuss cases arising from disputes as to registration of trade-marks.

It cannot be denied that no one has the monopoly of using a particular mark or symbol to advertise his goods, so that no other person can use it for advertising his goods which have nothing in common with the former's goods. At the same time, no trader has a right to use a trade-mark so nearly resembling that of another trader as to be calculated to mislead unconscious purchasers, and the use of such trade-mark may be restrained by injunction, although no purchaser has actually been misled: 7 A C 219 (12). It was held in the leading case of 2 Q B 639 (13), that if the use by the defendant upon his goods of unregistered trade-mark belonging to the plaintiff is calculated to pass off, or cause to be passed off, the defendant's goods as the goods of the plaintiffs, an injunction may be granted to restrain such use, and this whether the use be deliberately fraudulent and intended by the defendant to be deceptive or not: See also 41 Ch D 35 (14). At the same time, the exclusive right to use a trade-mark is ordinarily restricted to the class of goods to which it has been attached or applied: see 12 A C 453 (15).

The underlying principle of these cases obviously is that the defendant should be restrained from deliberately or inadvertently creating an impression in the mind of customers that his goods are those manufactured by the plaintiff. Where there is a likelihood of such impression being created, the defendant is restrained not only from manufacturing precisely the same kind of goods as those manufactured by the

12. R. Johnston & Co. v. Archibald Orr Ewing & Co., (1882) 7 A C 219.
13. Reddaway v. Bentham Hemp Spinning Co., (1892) 2 Q B 639=67 L T 301.
14. Thompson v. Montogomery, (1889) 41 Ch D 35=58 L J Ch 374=37 W R 637=60 L T 766.
15. Somerville v. Schemberi, (1887) 12 A C 453=56 L J P C 61=56 L T 454.

plaintiff, but also goods having some affinity with the plaintiff's goods. The case of 15 A C 252 (3), seems to be an extreme case illustrating the above rule. I am not inclined to treat that case as a clear authority for the question involved in the present case, partly, because it arose under the Registration Act, and the question was whether Dunn should be allowed to register the name of his baking powder as "Dunn's Fruit Salt Baking Powder," to which Eno objected on the ground that the words "Fruit Salt" had become associated with his well-known medicine and was likely to lead the customers to believe that Dunn's baking powder was manufactured by Eno. Another reason which detracts from the authority of that case is that there were sharp differences of opinion among eminent Judges who had the occasion to consider it. The trial Judge, Key, J., decided in favour of the plaintiff Eno. His decision was reversed by the Court of appeal, whose decision was reversed by the House of Lords by a majority of three to two, while a good deal can be said in favour of the view taken by the minority, the decision of the majority is based on the consideration that the words "Fruit Salt" may lead the unwary customers to believe that Eno has extended his business for the manufacture of baking powder, the common ingredient of his medicine and baking powder being supposed to be the fruit salt. The decision is based on peculiar circumstances of that case and cannot be a useful guide in determining the question arising in this case, namely, whether the defendant's chewing tobacco and the plaintiff's smoking tobacco will become so far identified in the public mind from the use of a common symbol as to lead the unwary to believe that both are manufactured by the plaintiffs.

The case of 1 Ch D 248 (8), was one in which the plaintiffs, who are manufacturers and sellers of tyres for cycles and motor-cycles under the name of "Warwick" sued the defendants for injunction. The defendants were the manufacturers and sellers of tyres for motor cars, and began to sell them under the name of "Warwick Motor Tyres." The plaintiffs' suit was successful. 15 R P C 105 (9), is another case in which, though the defendant manufactured a different article, he was was restrained from using the name which had become associated with the plaintiff's goods. The plaintiff manufactured cameras suitable for use by cyclists, who could affix them to bicycles. They were called "Bicycle Kodaks." The defendant, who manufactured bicycles called them "Kodaks;" he was restrained from using that word to advertise his bicycles.

The defendant in the present case strongly relies on the case of 3 Ch D 39 (10). It seems to me that this case is of no assistance to us, as it turned upon the provisions of a particular enactment in force in England. After noting the facts of the case Chitty, J., observed:

> "Upon these facts it is argued for the defendants that although the plaintiffs have registered their trade-mark for the whole of class 45, yet, by force of the terms of the trade-mark itself, it is confined to part only of the goods within the class, and therefore the registration must be restricted to such goods only."

The facts were that the plaintiffs registered their trade-mark for the whole of class 45, i. e., tobacco, whether manufactured or unmanufactured, a device consisting of, inter alia a shield with three crowns, and the word "Mixture" noted underneath. The defendants, cigar manufacturers, labelled their boxes with a device consisting of a shield and three crowns, omitting the word "Mixture," which was, of course, not appropriate to their goods. It was held that the registration of a trade-mark for an entire class, followed by user on one description of goods only, did not give the exclusive right to the use of such trade-mark for all descriptions of goods in that class, and that under the circumstances the plaintiffs were not entitled to an injunction. The ratio decidendi of that case appears from the following passage:

> "In fact the plaintiffs' case appears to resolve itself into this: they are or claim to be the proprietors of two trade-marks; one for cut tobacco or mixture, which they have registered, the other for cigars, which has not been registered, and registration of which has not been refused: they are really attempting to sue on the latter; which they cannot do by reason of the Act of Parliament."

The decision seems to be based on some provisions in the "Act of Parliament." The plaintiffs rely on an unreported decision of the Madras High Court in O. O. C. J. C. S. No. 159 of 1909 (7). In that case the plaintiffs, the manufacturers of cigarettes, sold in packets bearing the mark of Scissors, sued the defendants, who manufactured and sold "beedies" in packets also marked with the figure of scissors, for injunction. In spite of cigarettes and "beedies" being somewhat different, they were considered to be species of

the same genus. Wallis, J., held, on a review of a number of English decisions and the circumstances of the particular case, that the common mark of scissors was likely to lead the customers to believe that the plaintiff company had taken to the manufacture of "beedies" also. The damage, which the plaintiffs sustained did not lie in the fact that their customers would be attracted by the defendants, but in the fact that the the inferiority of the defendants' goods might adversely affect the reputation of the plaintiffs. In my opinion that case is of little assistance in arriving at a conclusion in the present case. Manufacturers of cigarettes may well be considered to have extended their business to the manufacture of "beedies," and the similarity of trade-mark is likely to create an impression on the minds of the customers that the manufacturers of both are the same. That consideration is not however applicable in this case for reasons which will be presently stated.

As regards the adverse effect on the plaintiffs' reputation, I do not think there is any risk to the plaintiffs if the unwary customers believe that the defendant's tobacco is manufactured by the plaintiffs. On the contrary, Orthodox Hindu customers are more likely than not to be deterred from purchasing the defendant's tobacco, if they suspect the same to have been prepared by the plaintiffs, who are well known European manufacturers of tobacco, as, in the preparation of chewing tobacco sold by the defendant other ingredients, including liquid substances, are used. It seems to me that in deciding to adopt the figure of an Elephant as his trade-mark the defendant was not prompted by any desire to imitate the plaintiffs' mark. For some reason or other the symbol of an Elephant has become a great favourite in trade circles. It is employed by manufacturers of a number of articles having nothing in common. Dealers in kerosene oil, buttons, combs, sackings, papers &c., employ the figure of an Elephant to advertise their goods. It is prominently shown on the labels embossed or attached to the cases containing these goods.

The rule deducible from the foregoing cases appears to be that the plaintiffs, whose goods have acquired a reputation in the market through a trade mark or name with which their goods have become associated, have a right to restrain the defendant from using a trade-mark or name which is identical with or similar to that of the plaintiffs, and such right extends not only to the particular goods sold by the plaintiffs, but also to cognate classes of goods, provided the cumulative effect of the similarity of the mark, the commercial connexion between the plantiffs' goods and those of the defendant and surrounding circumstances is such as to lead the unwary customers to mistake the defendant's goods for those of the plaintiffs. The raw material with which the articles in question are prepared, any affinity in the process employed in manufacturing them, the fact that the production of one can result from a slight extension of the business of the other, the habits and notions of the customers of the two, and the uses made of the article afford indicia of more or less cogency for determining whether the customers of the defendant's goods are likely to mistake them for those of the plaintiffs. Direct evidence establishing the fact that such impression was created in the past in the minds of certain persons is also of value. The inference to be drawn from all the circumstances should not be speculative, but probable. The difficulty of a case like this arises mainly from the fact that the Court has to record a finding not in respect of what has happened, but in respect of what is likely to happen.

Another important factor is that the class of persons, whose mentality is to be considered is that of "unwary customers." It seems to me that the standard to be borne in mind is neither that of a person who is devoid of all sense of discrimination, nor of persons who are very careful observers of things around them. It is that of an average man exercising ordinary caution. This seems to be the view taken in 24 A L J 975 (1), at p. 990, in which it was observed that:

> "The defendant's trade-mark is certainly not the same as that used by the appellants. But is it only colourably different? I think it is so different as to make it impossible to say that it is substantially the same. No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution."

The question in each case is one of inference from facts. Two cases are seldom exactly parallel, and therefore decided cases are of little value in determining the question whether the goods manufactured by the defendant are likely to be mistaken for those of

the plaintiff. It will be found that the decision in each case was influenced by one or more of the circumstances to which I have referred. I would examine the circumstances of the present case and apply those criteria in answering the main question on which its decision hinges.

The District Judge has given a comparative description of the labels on the packets and tins in which the plaintiffs and the defendant sell their articles. It appears that they differ in all details. The only thing which is common is the picture of an Elephant. Even as regards this feature, it is pointed out that the position of the trunk and the colour are different. As against this, it is said that the defendant's goods are likely to be known as "Elephant mark" tobacco, a description which may, in certain minds, confuse it with the plaintiffs' goods, which have become associated with that mark, and may lead the public to think that the plaintiffs have taken to manufacturing chewing tobacco. The possibility of such a mistake should be weighed against contrary influences derivable from other circumstances.

In considering whether the defendant's tobacco is likely to be mistaken for the plaintiffs' manufacture the important point to consider is the peculiar character of the chewing tobacco sold by the defendant. Mr. Gracie, one of the witnesses for the plaintiffs, tells us that chewing tobacco is used in England and America and is not peculiar to India, and that chewing tobacco is imported in this country by the Imperial Tobacco Company. This may be correct; but it should be borne in mind that the defendant's tobacco sold in tins is used only as an addition to "pan" and is prepared with spices. Such tobacco is not probably used in that manner anywhere outside India. Similarly, the defendant's tobacco sold in packets, is meant for use with chunam and not with "pan." This use again is peculiar to this country. The tobacco which is used by the plaintiffs in manufacturing cigarettes or the "Virginia Bird's Eye" smoked in pipes of the European style cannot be used in India for chewing purposes, and whether the plaintiffs manufacture them in India or import them from Europe, the popular belief is that they are of foreign make, besides being totally unlike the tobacco which is chewed in this country. Some consumers of the defendant's brand of chewing tobacco may be surprised if they are told that it is manufactured by the plaintiffs, who have specialised in cigarettes and "Virginia Bird's Eye Tobacco." Judging from the character of the two substances, it is not likely that the kind of tobacco which the defendant sells will be considered to be a by—product of the plaintiffs' concern or that the plaintiffs have any special facility in manufacturing that brand so as to induce the belief that the plaintiffs have taken to manufacturing the kind of tobacco sold by the defendant. On the contrary, the uses made of them are calculated to create the opposite belief. I put it to the learned advocate for the plaintiffs to mention any instance of the manufacturers of cigarettes being also the manufacturers of tobacco chewed as an addition to pan or with chunam. He could not mention any, and it can be confidently asserted that there is none. The combination is so unusual as to counteract the effect that might be produced by the mark of an Elephant which is the common feature of both.

Of the defendant's customers those who can read Urdu or Hindi cannot be deceived in respect of the tins containing the defendant's tobacco intended for use with "pan," as the name of the manufacturers, Rama and Company, is clearly noted in Urdu and Hindi. The packet in which the other kind of tobacco is sold by the defendant is described by the learned Judge as "crude" perhaps implying that it is a mere paper wrapper and not regular card-board cases like those containing cigarettes. The packets have noted on them in Hindi that the content thereof is Bisma tobacco. The name of Rama and Company, is also mentioned. Persons who generally use this kind of tobacco are drawn from better class of villagers and men of the same position residing in towns. They are mostly Hindus, and probably for this reason the inscription on the packets is only in Hindi. Biswan is a town in the Sitapur District and is noted for its tobacco. The reference to Biswan is intended to be a recommendation for the stuff. Any one who can read Hindi can at once find out the brand and the name of the manufacturer.

The defendant had been selling tobacco for three years before the suit was instituted. Hundreds, possibly thousands, of persons must have purchased the defendant's tobacco during that time. The plaintiffs did not examine any of them to prove that he

was misled into the belief that the defendant's tobacco was manufactured by the plaintiffs. If instances of this kind had been established by reliable evidence, they would have gone a long way in proving the plaintiffs' case. The absence of this class of evidence shows that no such instances have ever occurred. The learned advocate for the plaintiffs explains that, as soon as the plaintiffs came to know of the invasion of their trade-mark by the defendant, they instituted the suit. Even if this was so, there was plenty of time for the plaintiffs to investigate and find out the names of persons who could give evidence in their favour. They examined some witnesses, but none on this point. They had competent legal advice, and it is not unreasonable to presume that their failure to produce this class of evidence was due to the fact that none existed.

Taking all the circumstances into account and making allowance for the fact that the symbol of Elephant is a common feature of the tins and packets of chewing tobacco sold by the defendant and those of cigarettes and "Virginia Bird's Eye Tobacco" sold by the plaintiff, I am led to the conclusion that, while it is not impossible for some ignorant and particularly indiscriminating persons to mistake the defendant's goods for those of the plaintiffs, persons exercising ordinary caution are not likely to assume that the tobacco sold by the defendant was manufactured by the plaintiffs. Accordingly I answer the second question in the negative. The answer to the first question should follow that to the second, and I answer the first question also in the negative.

K.S. *Question answered.*

A. I. R. 1935 Allahabad 27

NIAMATULLAH, J.

Moti Ram and *others*—Appellants.

v.

Onkar Prasad and *others*—Respondents.

Execution First Appeal No. 74 of 1934, Decided on 24th September 1934, from decision of Sub-Judge, Budaun, D/- 29th November 1933.

(a) Civil P. C. (1908), S 151—Order under, is not appealable.

Orders under S. 151 are not appealable. [P 28 C 1]

(b) Civil P. C. (1908), O. 22—O. 22 is not applicable to execution proceedings.

Order 22, Civil P. C., under which substitution proceedigs are taken is not applicable to execution proceedings. [P 28 C 1]

(c) Civil P. C. (1908), S. 151—Court has inherent power to make such orders as to prevent abuse of process of Court.

Section 151 reserves to the Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. [P 28 C 1]

Benod Behari Lal and *S. B. L. Gour*—for Appellants.

Judgment.—This is a judgment-debtors' appeal which arises in the following circumstances:

Jwala Prasad and Narain Das obtained a mortgage decree against Moti Ram and others. Jwala Prasad assigned his rights to Ulfat Rai who subsequently died and is now represented by his son Onkar Prasad. The decree was passed in 1912 so that any fresh application for execution is barred. Onkar Prasad had made an application within time for execution of the decree for the common benefit of himself and Narain Das. The decree was transferred to the Collector as the property to be sold was ancestral property. Narain Das died in the meantime and his son Panna Lal made an application to the Collector praying for substitution of his name in place of his father Narain Das. It transpired before the Collector that Narain Das had died long before Panna Lal made his appearance. The Collector sent back the record of the case to the civil Court for substitution proceedings being taken. On the case being laid before the Subordinate Judge on 3rd January 1933, he ordered that a "service post card" be issued to Panna Lal directing him to apply for substitution of names by 18th January 1933. The case was laid before the Subordinate Judge on that date and it was noted that Panna Lal had made no application. Next day, namely, on 19th January 1933, the Subordinate Judge dismissed Onkar Prasad's application for execution. It should be observed that orders dated 30th January, 18th January and 19th January were all passed behind the back of Onkar Prasad. It does not appear from the record when Onkar Prasad came to know of the dismissal of his application for execution but he applied on 18th March 1933 that the record of the case be sent to the Collector for execution. This application was followed by another application dated 1st April 1933 praying that his application for execution dismissed on 19th January 1933 be restored. The learned Subordinate Judge who, it should be noted, is the same officer who had dismissed the

application for execution on 19th January 1933, restored it acting under S. 151, Civil P. C. The present appeal is from that order.

It is doubtful whether an appeal lies because orders under S. 151, Civil P. C., are not appealable, but the learned advocate for the appellants contends that the order is in substance one under S. 47, Civil P. C., and I heard arguments on the assumption that this is so, and pass my order on the same assumption.

In my opinion the order of the learned Subordinate Judge which is challenged before me is a correct one and if he had refused to pass the order which he did and if such order was justified by law it would have been a blot on the administration of justice. Onkar Prasad had an absolute right to execute the decree for the benefit of himself and other decree-holders (O. 21, R. 15, Civil P. C.). It was not strictly necessary that the heirs of the deceased decree-holder Narain Das should be brought on the record. O. 22, Civil P. C., under which substitution proceedings are taken is not applicable to execution proceedings. The Collector was not justified in returning the case to the civil Court. He should have proceeded with the execution of the decree at the instance of Onkar Prasad, the original applicant. The Subordinate Judge correctly noted in his order of 3rd January 1933 that one decree-holder can apply for the benefit of himself and other decree-holders but as he had received back the record from the Collector for substitution proceedings he directed Panna Lal to make an application for substitution. Panna Lal took no steps. The learned Subordinate Judge's order of 19th January 1933 dismissing the application for execution was clearly wrong. If the decree-holder is driven to necessity of making a fresh application for execution which, as already stated, is barred by limitation, the result will be a gross abuse of the process of the Court. S. 151, Civil P. C., which reserves to the Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court is meant for cases of this kind. I have no doubt that the order of the learned Subordinate Judge dated 19th January 1933, was passed by an oversight. He did not realise that Onkar Prasad was the applicant and that his application for execution could not be dismissed for failure of Panna Lal to apply for substitution.

In all the circumstances of the case the order under appeal is correct. The appeal is dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed..*

A. I. R. 1935 Allahabad 28

SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Kashi Prasad Verma—Applicant.

v.

Municipal Board, Benares —Opposite Party.

Criminal Ref. No. 50 of 1934, and Criminal Ref. No. 343 of 1934, Decided on 23rd October 1934, from order of Addl. Sess. Judge, Benares, D/- 11th December 1933.

(a) U. P. Municipalities Act (1916), S. 155—Essential ingredient—Importation should be of goods liable to pay octroi—Burden is on Municipal Board to prove that goods are liable to duty.

It is an essential ingredient of the offence that the importation should be of goods which are liable to the payment of octroi. No offence is committed if goods, which under the Act are exempted from liability, are imported. The mere fact that the accused had not sought the easier remedy of appealing to the District Magistrate would not compel the criminal Court to convict him in the face of an express exemption under the Act. The burden is on the Municipal Board to satisfy the Criminal Courts that the goods in fact were liable to duty. [P 29 C 1, 2]

(b) U. P. Municipalities Act (1916), Ss. 164 and 155—Complaint under S. 155—Accused can question liability to pay octroi duty on ground that goods are not liable to duty—S. 164 is no bar to such plea.

An accused person, who questions his liability to pay octroi duty on the ground that the goods were not in fact liable to the payment of octroi before a criminal Court hearing a complaint under S. 155, is not questioning his liability in any manner or before any authority other than that provided in the Act and S. 164 is no bar to his taking such a plea. [P 29 C 2]

(c) U. P. Municipalities Act (1916), S. 155—Municipal Account Code, R. 132 (14)—Tubes and tyres of motor-car are exempt from octroi duty.

Tubes and tyres which are especially designed for motor-cars only and are not meant for anything else which is not a machinery, are under Cl. 14 exempt from the payment of octroi.

[P 30 C 1]

Kanhaiya Lal Misra—for Applicant.

A. M. Khwaja—for Opposite Party.

Asst. Govt. Advocate—for the Crown.

Sulaiman, C. J.—This is a reference by the Additional Sessions Judge of Benares recommending that the con-

viction of the accused under S. 155, Municipalities Act, be set aside and is connected with a criminal revision filed by the accused. The accused is an importer of tubes and tyres. He imported a large quantity of such goods without paying any octroi duty. There was considerable correspondence between the officers of the Municipal Board and the accused, but the accused failed to pay the octroi duty which was demanded by the Board. He was then prosecuted under S. 155 of the Act and has been convicted and fined.

A preliminary objection is taken on behalf of the Board that it is not open to this Court and for the matter of that was not open to the Magistrate even to inquire into the question whether the goods were really liable to the payment of octroi. The argument is that once the Municipal authorities have chosen to assess octroi on certain goods, the only remedy open to the importer is to proceed under S. 164 of the Act, and appeal to the District Magistrate whose order is final. If he omits to do that, then the criminal Courts have no option but to convict the accused under S. 155, even if they are of opinion that the goods were not liable to the payment of octroi and were expressly exempted under the Act and that therefore the accused is not guilty. On the face of it such a contention is difficult to accept.

S. 155 provides that a person intending or attempting to introduce within octroi limits or abetting such introduction of any goods or animals liable to the payment of octroi for which the octroi has neither been paid nor tendered, shall be punishable with fine. The complainant must therefore satisfy the criminal Court that the accused has introduced or attempted to introduce or abetted the introduction of any goods or animals "liable to the payment of octroi." Unless this condition is fulfilled and the criminal Court is satisfied that the goods imported are really liable to the payment of octroi, no offence under S. 155 can be said to be committed. It is an essential ingredient of the offence that the importation should be of goods which are liable to the payment of octroi. No offence is committed if goods, which under the Act are exempted from liability, are imported. The mere fact that the accused had not sought the earlier remedy of appealing to the District Magistrate, would not compel the criminal Court to convict him in the face of an express exemption under the Act. Any other interpretation of the section would stultify criminal Courts which would be constrained to convict persons of an offence, although they know that they are not guilty. The burden in our opinion is on the Municipal Board to satisfy the criminal Courts that the goods in fact were liable to duty.

The learned advocate for the Municipal Board contends before us that the provisions in S. 162, of the Act created an absolute bar against the jurisdiction of civil and criminal Courts in matters of Municipal taxation. So far as civil Courts are concerned, his contention is well founded. But the jurisdiction of the criminal Courts is only partially barred, because Sub-S. (1) provides that the liability of a person to be assessed or taxed cannot be questioned:

"in any other manner or by any other authority than is provided in this Act."

Now a criminal Court is one of the authorities referred to in this very Act for hearing complaints under S. 155 of the Act. An accused person, who questions his liability to pay octroi duty on the ground that the goods were not in fact liable to the payment of octroi before a criminal Court hearing a complaint under S. 155, is not questioning his liability in any manner or before any authority other than that provided in this Act. S. 164 would more appropriately apply to cases where the goods are detained by the Municipal authorities or where octroi duty has been paid which the importer thinks is in excess of what he was bound to pay. On such matters the order of the appellate authority is final and the importer has no right to claim a refund in any civil or criminal Court, But we are unable to hold that on that account a criminal Court is compelled to convict an accused even though satisfied that the goods on which he has not paid octroi were not liable to the payment of octroi. We accordingly overrule the preliminary objection.

The learned advocate for the Board has drawn our attention to R. 231, Municipal Account Code, and the schedule attached thereto under which a breach of any of the rules, including R. 145, i. e., failure to pay the octroi assessed by the octroi superintendent, is punishable with fine. The accused has not been prosecuted and convicted under S. 231, Municipal Account Code. We are therefore not call-

ed upon to express any opinion as to whether in a case of this kind where the goods were not stopped at the barrier at all there has been an assessment by the octroi superintendent within the meaning of the rules in Ch. 10 of the Code.

The next question is whether the tubes and tyres, which had been imported by the accused were liable to the payment of octroi. Ch. 10, Municipal Account Code, contains a list of a large number of classes of articles on which duties are expressly made leviable and articles which are expressly made exempt from the payment of such octroi. R. 132, Class (16) specifically refers to carriages and vehicles of all sorts, including motor cars, bicycles and tricycles. Thus a motor car as a whole is expressly exempt from liability but parts of a motor car are not mentioned in Class (16). The accused therefore cannot claim exemption for parts of a car under this Class (16). The learned advocate for the accused relies strongly on the exemption in Class (14), under which:

"machinery, namely, prime-movers and component parts thereof, including . . . motor tractors . . . and other machine in which the prime-mover is not separable from the operative parts,"

are exempt from the payment of octroi. Under the same Class are also exempt:

"machinery (and component parts of thereof) meaning machine or sets of machines to be worked by electric, steam, water, fire or other power not being manual or animal labour, or which before being brought into use require to be fixed with reference to other moving parts; . . . provided that the term does not include tools etc. . . . and provided also that only such articles shall be admitted as component parts of machinery as are indispensable for the working of the machinery and are, owing to their shape or to other special quality, not adapted for any other purpose."

This category is very unhappily worded. In the same Class we have two different sentences which both apply to machinery. If there were nothing else in this rule, one might have been inclined to think that the definition that machinery means machines or sets of machines worked by power was wide and comprehensive enough to include motor cars also. But there are some circumstances which cannot be ignored:

(1) Motor cars are specially mentioned in Class (16) which does not mention parts thereof. (2) It is especially provided in Class (14) that motor tractors are exempt, but that Class does not mention motor cars.

On the other hand, it must be conceded that these Classes are not mutually exclusive, and there can be overlapping, for instance some goods, which fall under other Classes, may also fall under Class (12) when the octroi payable is less than one pice, or under earlier Classes when they are properly belonging to Government or the Municipal Board.

The language employed is undoubtedly very ambiguous. But it has been the subject of an interpretation by a learned Single Judge of this Court in the case of 1929 All 278 (1). Dalal, J., in that case held that a cylinder head was clearly part of a machine and was exempt. In the course of his judgment the learned Judge expressed the view that parts of motor cars are not exempted from duty, with the curious result that parts of the body of a motor car would be liable to duty but parts of the machine of a motor car would be exempt. That case however is not a binding authority for this statement of the law.

But we agree with the learned Judge that a distinction should be drawn between the machinery of a motor car and the body of such car. A motor car as a whole is an article which falls under Class (16), but the machine or machinery of the motor car is no article which falls under Class (14). It would therefore follow that a whole motor car would be exempt from duty, but the parts of the body of a motor car which are not a machinery would not be exempt from duty.

Bearing in mind a clear distinction which in common parlance is drawn between a machinery or a car and the body of a car, we must hold that that part of a motor car which is a set of machines worked by power is machinery whereas the body of the car, which is not so worked but which is used for purposes of affording accommodation or presenting a good appearance, is not machinery.

The difficulty, of course, will always arise in drawing the line of demarcation. But it may be stated broadly that the body of a car, which is well understood in common language as something distinct from engine, the chassis and the machinery, is not machinery.

But we are unable to hold that the machinery of a motor car constitutes nothing but the dynamo or the engine and that the other part of the machi-

1. Surjan Lal v. Emperor, 1929 All 278=115 I C 452=30 Cr L J 468.

nery including the electric wire and the wheels and the axles and the chains are no parts of the machinery.

It seems to us that parts of the car which are set in motion by power must be parts of the machinery, and so would be other indispensable, essential and component parts of the machinery.

In this view, we would be prepared to go to the length of holding that wheels, axles and chains, which by connection are driven by power are parts of the machinery of cars. This however does not conclude the matter. The question in this case is whether tubes and tyres are component parts of the machinery. Now, in order that they be component parts of the machinery, it is necessary that owing to their shape or other special quality they should not be adapted for any other purpose. The learned advocate for the accused strongly contends before us that tubes and tyres have been made by the manufacturers for use in motors cars and have been especially designed for such purposes. Had they been intended for use in slow going bicycles, they would have had a different texture, material and possibly shape.

If the wheels, which also are driven by power, are to be taken to be parts of the machinery, then it is obvious that a tube and a tyre, though detachable are necessary adjuncts of a wheel as the spokes and the rim are. The wheel of a motor car cannot serve its purpose without a tube and a tyre. The mere fact that these can be taken off and put on again does not make them any the less indispensable and essential parts of the wheel. Being constantly subject to friction with the road, they are much more liable to wear and tear than the main wheel, and have to be replaced frequently. But on this ground they cannot cease to be component parts of the wheel. It is impossible to regard them as a part of the body of the car or any other dispensable part.

We are accordingly of opinion that tubes and tyres which are specially designed for motor cars only, and are not meant for anything else which is not a machinery, are under Class (14) exempt from the payment of octroi. We accordingly accept the reference made by the Additional Sessions Judge of Benares and set aside the order convicting and sentencing the accused and direct that the fine, if paid, be refunded.

K.S. *Reference accepted.*

A. I. R. 1935 Allahabad 31

NIAMATULLAH AND COLLISTER, JJ.

Habibur Razzaq — Plaintiff—Appellant.

v.

Ram Sarup and *another*—Defendants—Respondents.

Second Appeal No. 464 of 1933, Decided on 10th September 1934, from decision of Dist. Judge, Shahjahanpur, D/- 2nd December 1932.

U. P. Municipalities Act (2 of 1916), S. 326—Chairman of Board acting as such making report to police against clerk of board resulting in his prosecution—Suit for damages for malicious prosecution—Notice under S. 326 (1) is necessary — Suit filed more than six months after plaintiff's acquittal is barred.

Notice under S. 326 (1) is necessary where the Chairman of the Municipal Board acting as such makes a report as a result of which a clerk of the Board is prosecuted and the clerk files a suit for damages for malicious prosecution. The important test is whether the officer professed to act in his official capacity. But when notice has been given, and the institution of the suit is delayed for more than six months after the plaintiff's final acquittal, it is barred by S. 326 (3): 26 *All* 220, *Diss. from.*; *Case law referred.*

[P 33 C 1, 2]

M. H. Faruqi—for Appellant.

Baleshwari Prasad and *B. S. Darbari*—for Respondents.

Judgment.—This appeal has arisen from a suit brought by the plaintiff-appellant for damages for malicious prosecution. The suit was dismissed by both the Courts below.

The plaintiff-appellant was the head clerk of the Municipal Board, Tilhar, District Shahjahanpur, from 1924 to 1929. Defendant 2 was the chairman of the Board up to 7th February 1927, when he was succeeded by defendant 1 who held that office till 1931, and perhaps subsequently. The appellant was in charge of the stationery and a report was made by some official to defendant 2 during his tenure of office that the appellant had embezzled a certain sum of money which his account showed had been spent in the purchase of stationery. The suspicion was apparently based on the absence of receipt from the seller of the stationery in question. Defendant 2 started a departmental enquiry which was not completed when he re-

linquished office. That enquiry was continued after defendant 1 assumed charge. According to the findings arrived at by the lower appellate Court, defendant 1 was reluctant to prosecute the appellant. The District Magistrate however pressed upon him the desirability of launching a prosecution. Accordingly, defendant 1 acting as the chairman of the Municipal Board made a report to the Police and the appellant was prosecuted after a preliminary investigation. He was convicted by the Sessions Judge but was acquitted, on appeal to this Court on 15th May 1930. The suit which has given rise to this appeal was instituted on 13th May 1931, on the allegation that there was enmity between the plaintiff and the two defendants, and that actuated by malicious motives they conspired to launch the prosecution which ended in the appellant's favour. It appears that the appellant gave a notice purporting to be one under S. 326, Municipalities Act; but the suit was not instituted till after the expiry of six months from the date of the order of this Court acquitting the appellant. One of the questions which arose out of the pleas taken in defence was whether the suit was barred by S. 326 (3), Municipalities Act, which provides that:

"No action such as is described in sub-S. (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action."

The lower Courts held that the suit was barred by the aforesaid rule of law. They also found that defendant 2 was in no way responsible for the prosecution of the plaintiff. As regards defendant 1, it was found that he prosecuted the plaintiff reluctantly and without malice and that there was a reasonable and probable cause for the plaintiff being prosecuted. The lower appellate Court has discussed all the circumstances of the case in a lengthy judgment; but it is difficult to discover whether according to that Court the circumstances existing on the date on which defendant 1 made a report to the police were such as to justify the assumption that the plaintiff was in all probability guilty of the offence for which he was prosecuted. It is not necessary for us to enter into a discussion of that aspect of the case in view of the fact that the suit appears to us to be barred by S. 326 (3), Municipalities Act, as held by the lower Courts. S. 326 (1), is in terms similar to those of S. 80, Civil P. C., and provides that:

"No suit shall be instituted against a Board, or against a member, officer or servant of a Board in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of two months next after notice in writing has been, in the case of a Board, left at its office, and, in the case of a member, officer or servant, delivered to him or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left."

The plaintiff complied with this part of S. 326, and the plaint contains a reference to the notice given by him to defendant 1 who was then the chairman of the Board. He (the plaintiff) however overlooked Sub-S. 3, S. 326, which made it necessary for him to institute his suit within six months from the date of the accrual of the cause of action, i. e. the date on which he was acquitted by the High Court. Learned counsel for the appellant contended before us that S. 326, Municipalities Act, is not applicable, as defendant 1, who was the prosecutor, could not have acted in good faith in his capacity as chairman of the Municipal Board if it is found that he prosecuted the appellant without reasonable and probable cause and maliciously. It is argued that notice under S. 326 is necessary only if the act complained of was done by the Board or one of its officers in good faith. As already stated, S. 80 Civil P. C., which applies to all public officers, is couched in similar terms and cases governed by that section are of authority in cases having reference to S. 326, Municipalities Act. In 26 All 220 (1), Banerji, J., held that:

"Notice under S. 80, Civil P. C., was not necessary as the officer in question had not acted in good faith in pursuance of the law, but had taken advantage of his position as a public officer to commit illegal and tortious acts maliciously and without cause."

The authority of that case has been considerably shaken by subsequent decisions of several Division Benches of this Court. In 33 All 544 (2), it was held by Stanley, C. J., and Banerji, J., that a notice under S. 49, Municipalities Act, 1900, which corresponds to S. 326 (1), of the present Municipalities Act, was necessary where a

1. Muhammad Saddiq v. Panna Lal, (1903) 26 All 220=1903 A W N 241.
2. G. I. P. Ry. Co. v. Ganpat Rai, (1911) 33 All 544=10 I C 122.

member of a Municipal Board, as such member, made a report to the Board which resulted in the prosecution of a certain person for a Municipal offence. The case in which the question arose was one for damages for malicious prosecution by the persons who were prosecuted and who on acquittal instituted the suit. It should be noted that Banerji, J., who was a member of the Bench deciding that case, had decided the case of 26 All 220 (1), already referred to.

Section 49, Municipalities Act 1900, did not contain the provision which was subsequently enacted in S. 326 (3) of the present Act. This however makes no difference, because if notice under S. 326 (1) of the present Act is necessary and the section is at all applicable, Sub-S. (3), S. 326 of the present Act must also be applicable with the result that if, after the passing of the present Act, a suit in which notice under S. 326 (1), is necessary is not brought within six months from the date of accrual of the cause of action, it will be barred by S. 326 (1). 1924 All 851 (3), is another case in point. A Division Bench of this Court held that the act of a police officer in entering a person's name in the "history sheet" is ordinarily an act done in his official capacity, that the motive in which the entry was made is totally immaterial and that if a person whose name is entered in the "history sheet" wishes to bring a suit against the officer concerned, he cannot do so without complying with the requirements as to the preliminary notice, of S. 80, Civil P. C. It was argued in that case that since the action of the police officer was not bona fide, he could not be held to have acted in his capacity as a police officer. The learned Judges held, following 1924 Cal 145 (4) and 1918 Mad 62 (5), that if the officer in question purported to act in his capacity as such, whether he was actuated by improper motives or not, notice was necessary.

The only other case to which reference need be made is 1930 All 704 (6), in which another Division Bench of this Court, of which one of us was a member, held that a notice under S. 80, Civil P. C., was necessary before a suit for damages for malicious prosecution could be instituted against an investigating police officer who purported to act in the discharge of his duty as a police officer. It was said that:

"An important test is whether the Police Officer professed to act in his official capacity."

There can be no doubt that defendant 1 acted and professed to act in his capacity as the chairman of the Municipal Board and therefore S. 326, Municipalities Act, is in terms applicable. This being so, notice was rightly given by the plaintiff to the defendant before he instituted the suit. But the institution of the suit, having been delayed for more than six months after the appellant's acquittal by this Court, is barred by S. 326 (3).

In the view of the case we have taken, it is not necessary to consider any other questions decided by the lower Courts. The appeal fails and is dismissed with costs.

R.K. *Appeal dismissed.*

3. Abdul Rahim v. Abdul Rahman, 1924 All 851=80 I C 72=46 All 884.
4. Dakshina Ranjan Ghose v. Omar Chand, 1924 Cal 145=75 I C 173=50 Cal 992.
5. Koti Reddi v. P. Subbiah, 1918 Mad 62=46 I C 86=41 Mad 792 (FB).
6. Bishambar Sahai v. Shambhu Dayal, 1930 All 704=124 I C 705.

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NIAMATULLAH, J.

Bhagwan Prasad and *another*—Defendants—Applicants.

v.

Pelu Kewat and *others*—Plaintiffs——Defendants—Opposite Parties.

Civil Revn. No. 21 of 1934, Decided on 24th September 1934, against order of Munsif, Shahganj, Jaunpur, D/- 9th August 1933.

Provincial Small Cause Courts Act (1887), Art. 35 (2) — Suit for recovery of value of tree alleged to have been cut and appropriated by defendant — If allegation in plaint does not amounts to averment that defendant is guilty of criminal misappropriation, suit can be instituted in Small Cause Court.

In a suit for recovery of the value of a nim tree alleged to have been cut and appropriated by defendants, if the plaintiff's allegation contained in his plaint does not amount to an averment that the defendants were guilty of criminal misappropriation, the suit is one which can be instituted in a Small Cause Court. The test in such cases is whether if in a criminal Court the evidence carried the case no further than what is stated in the plaint, a conviction would follow. [P 34 C 1, 2]

Shiva Prasad Sinha—for Applicants.

M. Kalim Jafri—for Opposite Parties.

Order.—This is an application in revision by the defendants and arises out of a Small Cause Court suit for recovery of Rs. 35 the value of a nim

tree alleged to have been cut and appropriated by defendants 1 and 2. The lower Court decreed the suit to the extent of Rs. 20. One of the grounds taken in the lower Court and urged in this Court relates to the jurisdiction of the Small Cause Court to entertain the suit. It is contended that the allegations in the plaint charge defendants 1 and 2 with the offence of criminal misappropriation, and therefore the suit falls within the purview of Art. 35 (11), Sch. 2, Provincial Small Cause Courts Act. The defendants' contention is so far right that if the plaintiff's allegation contained in his plaint amounts to an averment that the defendants were guilty of criminal misappropriation the suit was one which should have been instituted in a regular civil Court. I have been taken through the plaint by the learned advocate for the applicants and find that besides defendants 1 and 2 two other persons were impleaded as defendants 3 and 4 who are alleged to be the agents of the zamindars. The plaintiff alleges that defendants 1 and 2 are patwaris of two joining circles who generally act in a highhanded manner and in abuse of their position. The plaint goes on to allege that they cut the nim tree and in a subsequent departmental enquiry which resulted in the dismissal of defendants 1 and 2 defendants 3 and 4 stated that the tree in question had been cut by defendants 1 and 2 with the permission of the zamindar to whom it belonged. One of the defences in the present case was that the tree in fact belonged to the zamindar with whose permission it had been cut. Reading the plaint as a whole I am of opinion that it is consistent with an allegation which falls short of an averment of criminal offence. Defendants 1 and 2 are alleged to have cut the nim tree at the instance of defendants 3 and 4. It may be that the plaintiff alleges that defendants 3 and 4 had no authority to allow defendants 1 and 2 to cut the tree, but there is no allegation to the effect that defendants 1 and 2 knew that the tree belonged to the plaintiff and not to defendants 3 and 4 who permitted them to cut it, nor is there any allegation that at the time when defendants 1 and 2 were cutting the tree the plaintiff protested and asserted his right. The test in my opinion is whether if in a criminal Court the evidence carried the case no further than what is stated in the plaint a conviction should follow. I have no doubt that no criminal Court would have convicted defendants 1 and 2 if the evidence had carried the case no further than what is alleged in the plaint. There is no allegation expressed or implied that defendants 1 and 2 acted dishonestly and could not have honestly believed that the tree belonged to the zamindar whose karinda permitted them to cut and appropriate the tree. In this view of the case I am not satisfied that the lower Court had no jurisdiction to entertain the claim which it has partly decreed. The application is accordingly dismissed with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 34

KENDALL, J.

Jhinno Singh and *others* — Judgment-debtors—Applicants.

v.

Brahmdat Singh and *another*—Decree-holders—Opposite Parties.

Civil Revn. Nos. 446 and 563 of 1933, Decided on 14th September 1934, against decree of Sub-Judge, Azamgarh, D/- 29th May 1933.

Civil P. C. (1908), Sch. 2, para. 1 and S. 115—Judgment-debtors jointly and severally liable for decree — Application for reference to arbitration by decree-holder and only some of them —Order of reference by Court is illegal—Revision is competent.

Out of seven judgment-debtors who were jointly and severally liable for a sum due to the decree-holder, five only joined the decree-holder in the application for reference of the question as to the amount for which they were liable, to arbitration, and the reference was ordered by the Court.

Held : that as all the judgment-debtors were jointly and severally liable and the decree-holder was in a position to execute it against all, any one or more of them, and they were therefore one and all interested in the suit at the stage which it had reached when the reference to arbitration was made, the reference was illegal and should be set aside and the application in revision against the order was competent : 10 *I C* 559; 31 *All* 450 and 1927 *All* 563, *Rel on.*; 1931 *All* 453 and 1934 *All* 658, *Dist.* [P 35 C 1, 2]

Mukhtar Ahmad—for Applicants.

Shiva Prasad Sinha — for Opposite Parties.

Judgment.—This is an application for the revision of an order of the Subordinate Judge of Azamgarh maintaining the award of an arbitrator in execution proceedings. The facts are given fully in the judgment of the trial Court. It is only necessary to say that the

decree-holder was proceeding in execution against seven judgment-debtors, who were jointly and severally liable for a sum due to the decree-holder for mesne profits, and the question for decision was the amount of the sum for which they were liable. Of the seven judgment-debtors, five joined the decree-holder in application for a reference of this matter to arbitration, and the reference was accordingly ordered by the Court. At that stage all the seven judgment-debtors were jointly and severally liable for the amount of the decree, though at a subsequent stage two of them, Jagdeo Singh and Faujdar Singh, were exempted by the decree-holder. When the award was filed, an objection was lodged on the ground, among others, that as all the parties had not joined in the reference, the reference was illegal. But the trial Court relying on the decision in the case of 1931 All 453 (1), has held that the reference was not invalid merely because two of the judgment-debtors, who were jointly and severally liable, did not join in it.

Under para. 1, Sch. 2 Civil P. C.:

"where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgment is pronounced, apply to the Court for an order of reference."

In the present proceeding it is admitted that all the seven judgment-debtors were jointly and severally liable, and therefore the decree-holder was in a position to execute against any one or more of them. They were therefore one and all interested in the suit at the stage which it had reached when the reference to arbitration was made. If there were any doubt as to the law on the point, it has been decided by decisions of this Court reported from time to time, and I need only mention three: 10 I C 559 (2) and 31 All 450 (3), where at p. 452, it has been remarked:

"Therefore, it is manifest that the reference was not made by all the parties to the suit as mentioned in S. 506 of Act 14 of 1882. As there was no reference to arbitration by Badri Das and by one of the defendants, the arbitrator appointed under the reference had no power to decide the matter in controversy and the award was ultra vires."

This passage is good authority for holding that the present application is one that may properly lie under S. 115, Civil P. C. A third case, which I may refer to is that of 1927 All 563 (4). Learned counsel for the opposite party has pointed to the decision which is relied on in the trial Court, namely, the case of 1931 All 453 (1), and specially to the passage on p. 433 where the Bench remarks:

"But where the interest of the defendants may be severed, as in this case, there does not appear to be any bar to some contesting defendants joining with the plaintiffs in referring the matter in difference between them to arbitration."

It is stated that the defendants in that case were jointly and severally liable and for this reason the decision has been relied on. In the present case it is clear that as the judgment-debtors were jointly and severally liable, their interests should not be several, and at the time of the reference the two who did not join were interested in the subject-matter of the suit and the proceedings. I have further been referred on behalf of the opposite party to the decision of 1934 All 658 (5), but in that case the non-joining defendant was a pro forma party. In other words, he was not interested in the suit in the manner contemplated by the 1st para. of the Sch. 2. So the case is clearly distinguishable from the present one.

I am therefore clearly of opinion that the present application must succeed. I therefore allow it with costs and direct that the order of the trial Court be set aside and that the proceedings relating to the ascertainment of mesne profits be continued according to law from the stage where the reference to arbitration was made. The above order relates to Civil Revision No. 446 of 1933. The connected Civil Revision No. 563 of 1933, which relates to costs of the decree-holder, is now of no effect and is dismissed.

R.K. *Appeal dismissed.*

1. Bankey Lal v. Chotey Mian Abdul Shakur, 1931 All 453=133 I C 31=53 All 669.
2. Haswa v. Mahbub, (1911) 10 I C 559.
3. Shib Lal v. Chatarbhuj, (1909) 31 All 450=2 I C 363.
4. Tei Singh v. Ghasi Ram, 1927 All 563=102 I C 236=49 All 812.
5. Jagrup Ram v. Kashi Prasad Gupta, 1934 All 658=148 I C 1168.

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RACHHPAL SINGH, J.

Meharban Singh—Applicant.

v.

Bhola Singh and *others*—Opposite Parties.

Criminal Ref. No. 564 of 1934, Decided on 17th September 1934, from order of Sess. Judge, Farrukhabad, D/-11th June 1934.

Criminal P. C. (1898), S. 145 — Forcible dispossession more than two months prior to

preliminary order — Possession of opposite party must be maintained.

A person who has been dispossessed forcibly more than two months before the date of the preliminary order passed under S. 145 (but within that period prior to his complaint) cannot derive any benefit under that section. Where he claims to have been dispossessed and the Court finds that the dispossession took place more than two months before the date of the preliminary order, then the possession of the opposite party must be maintained. [P 37 C 2]

K. D. Malaviya and *Babu Ram Avasthi*—for Applicant.

G. S. Pathak—for Opposite Parties.

Judgment.—This is a reference by the learned Sessions Judge of Farrukhabad, recommending that an order passed by a Magistrate of First Class, in that District directing that one Bhola Singh under the provisions of S. 145, Criminal P. C., be put in possession of the plot in question, be set aside.

Bhola Singh made an application under S. 145, Criminal P. C., on 15th March 1933, in which he alleged that Munshi Singh, Gurdatta Singh and Maharban Singh had forcibly dispossessed him of a plot of land by erecting a building over it and by cutting some trees, and that therefore there was an apprehension of the breach of the peace. It may be stated here that in his application Bhola Singh, alleged that he had been dispossessed seven or eight days before the date of his application. The Sub-Divisional Magistrate asked the police to make a report and it was not till 11th May 1933, that he issued a notice to the opposite party. The learned Magistrate who tried the case came to the conclusion that Bhola Singh's possession continued undisturbed till lately when he was forcibly ousted from the plot. He did not however specify the exact date on which, accordingly to him, Bhola Singh had been dispossessed. He further found that it was made out that there was an apprehension of the breach of the peace, and therefore he made an order that Bhola Singh should be put in possession and the opposite party be prohibited from disturbing his possession.

Against the order passed by the learned Magistrate, revision was preferred to the learned Sessions Judge. Three points were urged before him. The first related to the alleged illegality of the notice issued by the learned Magistrate. But in view of a decision of this Court reported in 1933 All 264 (1), this point was abandoned. The second point urged was that as Bhola Singh, according to the evidence in the case, had been dispossessed more than two months next before the date of the notice (11th May), the order passed by the Magistrate was incompetent, having regard to the provisions of the proviso 2, sub-Cl. 4, S. 145, Criminal P. C. This is the only point which I have to consider in this reference. S. 145, Cl. 1, enacts that whenever a Magistrate is satisfied from a police report that a dispute likely to cause a breach of the peace existed, then he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader and to put in writing statements of their respective claims as regards the facts of actual possession of the subject of dispute. Cl. 4 of this section runs as follows:

"The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statement so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether and which of the parties was at the date of the order before mentioned in such possession of the said subject."

One of the provisos to this section runs thus:

"Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date."

The contention of the applicants (Munshi Singh, Gurdatta Singh and Meharban Singh) which has been accepted by the learned Sessions Judge is that in view of the proviso referred to above, sub-Cl. 4, S. 145, Criminal P. C., a Magistrate cannot make an order under S. 145, if it is found that the person making an application under that section had been dispossessed more than two months before the date on which the Magistrate issued a notice as required by the provisions of S. 145, Cl. 1, Criminal P. C. For the purpose of deciding this question I will assume that the finding of the learned Sessions Judge that Bhola Singh had been dispossessed more than two months before the date on which the order under S. 145, Cl. 1 Criminal P. C., is correct. On behalf of Bhola Singh it is urged

1. Kapoor Chand v. Suraj Prasad, 1933 All 264=142 I C 537=1933 Cr C 434=55 All 301 (FB).

that he had made his application within about a week after his dispossession and he should not suffer because the Court did not issue a notice more than two months after the date of his application. The only question for determination in this case is whether the contention which had been put forward on behalf of Munshi Singh, Gurdatta Singh and Meharban Singh is well-founded.

I have heard the learned counsel appearing on both sides and am of opinion that the view taken by the learned Sessions Judge in his order of reference is correct and must therefore be accepted. Having regard to the provisions of the proviso to sub-Cl. 4, S. 145, Criminal P. C., no other view is possible. Action can only be taken under S. 145 in those cases where a party has been dispossessed within a period of two months next before the date on which the Magistrate issues an order as contemplated under the provisions of Cl. 1, S. 145, Criminal P. C. The proviso further provides that in deciding the question of possession the Magistrate may draw a presumption that a party who is proved to have been in possession within two months next before the date of the order was the person in possession. But once the Magistrate finds that an applicant has not been in possession of the disputed land within this period, then, the only course open to him is to put the other party in possession. The learned counsel appearing for the applicant (Bhola Singh) relied on 1929 Mad 198 (2). In that case it was held by a learned Judge of the Madras High Court that when an application was made to a Magistrate under S. 145, Criminal P. C., by a person complaining of forcible dispossession, if, for no reason or fault of the applicant, the Magistrate is not able to pass a preliminary order within two months of dispossession, the party complaining would not on a proper construction of the first proviso to Cl. 4, S. 145, be made to suffer by reason of such delay on the part of the Magistrate and was entitled to an order under this section. The learned Judge also held that though the words of the proviso were capable of the interpretation that the dispossession must be within two months of the preliminary order yet the intent and the object of the section must be kept in consideration before such interpretation was put on it. The learned Judge in that case counted the period of the two months not from the date of the preliminary order, but from the date on which the applicant had filed his complaint. This view certainly supports the case of the applicant (Bhola Singh). But a different view however was taken in the other reported cases on the point. In 1929 Oudh 526 (3), Stuart, C. J., disagreed with the view expressed in the Madras case, and held that "two months" from the date of the order mean two months from the date of the order and not two months from the date of the complaint. In this case Stuart, C. J., remarked that the provisions of S. 145 were directed to enable a Magistrate to pass orders as to retention of possession with the object of preventing a breach of peace and that special exception was made in favour of persons who have been recently dispossessed.

In a recent Nagpur case: 1931 Nag 38 (4), the view taken was that a person complaining of forcible dispossession under S. 145 could not claim the benefit of that section if the dispossession took place more than two months prior to the date of the preliminary order under Cl. 4, S. 105. The Madras view in the above-mentioned case was not followed. I agree with the following remarks passed by the learned Judge in this Nagpur case:

> "The object of the section is to prevent a breach of peace and not to prevent a party, who has been forcibly dispossessed, from being obliged to have a recourse to the civil Court."

It appears to me that on a correct interpretation of the proviso of sub-Cl. 4, S. 145, the only conclusion that can be drawn is that a person who has been dispossessed forcibly more than two months before the date of the preliminary order passed under the section cannot derive any benefit under S. 145. Where he claims to have been dispossessed and the Court finds that the dispossession took place more than two months before the date of the preliminary order, then the possession of the opposite party must be maintained. As pointed out in the aforesaid Madras case it may be that the legislature did not contemplate such a result and at first sight it seems hard that a man who applies within a few days after his forcible dispossession should be deprived of his speedy re-

2. Srinivasa Reddy v. Dasaratha Rama Reddy, 1929 Mad 198=113 I C 336=52 Mad 66.

3. Emperor v. Baij Nath, 1929 Oudh 526=124 I C 363=31 Cr L J 678=5 Luck 440.

4. Emperor v. Parashram, 1931 Nag 38=130 I C 153=1931 Cr C 222=32 Cr L J 476=26 N L R 377.

medy simply because the Court to which the application was made did not make a preliminary order for a long time. The remedy however lies in the hands of the ligislature.

For the reasons given above I accept the reference made by the learned Sessions Judge and set aside the order passed by the learned Sub-divisional Magistrate and direct that the possession of Meharban Singh, Munshi Singh and Gurdatta Singh over the plot in question be maintained until evicted therefrom in due course of law.

R.K. *Reference accepted.*

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THOM AND HARRIES, JJ.

Ram Mohan Lal Agarwala, In the matter of.

Misc. Case No. 436 of 1934, Decided on 26th September 1934.

(a) Contempt—Contempt of Court—There can be no justification even if writer belives what he states to be true—He cannot lead evidence to establish truth of his allegations.

There can be no justification of contempt of Court, even assuming that the writer of a manifesto believes all he states therein to be true. If anything in the manifesto amounts to contempt of Court, he is not permitted to lead evidence to establish the truth of his allegation. Contempt of Court is saying or writing anything about the Court which may lower the prestige of the Court or bring it into contempt. [P 39 C 2]

(b) Contempt—Election manifesto slandering whole Judiciary to secure vote

It is not uncommon to attack abuses and to attack persons in the election manifesto whether the abuses be existent or not, or whether the persons deserve the vituperation which is often showered upon them in these productions; but to slander the whole Judiciary of the province in an attempt to secure votes at a Bar Council election is not only contemptible but almost criminal in its purpose. [P 39 C 2; P 40 C 1]

S. M. Hussain, *Mushtaq Ahmad* and *T. A. Bradley*—for Applicant.

Govt. Advocate—for the Crown.

Order.—Mr. Ram Mohan Lal Agarwala, an advocate practising in the High Court at Allahabad, has been directed to show cause why he should not be convicted for contempt of Court in respect of certain passages in election manifestoes which were issued by him in furtherance of his candidature for membership of the Bar Council of Allahabad at the recent Bar Council election. In five of these manifestoes the advocate made certain statements in respect of which the Court issued these notices. For the sake of convenience the arguments of the counsel for the advocate will be dealt with in one judgment. In the manifesto which is the subject of case No. 436 Mr. Ram Mohan Lal stated:

"The favoured few get tons and tons of money every month and also command respect because they are on the top already. They are above board. The Judge cannot snub them."

Coming from a member of the Bar this statement is undoubtedly highly objectionable. It is a statement to which we would have thought no respectable member of the Bar would have committed himself either in public or in private. We are not of the opinion however that it constitutes a serious contempt of Court, although it does imply a certain criticism of the Court. It amounts to no more, in our opinion, than a technical contempt and in the circumstances therefore so far as the particular statement is concerned, we discharge the notice which was issued against Mr. Ram Mohan Lal. In the manifesto which is the subject of Miscellaneous Case No. 437 Mr. Ram Mohan Lal stated as follows: A judicial officer however impertinent, arrogant and conceited, is protected while a poor advocate is:

" at the mercy of a Judical Officer at every turn. The Bar Council is entitled to be as jealous about the interest of an advocate as the High Court is about a Judicial Officer. A report whether correct or incorrect by a Munsif may be attended with direst consequences against an advocate while the poor advocate is helpless. The Court snubs an advocate and treats him with contempt while a mild retort from him is often met with direst result."

The advocate through his counsel has stated that by the words used he did not intend to convey any criticism either of the subordinate Courts or of the High Court. Learned counsel has argued that interpreting the words in their ordinary meaning they do not imply any reflection upon the judiciary. We have considered all that learned counsel has urged in this respect and we are of opinion that we cannot accept his contention. The particular statement must be read along with the rest of the manifesto of which it forms part, and it is apparent to us that what Mr. Ram Mohan Lal intended to convey by this passage was that whilst the judicial officer could always look to the High Court or to the law for protection—it may be against an advocate practising before him—when a report made by a judicial officer in regard to the conduct

of an advocate came before the High Court for disposal, the advocate against whom the report was made did not get a square deal. In other words, that the High Court before whom the reports about the conduct of advocates came did not deal with these reports in an even-handed and impartial manner. That, in our view, is the plain meaning of this passage and we are confirmed in our view upon a consideration of the terms of the manifesto as a whole.

Such reflections upon the conduct of the Court undoubtedly amounts to contempt of Court. We hold therefore that in uttering and publishing the passage complained of Mr. Ram Mohan Lal has been guilty of contempt of Court. We convict him of contempt of Court and impose upon him a fine of Rs. 50. Further, he will pay the Government's costs in connection with this case. The statement in respect of which notice was issued in case No. 438 is as follows:

"The writer objects to the procedure adopted by the leaders of the Bar in our High Court in certain contempt cases and cases of professional misconduct. They invariably, without going into the merits of the case, throw him at mercy of the Court. I respectfully submit, abject apologies are harmful to the dignity of the profession . . . ."

We have carefully considered this passage and the manifesto of which it forms part and we are of opinion that it does not amount to contempt of Court, although the statement is highly objectionable and one which we are surprised to see in a manifesto issued by an advocate. We accordingly discharge the notice in case No. 438. The passage in respect of which notice was issued in case No. 439 is as follows:

"Ministerial Officers under the connivance of of the presiding officers almost everywhere with some honourable exceptions accept bribes openly in the Courts . . . . No proceedings against me can desist me from exposing them who are in the wrong."

There can be no doubt whatever what was the intention of the writer of this passage. He clearly meant to convey to those to whom the pamphlet in which the passage appears was addressed that, with one or two exceptions, the subordinate judiciary in this Province was corrupt, that they allowed bribes to be taken in the Courts and that they indeed connived at this conduct. This, of course, is clear contempt of Court. Mr.Ram Mohan Lal was under the impression that he was entitled to make the statement referred to and further that in these proceedings he was entitled in his defence to prove that the statement was true. He therefore intimated to the Court by a written application that he proposed to call more than 1600 witnesses to prove his allegation. Later he reduced the number of the witnesses which he asked this Court to summon to give evidence today. He was required by the Court to furnish an affidavit stating upon what grounds he alleged that any of these witnesses would admit the truth contained in the passage referred to. From his affidavit it was perfectly clear that he had no ground whatever for alleging that the witnesses whom he named would support him in the sweeping allegations he had made against the Subordinate Judiciary. In these circumstances, had the leading of evidence in these proceedings been open to Mr. Ram Mohan Lal, we should have refused to summon the witnesses whose names he mentioned in his application to the Court. Clearly there can be no justification of contempt of Court, even assuming that the writer of the manifesto believed all he stated therein to be true. If anything in the manifesto amounts to contempt of Court, he is not permitted to lead evidence to establish the truth of his allegations. Contempt of Court is saying or writing anything about the Court which may lower the the prestige of the Court or bring it into contempt. Learned counsel was unable to cite any case in which evidence had been permitted in justification of an offence in a case for contempt. Not only therefore was the advocate not entitled to lead evidence in support of his allegations, but from his affidavit it was abundantly plain that he had no reason for believing that the witnesses he named would support him in the very grave and sweeping allegations he had made against the Subordinate Judiciary.

Learned counsel has contended that we ought to take a lenient view of the offence of his client in respect that the manifesto was written in an excess of zeal for the public interest. The passage is in a manifesto which the advocate issued for the purpose of securing votes from members of the Bar at the recent Bar Council election. It is not uncommon to attack abuses and to attack persons in an election manifesto whether the abuses be existent or not, or whether the persons deserve the vituperation which is often showered upon them

in these productions, but to slander the whole Judiciary of a Province in an attempt to secure votes at a Bar Council election is not only contemptible but almost criminal in its purpose. Nothing that learned counsel for the advocate has been able to say has in any way lessened the heinousness of the offence which Mr. Ram Mohan Lal has undoubtedly committed. If he had been of the opinion that abuses existed in the subordinate Courts there were other methods which he could have adopted if he had been truly concerned with the removal of these abuses. It is apparent to us however that the main consideration present in Mr. Ram Mohan Lal's mind when he wrote this manifesto was to secure sufficient number of votes to return him as a member of the Bar Council.

We accordingly convict Mr. Ram Mohan Lal of contempt of Court in respect of the passage referred to in case No. 439 and we sentence him to a fine of Rs. 200. Further he will pay the Government's costs in connection with these proceedings. The passage in respect of which notice was issued in Miscellaneous Case No. 440 is as follows:

"I believe you must have seen my name prominently in the press in connexion with a contempt of Court case again under the Legal Practitioners Act last year. I was conducting my private case. It was not a case of a client and was not a case of moral turpitude but even then I was punished twice over for the same alleged offence. We are helpless. Being a fighter and having suffered for the strength of my convictions I can assure you that I will fight for your rights as well."

In our view this is a clear reflection upon the High Court. The writer alleges that he was punished twice for the same offence and anyone reading the passage would understand that the High Court was responsible for imposing double punishment upon the accused for the same offence. Further the writer infers in the passage that he was unjustly convicted, that he had suffered for his convictions and he assures his audience that he would continue to fight as he had fought in the past for their rights as well. In our view this is a flagrant contempt of Court. We have listened to all that has been urged on behalf of the advocate by his counsel. We cannot however giving due consideration to all, that he has stated, regard this merely as a technical contempt. The passage clearly shows that no matter what the decision of the High Court is, he is going to repeat the conduct for which he has already been punished and that he has really in effect suffered serious injustice. There can be no doubt that such an aspersion upon the Court amounts to serious contempt of Court. We convict Mr. Ram Mohan Lal of contempt of Court in respect of the passage mentioned in Miscellaneous Case No. 440. We sentence him to a fine of Rs. 50 and we direct that he do pay the Government's costs of these proceedings. Mr. Ram Mohan Lal is ordered to pay all the fines and the costs within two months from this date. Failing to pay the costs and the fine of Rs. 50 imposed in case No. 437 Mr. Ram Mohan Lal is sentenced to simple imprisonment of one month. In default of the payment of the costs and the fine of Rs. 200 imposed in case No. 439 Mr. Ram Mohan Lal is sentenced to a period of simple imprisonment of two months. In default of payment of the costs and Rs. 50 fine imposed in case No. 440 Mr. Ram Mohan Lal is sentenced to undergo a period of simple imprisonment of one month. The costs of the Government Advocate in each case will be Rs. 80.

In Miscellaneous cases Nos. 436, 437, 438, and 440 notices to show cause were also issued to Mr. Mohammad Shafi, the proprietor of the Imperial press, printers of the manifestoes referred to in these cases. In case No. 440 notice was also issued to a co-proprietor, Mr. Mohammad Azimuddin. These persons have appeared before us today and through their counsel they have filed statements in Court. In these statements they say definitely that they had no intention to make any aspersion either against the High Court or against the Subordinate Judiciary, that they were unaware that what they were printing contained a contempt of Court and further that if they have unwittingly committed contempt of Court they offer an unconditional apology.

We take into consideration the fact that the pamphlets in question were printed upon the instructions of a member of the Bar and therefore there is some excuse for Mr. Mohammad Shafi and Mr. Mohammad Azimuddin and the fact of their explanation that they were unaware that what they were printing contained anything amounting to a contempt of Court. No doubt it is true that they relied entirely upon the advocate who gave instructions that nothing was being printed that was contempt of Court. It is not unreasonable that they should

have relied upon the fact that they had been instructed to do the printing by an advocate.

They have undoubtedly in law been guilty of contempt of Court in respect of all the statements except one referred to in Miscellaneous Case No. 438. In view of the unqualified apology which they have tendered and of the other circumstances which we have referred to above, we do not think that in justice the Court should impose any punishment upon them in respect of the offence for which they are guilty. We think, in the circumstances, that a warning is sufficient in their case. In their case the notices will be discharged.

Mr. Ghulam Azhar, proprietor of the City Press, Allahabad was ordered to show cause in connection with the passage referred to in case No. 439. He also has tendered an unqualified apology and through his counsel and his written statement assured the Court that it was not his intention to cast any aspersion upon the Court. In his case also therefore we accept the apology and we think that it is unnecessary to impose any punishment on him in respect of the offence of which he has been guilty. We consider that in his case also a warning will be sufficient. We discharge the notice in his case.

K.S. *Order accordingly.*

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RACHHPAL SINGH, J.

Ram Bhajan Kasodhan and *another* —Plaintiffs—Appellants.

v.

Matbar Ram and *others* — Defendants —Respondents.

Second Appeal No. 614 of 1930, Decided on 12th September 1934, from decision of Second Addl. Dist. Judge, Gorakhpur, D/- 30th August 1929.

Guardians and Wards Act (1890), S. 29—Sanction given by Court to guardian to raise loan—Burden of proof is on minor—Alienation by guardian in utter disregard of directions of Court's order of sanction—Alienee is not protected by sanction—Hindu Law—Alienation, Guardian.

In ordinary cases it is for the transferee to prove that a loan, taken by a guardian of Hindu minors who constitute a joint family, was for the purpose of family necessity. But once the sanction under S. 29 is obtained, the burden of proof would shift and, if the minors come to avoid the transfer then it will be for them to show that the transfer is not binding upon them. Alienation in contravention of the directions of the Court sanctioning the alienation, is not protected by the sanction. Hence when the guardian alienates the property in utter disregard of the directions in the order the transferees cannot claim that they are protected by the sanction. As soon as the sanction goes out, the case has to be decided like any other case between the Hindu minors who are members of a joint family and their creditors who have granted a loan to their guardian. The mortgagees have then to show that the loan was taken for family necessity and the amount so taken was paid in satisfaction of the loan due by the father of the minors: 98 *I C* 500, *Applied.* [P 42 C 2; P 43 C 1, 2]

H. C. Mukerji—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—This is a second appeal arising out of a suit instituted by the plaintiffs for a declaration.

One Ganga was the father of Ram Lagan, Ram Bhajan and Thakur. Mt. Ramkali was the wife of Ganga. When Ganga died, all his three sons were minors. It appears that some time after the death of Ganga, Mt. Ramkali made an application to the District Judge asking that she should be appointed to act as guardian of the person and property of the three minors who constituted a joint family. The Court appointed Mt. Ram Kali to act as guardian of her three minor sons.

On 30th April 1921, Mt. Ramkali made an application to the District Judge asking for permission to create a mortgage over a part of the estate of the minor (1 anna and 3 pies share) in order to pay off certain debts alleged to be due to creditors from the father of the minors. On 26th September 1921, the District Judge granted permission to Mt. Ramkali in the following words:

"Permission granted to the guardian to mortgage usufructuarily 1 anna 3 pies share of the minors in Pichaura for not less than Rs. 2,100, (two thousand and one hundred) on the condition that the whole consideration money is paid into this Court on the date of execution of the mortgage-deed."

After this on 9th June 1922, Mt. Ramkali and one of her sons Ram Lagan (who has been found to have been a minor at the time of the execution of the mortgage) created a mortgage in favour of the defendant-respondent No. 1, Matbar Ram, for a sum of Rs. 2,800. The money was not deposited in Court as directed by the order of the District Judge under which Mt. Ramkali was permitted to create a mortgage.

Plaintiffs, the other two sons of Ganga and Mt. Ramkali, instituted a suit in the trial Court for a declaration that the mortgage deed of 9th June 1922, executed by their mother and Ram Lagan was not binding upon

them. The defence of the defendants was that the mortgage was binding upon the plaintiffs as it had been created by their guardian after the sanction of the District Judge had been obtained. It was further pleaded that the loan had been taken by Mt. Ramkali for payment of the debts due by the father of the minors. The learned Subordinate Judge who tried the case, decreed the suit of the plaintiffs to the extent of two-thirds share. Both sides appealed to the learned District Judge who decreed the suit of the plaintiffs in full, on condition of their paying to the defendants-mortgagees a sum of Rs. 2,037-11-0. Against this decree the plaintiffs preferred a second appeal to this Court, while the defendants filed cross-objections. The cross-objections related to a sum of Rs. 700, which had not been allowed by the lower appellate Court, and the contention of the defendants was that they should have been allowed this amount as well. When the case came before me I framed two issues, which were sent down to the Court below for findings. They were: (1). Whether the sum of Rs. 700, went towards satisfying the debts due from the father of the minors? (2) Whether the sum of Rs. 1,995, was applied towards the satisfaction of the debts due from the father of the minor?

The learned District Judge has forwarded his findings. He has decided that there is no proof that the sum of Rs. 700, was due to the defendants from the father of the two minor plaintiffs. As regards the other substantial items in the case, he came to the conclusion that the major portion of the loan was not proved to have gone towards payment of the debt due from the father of the two plaintiffs. His finding is that only a sum of Rs. 146-8-0 has been proved to have gone towards the satisfaction of the debt due from Ganga.

These findings have been challenged by the learned counsel appearing for the respondents.

So far as the findings of the learned District Judge on the two issues are concerned, it appears to me that the defendants have no case. The learned District Judge considered the evidence which was produced by the parties and came to the conclusion that the defendants had only been able to show that a sum of Rs. 146-8-0 was paid towards the debts due by the father of the two minors and the rest of the case had not been proved. I do not see any reason for taking a different view in second appeal.

The principal contention raised on behalf of the defendant mortgagees by their learned counsel is that as the transfer was made by a certificated guardian of the two minors, there was no necessity for the defendants to have made any inquiries on the question of actual necessity or otherwise. S. 29, Guardians and Wards Act (8 of 1890) lays down that a guardian appointed by the Court shall not make any transfer without the sanction of the Court. The effect of the order passed by the District Judge granting an application for taking a loan is that the creditors who lent the money are protected, and it is not necessary for them to make further inquiries to find out whether the loan is really for the benefit of the joint family. The sanction of the District Judge is in itself a protection which they can use in their favour. It is not necessary for them to go behind the order and to make inquiries to satisfy themselves in order to find out whether the Court had made an inquiry as to the existence and binding nature of the prior debts. After a proper sanction has been obtained from the District Judge by the gruadian, the transaction entered into between the guardian and the creditors will be binding on the minors unless they can prove fraud or improper dealing on the part of the creditors. This is now a settled view. I may point out that there is a great deal of difference between the views taken by the various High Courts on the question as to what amounts to a proper sanction. Some of the High Courts have held that the order passed by the District Judge on the face of it must show that inquiries had been made by the Court and that the result of those inquiries proved that there was necessity for taking a loan; while other High Courts have held that the fact that the order does not show that inquiries were made is a mere irregularity. For the purposes of deciding this case it is not necessary to enter into this question at all. We will take it that where a proper sanction has been given by the District Judge to a guardian to raise a loan and he takes a loan and subsequently the minors come to Court to avoid that loan, then they must show that the loan is not binding upon them. Where the loan has been taken with the sanction of the District Judge, the burden of proof shifts. In ordinary cases it is for the

transferee to prove that a loan taken by a guardian of the Hindu minors who constitute a joint family was for the purpose of family necessity. But once the sanction is obtained, the burden of proof would shift and, if the minors come to avoid the transfer, then it will be for them to show that the transfer is not binding upon them.

In the case before me, I have quoted above the terms under which the District Judge granted permission to Mt. Ramkali to take a loan. One of the conditions laid in the order was that the entire amount of the loan taken by the guardian would be paid into Court on the day on which the mortgage deed is executed. The other was that the guardian was not to mortgage the property (1 anna 3 pie share) for a sum of less than Rs. 2,100. It is conceded that both these conditions were not complied with. The effect of the order of the District Judge was that he gave the guardian permission to burden the estate mortgaged to the extent of Rs. 2,100, and no more. But I find that in defiance of the terms of the order the guardian created a mortgage for a much bigger amount. The result was that the estate had to bear a burden which was much larger than the amount for which the guardian had been given permission to mortgage. If it had been a case in which the property had been sold, it could have been argued that it did not affect the sanction, because the guardian had been able to obtain better terms thus benefiting the estate of the minors. But in the case of a mortgage the matter is altogether different. It is quite possible that when the learned District Judge gave sanction to the guardian to make a mortgage, there were reasons for him for passing an order that the amount secured by the mortgage should be paid into Court. It may be that the District Judge may have thought that when the prior creditors claim to recover the loans due to them from the father of the minors, then he will scrutinise them and satisfy himself that the amount claimed was really due. But the mortgagees in the present case, fully knowing the terms of the order of the District Judge, granted a loan to the guardian of the minors which they were not justified to do. Not having complied with the terms of the order of the District Judge under which the guardian had been permitted to take the loan, it is not open to the mortgagees to claim any benefit which they would have been entitled to otherwise because of the sanction given to the guardian. In 98 I C 500 (1), Mukerjee, J., took the view that where the property of a minor was alienated by his guardian in contravention of the directions contained in the order of the Court sanctioning the alienation, the alienation was not protected by the sanction. This case appears to me to be applicable to the one before me. Here also the guardian alienated the property in utter disregard of the directions contained in the order given by the District Judge and, therefore the transferees under the terms of the mortgage deed in question cannot claim that they are protected by the sanction. As soon as the sanction goes out, the case has to be decided like any other case between the Hindu minors who are members of a joint family and their creditors who have granted a loan to their guardian. In order to establish the fact that the mortgage deed is binding on the minors, the mortgagees have to show that the loan was taken for family necessity and the amount so taken was paid in satisfaction of the loans due by the father of the minors. On this point, as I have already remarked, the finding of the learned District Judge is against the mortgagees with the exception of a sum of Rs. 146-8-0.

For the reasons given above, I allow this appeal, modify the decree of the Court below and decree the suit of the plaintiffs on their paying a sum of Rs. 146-8-0 to the defendants-mortgagees within a period of three months from to-day. The parties will receive and pay costs in all the Courts in proportion to their success and failure.

The cross-objection filed by the defendants stands dismissed with costs. Permission to file Letters Patent Appeal is granted.

R.K. *Appeal allowed.*

1. Mangal Kurmi v. Sheo Saran, (1926) 98 I C 500.

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KENDALL AND IQBAL AHMAD, JJ.

Mt. Sheoraji—Plaintiff—Appellant.

v.

Ram Sawari Devi and *others* —Defendants—Respondents.

First Appeal No. 343 of 1930, Decided on 18th September 1934, from decision of Sub-Judge, Gorakhpur, D/- 26th April 1930.

(a) Hindu Law—Gift—Gift to wife—Heritable estate not transferred in express terms

— Restraint on donee's power of alienation put by express words — Only limited estate held transferred – Transfer of Property Act (1882), S. 8.

In interpreting a deed of gift by a Hindu in favour of a Hindu female, what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property should be considered and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estate. The deed must be considered as a whole. It is not permissible to insist upon one portion of the document to the exclusion of other portions. In other words, the intention of the transferor must be gathered by giving legitimate and due effect to all the terms of the deed, but when the transfer is in favour of a Hindu female, the fact that under the Hindu law women do not ordinarily get absolute estate of inheritance must be kept in view. The principle laid down by the legislature in S. 8 that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, is also not of much practical utility when the interpretation of a transfer by a Hindu in favour of a Hindu female is in question as the words "by necessary implication" in that section do attract the operation of the general notion of a Hindu that a Hindu woman ordinarily gets an estate for life and not an absolute estate : 2 *I A* 7 (*P C*), *Ref.*

[P 45 C 2]

In a gift by a Hindu there were the following three important features of the document : (1) The transfer was in favour of a Hindu wife who ordinarily gets an estate for life under the Hindu law ; (2) heritable estate was not by express terms transferred to her ; (3) restraint on the donee's power of alienation was put by express words in the deed :

Held : that these facts, clearly indicated that the donor intended to transfer only limited estate peculiar to Hindu females in the properties gifted. The clause in the deed that the powers which the donor had as a zamindar should be exercised by the donee did not in any way indicate the transfer of an absolute estate in favour of the donee. All that that clause meant was that the donee like the donor should be entitled to realize rent, to bring suit for recovery of rent, to make distraints, etc.: 1928 *P C* 156, *Dist.* [P 46 C 2]

(b) Deed—Construction—Judicial decisions are not infallible guide.

Considerations governing the construction of one particular document cannot be of much help in construing another document and, as such, judicial decisions dealing with the interpretations of document are by no means an infallible guide when the construction of a particular document is in question. [P 45 C 2]

P. L. Banerji and *N. Upadhiya* — for Appellant.

K. N. Katju and *Sankar Saran* — for Respondents.

Judgment .—The litigation that has culminated in the present appeal owes its origin to a deed of gift dated 14th August 1916, executed by one Kalap Nath in favour of his wife, Mt. Sampata, and has been occasioned by the uncertainty attending construction of deeds of transfer executed in favour of Hindu women and the difficulty in deciding whether an absolute estate or a limited estate peculiar to Hindu females was intended to be transferred. The deed of gift of 1916 is couched in plain and simple language and is free from legal technicalities. It begins by reciting that Kalap Nath is the owner of the properties transferred by the deed and that he has no male issue and has become old. The deed then goes on to say that Kalap Nath was very pleased with Sampata and "made a gift of the shares and houses" with all its inherent and adventitious rights in her favour and put her in possession thereof and that:

"She should enter into possession of the gifted property and enjoy the same, pay the Government revenue and get her name entered in the public documents in place of the name of me, the executant."

Then there is the following clause in the deed restraining alienation:

"She cannot make any temporary or permanent transfer of any sort without the permission of me, the executant."

The deed concludes by declaring that:

"All the powers which I, the executant, had as a zemindar shall be exercised by Mt. Sampat-Dubain aforesaid. I, the executant, have no objection to this."

The family pedigree of Kalap Nath Dube, that is explanatory of the parties to the present litigation, is simple except possibly in one respect, viz., that Kalap Nath married more than one wife. By Mt. Ganga, his first wife, he had a daughter named Mt. Sheoraji who was the plaintiff in the suit, Mt. Sampata, the second wife of Kalap Nath, also has a daughter, Ram Sawari Debi. Sampata, her daughter and her daughter's sons were the defendants in the suit.

Kalap Nath Dube died in the year 1919, leaving certain properties that were not included in the deed of gift. On 10th September 1929, Sampata executed a deed of gift with respect to the properties covered by the deed of 1916 and also the properties left by Kalap Nath at the time of his death in favour of her daughter and daughter's sons. It was recited in the deed that Kalap Nath had made an oral will in favour of Sampata with respect to the properties owned by him at the time of his death. In the deed of gift executed by her, Sampata

claimed to be the full owner of the properties mentioned above and purported to make an absolute transfer in favour of the donees.

The plaintiff prayed for a declaration that the donees of Sampata were entitled to remain in possession of the properties gifted to them only during the life-time of Sampata and that after her death all the heirs of Kalap Nath Dube would be entitled to that property. The deed of gift of 1916 was characterized by the plaintiff as "fictitious" on the allegation that Kalap Nath had no intention to transfer his property by the said deed. In the alternative the plaintiff maintained that by the deed of 1916 only life-interest in the property gifted was given to Sampata. The plaintiff denied the alleged will recited in the deed of gift executed by Mt. Sampata. But as Mt. Sampata, as the widow of Kalap Nath, was entitled to remain in possession of all his properties as a Hindu widow during her life time, the plaintiff did not claim immediate possession of any of the properties in dispute.

The defence to the suit was that the deed of 1916 was an operative document and that full proprietary rights in the property gifted by that deed were transferred to Mt. Sampata. An oral will by Kalap Nath devising the properties left by him at the time of his death in favour of Mt. Sampata was also put forward by the defendants.

The learned Judge of the Court below held that the will set up by the defendants was not proved and, accordingly, granted the declaration prayed for to the plaintiff with respect to the properties left by Kalap Nath at the time of his death, and there is no controversy about that property in the present appeal. The learned Judge however held that by the deed of gift of 1916, Kalap Nath did intend to, and did as a matter of fact, transfer absolute proprietary rights in favour of Sampata and, accordingly, dismissed the claim with respect to the properties included in that deed. By the present appeal the finding of the learned Subordinate Judge that by the gift of 1916 Sampata was made absolute owner of the properties gifted in her favour is assailed.

It is now admitted that the deed of 1916 was followed by mutation of names in favour of Sampata in the revenue papers and that she all along remained in possession of the gifted property, and the only question for consideration is, whether absolute or limited estate in the properties gifted was transferred in favour of Sampata by that deed.

It is well settled that considerations governing the construction of one particular document cannot be of much help in construing another document, and, as such, judicial decisions dealing with the interpretation of documents are by no means an infallible guide when the construction of a particular document is in question. But there are certain principles peculiar to transfers in favour of Hindu females that cannot be lost sight of, and those principles were laid down by their Lordships of the Privy Council so far back as in the year 1874 in 2 I A 7 (1). Their Lordships observed in that case that:

> "It is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property"

and that:

> "It may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estate of inheritance which they are enabled to alienate."

It is needless to observe that in each case the deed under consideration must be considered as a whole and that it is not permissible to insist upon one portion of the document to the exclusion of other portions of the same. In other words, the intention of the transferor must be gathered by giving legitimate and due effect to all the terms of the deed, but when the transfer is in favour of a Hindu female, the fact that under the Hindu Law women do not ordinarily get absolute estate of inheritance must be kept in view. The principle laid down by the legislature in S. 8, T. P. Act, (4 of 1882), that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, is also not of much practical utility when the interpretation of a transfer by a Hindu in favour of a Hindu female is in question as the words "by necessary implication" in that section do attract the operation of the general notion of a Hindu that a Hindu woman ordinarily gets an estate for life and not an absolute estate.

1. Maulvie Mohammed Shumsool Hooda v. Shewak Ram, (1876) 2 I A 7=3 Sar 405 (PC).

Mr. Upadhiya, the learned counsel for the appellant, mainly relied on the clause in the deed of 1916 that provides that Sampata would not be competent to transfer the property without the permission of Kalap Nath and contended that that clause demonstrates that absolute estate was not transferred to Sampata.

The learned counsel for the respondents, on the other hand, maintained that according to the true construction of the document of 1916 Sampata was given a heritable and transferable interest in the properties gifted to her and contended that even if the document was not open to that contruction, Sampata, at any rate, got a heritable right in the properties by operation of the rule of Hindu Law that has been summed up by Mr. Mayne in para. 664 of his book on Hindu Law. The paragraph runs as follows:

"Thirdly, immovable property, when given or devised by a husband to his wife, is never at her disposal, even after his death. It is her stridhanum so far that it passes to her heirs, not to his heirs. But as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male even though the gift is made in terms which create a heritable estate (*x*). It is different if the gift or devise is coupled with an express power of alienation (*y*)."

The learned counsel further in support of his argument relied on the decision of their Lordships of the Privy Council in 1928 P C 156 (2). In that case their Lordships are reported to have observed as follows:

"In their Lordships' opinion there is nothing so far in the deed to cut down the gift or prevent the Rani from taking such an estate in the properties, which are the subject of the gift, as a wife takes in an immovable property given her by her husband. According to the Hindu law, such property is taken by her as stridhan and is descendible to her heirs and not to his, and would devolve first on her daughter and her daughter's daughter, and failing them on her daughter's son, thus effectually excluding Balwant; but over such property, it is stated by Mr. Mayne, para. 664, she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her."

The proposition of law contended for by the learned counsel for the respondents is in our judgment of no help to the respondents in the present case. That proposition is with reference to stridhanam and can have no application to cases where only life estate was intended to be transferred by a particular deed in favour of a Hindu female. In passing, we may note that in a recent decision in 1930 P C 239 (3), their Lordships observed as follows:

"The proposition that under the Hindu law in the case of immovable property given or devised by husband to his wife, the wife has no power to alienate unless the power of alienation is conferred upon her in express terms is not sound."

It follows that in order to set at rest the controversy between the parties the intention of Kalap Nath as disclosed by the deed of 1916 and the surrounding circumstances must be ascertained. The omission of the use of any express words in the deed indicating the transfer of a heritable interest in the property is significant and cannot be lost sight of. There are no words in the deed to the effect that after the death of Sampata her heirs would succeed to the property gifted to her. Then there are express words in the deed forbidding alienation of the property by Sampata without the permission of the donor. In short, there are the following three important features of the document: (1) The transfer was in favour of a Hindu wife who ordinarily gets an estate for life under the Hindu Law. (2) Heritable estate was not by express terms transferred to her. (3) Restraint on the donee's power of alienation was put by express words in the deed.

These facts, in our judgment, clearly indicate that Kalap Nath intended to transfer only limited estate peculiar to Hindu females in the properties gifted to Sampata. The clause in the deed that the powers which the donor had as a zamindar shall be exercised by the donee do not in any way indicate the transfer of an absolute estate in favour of Sampata. All that that clause means is that Sampata like the donor shall be entitled to realise rent, to bring suits for recovery of rent, to make distraints, etc.

The circumstances attending the execution of the document also point to the conclusion that estate for life only was transferred to Sampata. It was suggested by the plaintiff that Kalap Nath executed the deed of gift of 1916 in order to protect Sampata from the assertion of adverse claims by the other reversioners of Kalap Nath. This suggestion of the plaintiff is borne out by a passage in the evidence of Sampata herself. She admitted that Dwarka Dube and others rais-

2. Narsingh Rao v. Beti Mahalakshmi Bai, 1928 P C 156=109 I C 703=55 I A 180=50 All 375 (PC).

3. Salig Ram v. Bawa Charanjit Lal, 1930 P C 239=128 I C 265=57 I A 282=11 Lah 645 (PC).

ed objection in connection with the mutation of her name in the revenue papers. Again there is nothing in the evidence to suggest as to why Kalap Nath should have intended to disinherit the plaintiff, his daughter by the first wife. Sampata stated that when a daughter was born to her the plaintiff got displeased. We are not prepared to accept this statement of Sampata. We find that Dhanpat Ram, the husband of the plaintiff, attested two simple money bonds executed by Sampata in the year 1919. This fact shows that cordial relations existed between Sampata and the plaintiff's husband.

For the reasons given above, we hold that by the gift of 1916 Sampata got only life estate in the property gifted by that deed. Accordingly we allow this appeal and modifying the decree of the Court below decree the plaintiff's suit with costs here and below.

R.K. *Appeal allowed.*

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NIAMATULLAH, J.

L. Kirpa Ram—Plaintiff—Applicant.

v.

Balak Ram—Defendant—Respondent.

Civil Revn. No. 56 of 1934, Decided on 26th September 1934, against order of Sm. C. C. Judge, Pilibhit, D/- 24th November 1933.

Limitation Act (1908), S. 20 — Debtor paying amount not mentioning as to how it is to be appropriated — If creditor appropriates towards interest, such payment operates as payment of interest.

It is possible that interest as such may not be paid by a debtor but payment by him may operate as payment of interest as would be the case where the creditor has got the right to appropriate a payment towards interest and does exercise that right. After the exercise of that right, no question can arise as to whether the payment was made towards principal or interest, and the creditor cannot subsequently convert it into payment of principal only, because it is for his benefit that he should reconsider his position as regards such payment: *Case law referred.*

[P 48 C 2]

G. S. Pathak—for Applicant.

Shambu Prasad for *Shiva Prasad Sinha*—for Respondent.

Order.—This is an application for revision by the plaintiff whose suit for recovery of Rupees 339-8-0 on foot of a bond dated 13th April 1929 was dismissed by the lower Court (Small Cause Court at Pilibhit) on the ground that it was barred by limitation.

The suit was instituted on 14th August 1933, i. e., more than three years from the date of the bond. The principal sum advanced was Rs. 475 which carried interest at the rate of 1 per cent per mensem. On 22nd March 1930 a sum of Rs. 275 was paid. This payment will not however save limitation as the suit was instituted more than three years from the date on which it was made. The plaintiff relies on the payment by the defendant of Rs. 20, on 15th December 1931, which is alleged to be noted on the back of the bond in the handwriting of the defendant. The defendant denied the bond and payments alleged by the plaintiff. The lower Court has not recorded any finding on any other question arising in the case but dismissed the plaintiff's suit on the allegations made by him.

As regards the circumstances in which Rs. 20 was paid by the defendant the plaintiff's evidence shows that he (the defendant) did not say that the sum was being paid towards interest, but the plaintiff and another witness of his depose that on the defendant making the payment the plaintiff remarked that it should be appropriated towards principal. The defendant kept silent. Thereupon the plaintiff credited it as part payment of interest, the amount of which was in excess of Rs. 20 on that date. Apparently, the lower Court has not accepted the graphic account which the plaintiff and his witness give of the manner in which the payment was made and appropriated nor am I inclined to accept all that the plaintiff and his witness have stated. In all probability, the defendant paid Rs. 20 and the plaintiff accepted it, neither side mentioning how the sum was to be appropriated. As interest exceeding the amount paid was due, the plaintiff naturally appropriated the same towards it, which he had every right to do. In these circumstances, it cannot be said that the defendant paid Rupees 20 towards interest as such.

The learned advocate for the applicant has referred to Mitra Vol. 2, p. 923 wherein the author expresses the opinion that where interest in excess of the amount paid is due and the debtor does not specifically state that the payment is to be appropriated towards interest or principal, the proper inference is that he paid interest as such. But the view which has been accepted by at least two Division Benches of this Court is different. In 1930 All

392 (1) a Division Bench of this Court held that a payment cannot be considered to be of interest as such unless it was "avowedly" made towards interest. The same view was taken in 1933 All 453 (2). I must therefore hold that on the view of the evidence taken by the lower Court and by myself, the sum of Rs. 20 was not paid towards interest as such.

The learned counsel for the applicant has strenuously contended that if the payment in question is not considered to be one made towards interest, it must be taken to have been made towards principal and as it appears in the hand-writing of the debtor, it saves limitation. It is conceded that this contention is opposed to the decision of a Division Bench in 1933 All 453 (2) to which I was a party. An appeal has been made to me to refer this question to a Division Bench. I heard counsel at length in order to satisfy myself that reasonable doubt can be entertained as regards the soundness of the view taken in that case. If I had entertained such doubt I would have acceded to the counsel's request.

In my opinion it is not correct to say that in circumstances like those appearing in this case, the debtor must be considered to have paid part of the principal. A similar argument was advanced in the case above referred to and the Bench observed:

"In our opinion this argument is based on a fallacy and proceeds on the assumption that where interest is not paid as such, that is, the debtor does not clearly mention that the payment made by him was to be appropriated towards interest, it should be considered to have been paid by him towards principal. To our mind this is a wholly erroneous assumption. A debtor may pay a certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal. The payment will not be considered to be the payment of interest as such and will not save limitation on that footing. The creditor may, however, appropriate such payment towards interest, as he is entitled to do under S. 61, Contract Act. The position then is that though interest was not paid as such, payment made by the debtor was lawfully appropriated towards interest. It cannot be considered to be payment in part satisfaction of the principal."

I am unable to discover any flaw in this reasoning. I may usefully amplify it. Ss. 59 to 61, Contract Act deal with the subject of appropriation of payments. In terms they relate to cases in which "several distinct debts are due." It is arguable that principal and interest due under the same transaction cannot be considered to be distinct debts within the meaning of S. 59, Contract Act. In 1922 P C 233 (3), their Lordships expressed themselves as follows:

"There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital . . . They therefore think that the money received must be applied in the ordinary way, first in the reduction of the interest, and when that is satisfied in the reduction of the principal."

This case is an authority for one of two propositions: (1) either that principal and interest should for the purposes of Ss. 59 and 61, Contract Act, be considered to be distinct debts or (2) if they form part of the same debt, the principles of Ss. 59 to 61 are nevertheless applicable to them. In either case, it is open to a creditor to appropriate a sum paid by his debtor without specifying whether it was paid towards interest or principal, to appropriate it towards overdue interest. If the creditor appropriates it towards overdue interest, the same should be considered to have been satisfied to that extent there and then. Is it open to the creditor to say subsequently when the question of limitation arises in a suit between him and his debtor that the payment was made towards principal? He had a right to treat it as payment towards interest and he appropriated it towards it. The sum having been thus appropriated payment towards interest to that extent became an accomplished fact. It is possible that interest as such may not be paid by a debtor but payment by him may operate as payment of interest as would be the case where the creditor has got the right to appropriate a payment towards interest and does exercise that right. After the exercise of that right no question can arise as to whether the payment was made towards principal or interest. In the present instance it is the plaintiff's own case that he had appropriated it as part of the interest due.

The argument put forward before me and which seems to have been

1. M. B. Singh & Co. v. Sircar & Co., 1930 All 392=127 I C 581=52 All 459.
2. Ram Prasad v. Binaek Shukul, 1933 All 453 =144 I C 899=55 All 632.
3. Meka Venkatadari v. Parthasarathi Appa Row, 1922 P C 233=61 I C 31=48 I A 150=44 Mad 570 (P C).

somewhat countenanced in 1918 Cal 891 (4) is based on the assumption that in a case like this there are only two alternative hypotheses, namely, that the payment was towards interest or principal as such. As pointed out in 1933 All 453 (2) there is a third hypothesis, namely that the debtor did not make the payment specifically towards interest as such or principal as such. Cases are easily conceivable in which a debtor may not apply his mind to the question whether he should make the payment towards interest or principal. In such a case, whether the payment was of interest or principal would depend upon the manner in which the creditor exercises his option. If he treats it as payment of interest, it becomes a payment of interest and cannot be subsequently converted into payment of principal only because it is for the benefit of the creditor that he should reconsider his position as regards such payment. The fallacy lurking in the appellant's contention is that it fails to recognise that the debtor may not pay interest as such but a payment may operate as one towards interest by the action of the creditor.

Lastly, the learned advocate relied upon the endorsement in respect of the payment of Rs. 20 said to be in the handwriting of the defendant as acknowledgment. It is in these terms: "Received Rs. 20 in respect of this bond." These words do not imply any subsisting liability in respect of any debt remaining due after the payment of Rs. 20. They are consistent with Rs. 20 being the only sum due under the bond which was paid in final satisfaction thereof. In my opinion the endorsement is not such acknowledgment as would save limitation. The result is that this application for revision is dismissed with costs.

K.S. *Application dismissed.*

4. Hem Chandra Biswas v. Purna Chandra Mukherji, 1918 Cal 891=35 I C 638=44 Cal 567.

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KENDALL, J.

Dattatray Mahadaji Phadnis—Plaintiff—Applicant.

v.

Rama Datt Sharma—Defendant—Opposite Party.

Civil Revn. No. 39 of 1934, Decided on 13th August 1934, from decision of Munsif, Banda, D/- 21st December 1933.

Civil P. C. (1908), Ss. 115 and 151—Court considering matter judicially and refusing to exercise discretion under S. 151—S. 115 does not apply.

Section 115 cannot be applied to cases where the Court has considered a matter judicially and has refused to exercise its discretion under S. 151 so that no question of jurisdiction arises at all. [P 49 C 2]

Mushtaq Ahmad—for Applicant.

K. Verma—for Opposite Party.

Order.—The present application is stated to be one for the revision of an order of the Munsif of Banda, dated 21st December 1933, rejecting an application for an order restoring to the Munsif's file an application for review of a previous order, dated 1st November 1933, rejecting the applicant's plaint. A preliminary objection was raised that the provisions of S. 115, Civil P. C., would not apply in a case like this, where the Munsif had merely refused to exercise the powers vested in him under S. 151, Civil P. C. It was however submitted on behalf of the applicant that the order of the Munsif showed that he was dealing with the matter not under S. 151, but under O. 47, R. 7, Cl. (2), Civil P. C., and that in this he was wrong because the application for review had been rejected, not in consequence of the failure of the applicant to appear, (he did in fact appear through his pairokar or agent), but in consequence of his failure to make up the deficiency in court-fees. There has been some argument on this point, but I do not propose to discuss it at length, because it is quite clear from the Munsif's order that he did believe that he was dealing with the matter under S. 151. He remarks at the end of his order:

"After taking into consideration the entire circumstances, I am satisfied that there are no extenuating circumstances in favour of the applicant on facts as well to justify the exercise of the power conferred under S. 151, Civil P. C."

The matter might therefore be disposed of summarily on the ground that S. 115, cannot be applied to the case because the Munsif has considered the matter judicially and has refused to exercise his discretion under der S. 151, so that no question of jurisdiction arises at all. There are however circumstances in which this Court would itself be justified in exercising its discretion under S. 151 and setting aside the order of the Munsif. If the circumstances immediately attending the Munsif's order rejecting the application for review are considered by themselves and without reference to what went before they might justify this Court in setting aside

the order. The plaint had originally been rejected on 1st November 1932 on the ground that the court-fee paid was insufficient: but subsequently on 22nd July 1933 the Munsif conditionally allowed an application for review of this order on the condition that the balance due for court-fees was paid in full within 25 days, that is to say by 16th August 1933. On that date. according to the affidavit filed by the applicant, he appeared and stated that the money had not yet been received from Bombay, but might arrive at any moment, and it did actually arrive by telegraphic money order the same evening after the Court was closed.

But when the applicant appeared in Court on 17th August the Munsif said that he had already dismissed the application for review at 10 a. m. If these were the only circumstances to be considered, namely, that the Munsif had believed the case to be a good one for review, and that the condition imposed by him had only been nominally violated—the money having been available on the last date allowed and having been proffered in Court on the following day as soon as the Court opened—it might be held that the Munsif had acted with too much rigour in rejecting the application for review and had in consequence not acted judicially in refusing to set that order aside at a subsequent stage under S. 151. There are however other circumstances in the case that I am bound to take into consideration.

The suit concerned is one of a number instituted by the liquidator of a certain company whose headquarters were at Bombay. The company was one that had carried on business by granting loans on receipt of certain fees. It had received fees from some persons and was consequently indebted to them, and it had issued loans to other persons which had not been repaid, and consequently had claims against them. The company went into voluntary liquidation in 1930, and the liquidator was appointed for the purpose of realising the money from the debtors and paying it to the creditors of the firm. He had instituted suits all over the country, and I am informed that 126 suits involving about Rs. 29,000 were instituted in Banda district alone. The liquidator however had no money to start with, and when the suits were filed in the Court of the Munsif of Banda on the last day of limitation, namely, 1st August 1932 through the liquidator's agent, it was impossible for him to provide the money necessary for the court-fees, so that the plaints were filed on insufficient court-fee stamps. I do not know what the circumstances of the other suits were, but in the present suit the order sheet shows that on two dates after the filing of the plaint, namely, on 3rd September 1932 and 15th October 1932 further time was allowed by the Court, and it was not until 1st November 1932 that the plaint was finally rejected under R. 11, O. 7.

It may be noted that the Court had no option but to reject the plaint under the provisions of this rule, and that the order rejecting the plaint was a "decree" within the definition of S. 2 Civil P. C. On 3rd January 1933 however the applicant applied for restoration. of the suit, and the Munsif, rightly appreciating that the only remedy of the applicant was either an appeal against the decree or an application for review, treated it as an application for review, and allowed time for the payment of the necessary fees. These fees were paid and, as I have already remarked, on 22nd June 1933 the order passed was that the application for review was conditionally granted provided that the court-fees were paid in full within 25 days. What happened after that I have already described. I am not in a position to say why the Munsif believed that there were good grounds for granting a review if this condition were fulfilled. An affidavit had been filed in his Court showing the difficulties under which the liquidator was labouring. But these difficulties however real in themselves, had nothing to do with the ground set forth in O. 47 as good ground for a review, and I am therefore of opinion that this order of 22nd July 1933 was in itself not a proper order.

If it had been a proper order and if the application for review had subsequently been rejected because the money had been proffered by the applicant only a few hours after the expiration of the period allowed to him, then, in my opinion, the Court would have been acting with judicial discretion in accepting the money and allowing the review. As however there were no proper grounds for allowing a review at all, I shall not be justified in using the powers vested in this Court by S. 151, of the Code in interfering with the order passed. The application is therefore dismissed with costs.

K.S. *Application dismissed.*

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SULAIMAN, C. J. AND BAJPAI, J.

Municipal Board of Mainpuri—Defendant—Appellant.

v.

Ajudhia Prasad and *another*—Defendants—Respondents.

Second Appeal No. 686 of 1931, Decided on 28th September 1934, from decision of Addl. Sub-Judge, Agra, D/- 6th February 1931.

(a) U. P. Municipalities Act (2 of 1916), S. 175—Defective warrant issued against defaulter—Defaulter cannot plead that distress was unlawful—But stranger can allege that warrant is unlawful.

If some amount is due from a person and a warrant is issued against him, and there is a defect in the form of that warrant, it will not be open to the defaulter to plead that the distress was unlawful; but it does not entitle the board to say that it is not open even to a stranger to allege that the warrant was unlawful.

[P 52 C 1]

(b) U. P. Municipalities Act (2 of 1916), S. 326—Larger amount claimed in notice—Simply because claim is reduced in plaint, suit should not be dismissed.

The mere fact that a larger amount was claimed in the notice does not in any way prejudice the person to whom the notice is sent in the preparation of his defence nor does it in any way prevent him from making proper amends. And there is no provision which authorizes a Court to dismiss the suit if the amount claimed in the notice has been subsequently reduced at the time of the institution of the suit. In proper cases this factor might be taken into consideration in connexion with the order regarding costs.

[P 52 C 2]

Krishna Murari Lal—for Appellant.

Muhammad Ismail, *N. P. Asthana*, *M. L. Chaturvedi* and *B. N. Sahai*—for Respondents.

Bajpai, J.—This is a second appeal by the Municipal Board of Mainpuri who was defendant 1 in the Court below. The plaintiff, Ajudhia Prasad, brought a suit for the recovery of a sum of Rs. 1,500, which he claimed as damages from the two defendants. The second defendant was the Secretary of State for India in Council. The allegations contained in the plaint were that the plaintiff was an advocate practising at Agra, that on 23rd March 1929, when the plaintiff was working at his place with his clients the plaintiff's horse and carriage were distrained by the defendants when as a matter of fact nothing was due from the plaintiff, and as a result of this wrongful action the plaintiff suffered damages. It was stated in the plaint that the plaintiff had served a notice claiming Rs. 5,250 as the amount of damages, but the plaintiff was advised to claim in the suit the moderate sum of Rs. 1,500 only as compensation for the wrongful distraint. None of the defendants admitted their liability, although they conceded that the horse and carriage of the plaintiff were wrongfully attached. The Municipal Board of Mainpuri alleged that it was through the negligence of either the Collector of Agra or the Collector of Mainpuri that the attachment was made of the plaintiff's property.

The facts appear to be that certain projection dues were due from one Khiali Ram minor. The plaintiff had married the sister of Khiali Ram, and on the date of the attachment, Khiali Ram was living with Pandit Ajudhia Prasad at Agra. The letter that was sent by the Municipal Board of Mainpuri to the District Magistrate of Mainpuri asking the latter to take action for the recovery of the dues was undoubtedly a misleading letter. It was said that the dues were to be realised from Pandit Ajudhia Prasad, Vakil, Mohalla Gurki Mandi, Agra guardian of Khiali Ram minor. The letter that was sent by the District Magistrate of Mainpuri to the District Magistrate of Agra, was to the effect that distress by seizure of movable property belonging to the said Pandit Ajudhia Prasad should be made for the realisation of a sum of Rs. 109-11-0. The Amin went to the spot and in spite of protest made by Pandit Ajudhia Prasad attached the latter's horse and carriage. Some correspondence followed between the plaintiff and the Municipal Board of Mainpuri, but the plaintiff had to serve a notice and had subsequently to file the present suit.

The Court of first instance decreed the plaintiff's suit for nominal damages in the sum of Rs. 5 against defendant 1. His suit was dismissed against defendant 2, and the costs of the second defendant were directed to be borne by the plaintiff. The plaintiff and defendant 1 were ordered to pay their own costs.

On appeal the learned Additional Subordinate Judge decreed the plaintiff's suit for Rs. 15 and varied the order of the Court of first instance regarding costs. He directed that the plaintiff should get the total costs incurred by him in the Court below from defendant 1, and that if the Secretary of State had recovered any costs from the plaintiff in pursuance of the decree of the trial Court then the plaintiff

would be entitled to get it back from the Municipal Board of Mainpuri.

In second appeal by the Municipal Board of Mainpuri it is contended that the plaintiff's suit should have been dismissed against the appellant. From the very start the case of the Municipal Board has been that there was no negligence on their part and that the attachment was due to a mistake in the office of either the District Magistrate of Mainpuri or the District Magistrate of Agra. The letter that was sent by the Municipal Board was considered by the lower appellate Court, and it has arrived at a definite finding that there has been an interpolation in that letter subsequent to its despatch. The word "minor" was not put down originally, but that it has been subsequently added. We are bound by this finding and in any event there can be no doubt that the letter of the Board was misleading. It did, even on the Board's showing mislead the District Magistrate of Mainpuri who directed the property of Pandit Ajudhia Prasad to be seized. The initial responsibility lay with the Board and it is not possible for them to shift that responsibility on the other defendant. The suit of the plaintiff therefore on the merits was rightly decreed against the Municipal Board.

It was however contended by learned counsel on behalf of the Board that under S. 175, U. P. Municipalities Act, a distress or sale made under the Act shall not be deemed unlawful on account of an error, defect or want of form in the bill, notice, warrant of distress, inventory or other proceeding relating thereto, and the argument was that the mere fact that a mistake crept into the letter sent by the Municipal Board to the District Magistrate of Mainpuri would not make the distress unlawful so as to enable the plaintiff to file a suit for damages. We think that the scope of this provision of law is different. If some amount is due from a person and a warrant is issued against him and there is a defect in the form of that warrant it will not be open to the defaulter to plead that the distress was unlawful, but it does not entitle the Board to say that it is not open even to a stranger to allege that the warrant was unlawful. It was then argued that the notice sent to the Board was bad and therefore the plaintiff is not entitled to maintain the suit. The argument is developed in the following manner: S. 326, provides that:

> "No suit shall be instituted against a Board . . . . . until the expiration of two months next after the notice in writing has been, in the case of a Board, left at its office . . . . explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed . . . . . ."

It is said that in the present case the amount of compensation claimed in the notice was Rs. 5,250 and as the plaintiff in the suit limited the claim to Rs. 1,500 the suit should be dismissed. We are unable to accede to this contention. It is conceded that it would have been open to the plaintiff to amend his plaint after it had been filed and to reduce the amount of his claim, but what is contended is that if an excessive amount was claimed in the notice and if the plaintiff, being better advised, reduced his claim in the suit then the suit should be dismissed. The wording of the section does not warrant this interpretation and there seems to be no principle underlying the argument. It is said that the object of this provision of law is to enable the defendant to prepare his defence and, if so advised, to make amends. The mere fact that a larger amount was claimed in the notice does not in any way prejudice the person to whom the notice is sent in the preparation of his defence nor does it in any way prevent him from making proper amends. The second paragraph of the section makes it clear that if sufficient amends have been tendered to the plaintiff then the plaintiff will not be entitled to recover any sum in excess of the amount so tendered and shall pay all costs incurred by the defendant after such tender. It would therefore appear that even in the case of an excessive demand a penalty is imposed on the plaintiff only if sufficient amends have been tendered. There is no provision which authorises a Court to dismiss the suit if the amount claimed in the notice has been subsequently reduced at the time of the institution of the suit. In proper cases this factor might be taken into consideration in connexion with the order regarding costs. We are of the opinion that the plaintiff had the option to abandon a portion of his claim.

Finally, it was said that the order of the Court awarding full costs to the plaintiff against defendant 1 was not justified and that we should restore the order of the Court of first instance on this point. It appears that the action of the Municipal Board was improper from the very start. They sent

a misleading letter to the District Magistrate and upon the findings of the lower appellate Court they have been guilty of tampering with a document. They did not agree to express any regret for their conduct, and we think that the lower appellate Court exercised a correct discretion in awarding full costs to the plaintiff against the Municipal Board. We think the view of the lower appellate Court is correct and we dismiss this appeal with costs.

K.S. *Appeal dismissed.*

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SULAIMAN, C. J. AND BAJPAI, J.

(*Firm*) *Puttu Lal Kunji Lal* — Plaintiffs—Appellants.

v.

(*Firm*) *B. Jagannath*— Defendants — Respondents.

First Appeal No. 13 of 1934, Decided on 27th September 1934.

Limitation Act (1908), Art. 85 — Open account is continuous or current consisting of series of transactions—Dealings having items on one side only are not mutual accounts.

An open account is one which is continuous or current uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. An account current is an open or running account between two or more parties or, an account which contains items between the parties from which the balance due to one of them is, or can be ascertained, from which it follows that such an account comes under the term of an open account, in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits : 6 *C L J* 158 and 6 *Mad H C R* 142, *Foll.* [P 54 C 1]

The account between the parties was open and current but there never was an occasion when the balance stood in favour of the defendant, and from the nature of the dealings it was clear that there never was a possibility of the balance standing in favour of the defendant :

Held : that it could not be said to be mutual and that Art. 85 did not apply. [P 54 C 1]

P. M. L. Verma—for Appellants.

Panna Lal—for Respondents.

Bajpai, J.—This is an appeal from an order of remand and the appeal is directed to the decision by the Court below that the plaintiffs' claim with the exception of a small sum of Rs. 49-13-3 is barred by time. The plaintiff alleged in his plaint that he had a firm of commission agents dealing in betel leaves at Mohoba in the district of Hamirpur, and that the defendant was a firm dealing in betel leaves in the city of Aligarh. The plaint went on to say that the defendant purchased betel leaves from the plaintiff's firm between 17th November 1926 to 17th November 1928 of the value of Rs. 10,095-1-9 and paid Rs. 9,426-7-6 up to 16th November 1928 and as such a balance of Rupees 668-10-3 was due to the plaintiff from the defendant under account. This sum together with interest was claimed in the plaint.

The lower appellate Court has held that as the suit was instituted on 10th August 1931, the claim for the price of articles supplied before 10th August 1928 was barred by time. There were two other dates which were considered—one was 16th November 1928 when the defendant sent Rs. 50—to the plaintiff and the other was 17th November 1928 when the plaintiff sent betel leaves of the value of Rs. 49-13-3 to the defendant. The Court below held that the plaintiff:

"had the option to credit the sum of Rs. 50 the entire balance due on 16th November 1928,"

and therefore the sum of Rs. 49-13-3, the price of the goods supplied on 17th November 1928 was within time on the date of the institution of the suit. In the appeal before us it is contended that the plaintiffs' suit is not barred by time for any amount. The first submission is that this is a suit for the balance due on a mutual open and current account under Art. 85, Limitation Act, and therefore the time from which the period begins to run is the close of the year in which the last item admitted or proved is entered in the account. We have come to the conclusion that the account between the parties was neither, on the pleadings nor on the evidence produced by the plaintiff a mutual open and current account. The facts are that the plaintiff supplied betel leaves to the defendant from time to time and the defendant paid the price thereof from time to time and this went on up till November 1928. Before November 1928 there were transactions up till May 1928, and therefore if the account was not mutual open and current, the transactions that took place up till May 1928 could not be considered in the present suit because they would be barred by time. In 6 C L J 158 (1), Mukerji, J., says:

"Now it is well settled that an open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. An account current is an open or running account between

1. Ram Pershad v. Harbans Singh, (1907) 6 C L J 158.

two or more parties or an account which contains items between the parties from which the balance due to one of them is or, can be ascertained from which it follows that such an account comes under the term of an open account, in so for as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits."

In support of these propositions the learned Judge referred to the judgment of Holloway, J., in 6 M H C R 142 (2). where that learned Judge observed that:

"in order that accounts might be mutual there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

We agree with the above observations. Applying the test laid down therein we have got to see whether the accounts between the parties can be said to be a mutual, open, and current account. It may be conceded that it was an open and current account inasmuch as it had not been closed, but it cannot be said to be mutual. The plaintiff in his statement before the Court said that there never was an occasion when the balance stood in favour of the defendant and from the nature of the dealings it is clear that there never was a possibility of the balance standing in favour of the defendant. For all practical purposes the plaintiff purchased betel leaves on behalf of the defendant and sent them to the defendant. The defendant used to pay the price thereof from time to time to the plaintiff and as mentioned before the accounts never revealed that the defendant paid more than what was due to the plaintiff. Reliance was placed by the learned counsel for the appellant on the case of 1928 All 236 (3). The facts of that case were entirely different. The plaintiffs there were commission agents and they after having obtained some margin money purchased and sold grain on behalf of the defendants with the result that on occasions the balance stood in favour of the defendants when the transaction resulted in a profit and at others it stood against the defendants when the transaction resulted in a loss. At the time of the institution of the suit there was a great deal of loss and the plaintiffs therefore brought the suit for the recovery of that amount. It was held that the parties stood to each other in a dual relationship and there was a mutuality of dealings and that the suit was within time under Art. 85, Limitation Act. This case therefore does not help the plaintiff and we have no hesitation in holding that Art. 85, Limitation Act, does not apply to the present case.

It was then contended that Art. 83 was applicable but that relates to a contract to indemnify and in the present case there was no such contract between the parties nor can Art. 115 apply, for the present suit cannot be said to be a suit for compensation for the breach of any contract. It is a suit for the recovery of a certain sum of money due for articles supplied to the defendant. A lukewarm argument was advanced before us to the effect that Art. 52 would be applicable to the facts of this case, but it is clear that there was no fixed period of credit in the present case and that article has no application.

The main contention of the plaintiff was that the dealing between the parties was a continuous dealing and therefore there was only one cause of action which cannot be divided. Reliance in this connection was placed upon the case of 1916 Cal 580 (4). The basis of the decision in this case was that the claim was not barred by limitation because of the application of the proviso to S. 20, Limitation Act. It was held that where a cheque is signed by the debtor and paid in part payment of the principal of a debt, the cheque being subsequently signed, the Proviso to S. 20, Limitation Act, was complied with and the suit was within limitation. It was not necessary to decide anything further but their Lordships towards the end of their judgment relied upon the case of 18 C B 325 (5), at p. 334 and they quoted the following passage from that judgment:

"Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided."

The English case is not an authority for the proposition that for purposes of limitation, in the case of a continuous demand, the whole forms

2. Hirada v. Gadigi, (1871) 6 M H C R 142.
3. Dan Dayal v. Pearey Lal, 1928 All 236=108 I C 694=50 All 645.
4. Kedar Nath v. Dinabandhu Saha, 1916 Cal 580=31 I C 626=42 Cal 1043.
5. Bonsey v. Wordsworth, (1856) 18 C B 325=25 L J C P 205=2 Jur N S 494=4 W R 566.

but one cause of action. The question there was a question of jurisdiction and it was held that in a case like this although a part of the cause of action might arise in a different place, for purposes of jurisdiction the entire cause of action must be deemed to be one. We are not prepared to extend the principle contained therein to a question of limitation more especially when we find that we have got to decide the case on the basis of a legislation which was enacted in the year 1877 long after 1856. For the same reasons we are not prepared to follow the case of 1923 Bom 113 (6).

The case which is very similar to the facts of the present case is 1921 All 325 (7). It was held there that in the case of a tradesman's account for goods sold and delivered to the customer from time to time, in respect of each item the liability to pay and the period of limitation commences on the date of the delivery of that particular item. In a suit by a tradesman for the price of goods sold and delivered from time to time, the customer having from time to time made payments without specifying any particular item for which the payments were made, the limitation was governed by Art. 51 in respect of each item as delivered. The plaintiff in a case like this is, of course, entitled to appropriate the payments to the earlier items in the account but not to credit them to the entire balance due up to date in the sense of saving limitation for each and every item. This is what has been done by the lower appellate Court in the present case. The item of Rs. 50 has been allowed to be credited towards earlier liabilities but the suit for the remaining balance has been held to be beyond time on the ground of limitation. There is no force in this appeal and is dismissed with costs.

The defendant has filed cross-objections regarding the sum of Rs. 50. We have held already that the Court below was right in allowing the plaintiff to appropriate this sum towards the earlier purchases. There was no specification by the defendant when he made this payment that it should be applied towards any particular debt and the plaintiff was therefore justified in appropriating it towards an earlier account. The mere fact that there is some similarity between the figure of Rs. 50 the amount paid by the defendant and the figure of Rs. 49-13-3 the price of the goods supplied does not show in the absence of any other evidence that this sum had to be credited towards the purchase of 17th November 1928 and could not be appropriated towards an earlier liability at the option of the plaintiff.

There is no force in the cross-objections and we dismiss them also with costs.

K.S. *Appeal and cross-objections dismissed.*

6. Najan Ahmed v. Salemahomed, 1923 Bom 113=77 I C 943.
7. Abdul Aziz v. Munna Lal, 1921 All 325=63 I C 435.

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BENNET, J.

Mt. Haidari Begum—Applicant.

v.

Jawad Ali—Opposite Party.

Criminal Misc. Ref. No. 533 of 1933, Decided on 20th September 1934.

(a) Criminal P. C. (1898), S. 491—Divorced Mahomedan lady applying under S. 491 for custody of her minor child—High Court held should not entertain application—Applicant should move District Judge under Guardian and Wards Act.

A Mahomedan lady had been divorced by her husband, her son aged four years remaining with him. She applied to the High Court under S. 491 that her minor son be brought before the Court and be delivered to her by her husband because under Mahomedan law the mother was entitled to the guardianship of a child under seven years of age.

Held: that the applicant should seek her remedy under a special Act, viz., Guardian and Wards Act, by an application to the District Judge, and the High Court should not exercise its discretionary power under S. 491 specially as it was more convenient that the case should be considered under the Guardian and Wards Act. [P 56 C 1, 2]

(b) Letters Patent (All.) S. 10—No Letters Patent appeal lies from order passed in exercise of criminal jurisdiction of one Judge.

A Letters Patent appeal does not lie from an order passed in the exercise of criminal jurisdiction of one Judge. [P 58 C 1]

Tej Bahadnr Sapru, Kabir Jafri and *S. M. Husain*—for Applicant.

Muhammad Ismail—for the Crown.

K. Masud Hasan—for Opposite Party.

Bennet, J.—This is an application which has been made to this Court under S. 491, Criminal P. C., by Mt. Haidari Begum who was married to the opposite party Saiyed Jawad Ali Shah known as the Mian Sahab of Gorakhpur. The application is that the minor son aged 4 years of the parties should be brought before this Court and be delivered to the applicant. It is stated that on 29th July 1933, the applicant left Gorakhpur to go to the house of

her father in Lucknow and she expected her husband to follow with the child, but her husband did not come or send the child, and on the 2nd August, she received a letter from her husband divorcing her. Her husband has kept the child. She has therefore made this application as under the Mahomedan law the mother is entitled to the guardianship of a child under 7 years of age. Now, the first question which arises is whether this Court should exercise its discretionary power under S. 491 in this matter. The discretionary power is given by the following words: "Any High Court may, wherever it thinks fit, direct." In the present case it appears to me that there is another form of procedure which may be adopted by the applicant under the Guardian and Wards Act, and the question is which of these forms of procedure should be adopted in the present case. I will briefly refer to the sections of the Guardians and Wards Act, 8 of 1890, which apply. Under S. 7 the Court may appoint a guardian for a minor. The Court is not tied down to select as guardian the natural guardian under the personal law of the minor; that is, the Court in the present case is not bound down to appoint the mother as guardian. The criterion in S. 7 is:

"Where the Court is satisfied that it is for the welfare of a minor that an order should be made."

Under S. 12 (1) the Court may direct that the person having the custody of the minor shall produce him. It is therefore open to the Court of the District Judge of Gorakhpur to entertain an application under S. 12 for the production of this minor. Under S. 45 (1) (a) if the person having the custody of a minor objects to produce him or cause him to be produced in compliance with a direction under section 12 (1) such person in liable to a fine not exceeding Rs. 100, etc., and to detention in civil jail until he undertakes to produce the minor or cause him to be produced. The District Court therefore can enforce its order for production of the minor by detention in the civil jail. There is no doubt therefore that under the Guardians and Wards Act, the District Court has ample powers to compel the production of a minor from the custody of any person. Now, the following considerations arise in regard to the two methods of procedure which are open to the applicant in this case:

(1) The power under S. 491, Criminal P. C., is a general power of the nature of a Habeas Corpus. The power under the Guardian and Wards Act, is a power under a Special Act, dealing with a special subject, that is, the subject of minors. I consider that where there is a Special Act dealing with a special subject resort should be had to that Act instead of to a general provision. In the present case it is more desirable that the matter should be heard under the Special Act because there are provisions in the Special Act such as S. 7 which indicated to the Court how it should procee, whereas in the general provision in S. 491, Criminal P. C., there are no special provisions to indicate to the Court as to how it should proceed in the case of a minor. No doubt sub-S. (1) (a) states that the person when produced should be dealt with according to law, and therefore the Court may refer to the Guardians and Wards Act, as indicating the law on the subject, but it appears to me that it is more convenient that the case should be considered under the Guardians and Wards Act.

(2) The next point is that under the Guardians and Wards Act, the inquiry could be made at Gorakhpur where the husband and the child are residing and where the applicant has been residing up till lately, as it is stated that she left Gorakhpur on 29th July 1933. Learned counsel informs me that as far as he has been able to ascertain there are no rules for procedure framed as yet under S. 491 (2). It will therefore be difficult, if there is an inquiry under S. 491 (2), to know under what rules that inquiry should proceed as no special rules have yet been framed. The suggestion is that the procedure should be by affidavit on each side. I do not consider that procedure by affidavit is at all as satisfactory as procedure by the examination of witnesses who are produced in Court and subjected to cross-examination. The Court cannot however make an inquiry by the hearing of witnesses under S. 491, Criminal P. C., and if it did a great deal of time would be taken up and it would be inconvenient for the witnesses to make the long journey of 200 miles from Gorakhpur to this Court.

(3) The third point which occurs to me is that it is a general rule of procedure that where Courts of different rank have jurisdiction then an application should be made in the lowest Court which has jurisdiction. Accordingly the application would be more

properly made in the District Court at Gorakhpur. I may instance for example the case of criminal revisions where in numerous rulings this Court has laid down that an application in revision should be directed in the first instance to the Sessions Judge, although in that case the Sessions Judge himself cannot dispose of the matter, but can only forward it to this Court. Another example would be in the case of further inquiry into a criminal complaint which has been dismissed. No doubt it would be open to this Court to direct such a further inquiry, but there is also no doubt that if an application were made to this Court and the fact was that no such application had been made to the District Magistrate or to the Sessions Judge, then this Court would direct that the application should be made to one of those Courts.

(4) The next point is whether the proceedings in the present case ought to be criminal or civil. Learned counsel referred to a ruling reported in 12 Bom L R 891 (1). In that case, which was heard in the year 1910 by a Single Judge, the question of taking action under the Guardians and Wards Act was not mentioned. The case however appears to have been different because the allegation was on behalf of the wife that her husband had attacked the person in charge of their two boys and had forcibly taken those two boys away. In the present case there is no such allegation of force as the suggestion is that the wife left her home at Gorakhpur and the child remained there. Learned counsel suggested that there was an element of fraud because the husband had undertaken to follow her with the boy. But that is a matter for subsequent inquiry. In the present case the husband is admittedly a religious leader of the Muslim community in Gorakhpur known as the Mian Saheb and is so described in the heading of the application. It does not appear desirable that religious leaders should be brought into the criminal Courts where the matter can be disposed of by the Civil Courts.

(5) The next point is that an order by the High Court under S. 491, Criminal P. C., would not bar a party from making an application to the District Judge under the Guardian and Wards Act. The proceedings in this Court therefore would not be final and it is not desirable that this Court should take proceedings which are not final unless there is such urgency in the matter that a remedy does not exist otherwise. As I pointed out in the present case a remedy can be obtained just as soon from the District Judge under the Guardians and Wards Act, as from this Court. There is no advantage therefore from the point of view of urgency in applying to this Court.

(6) The real issue which has to be decided is, who is to have charge of this child ? Whether this question is decided by this Court under S. 491, Criminal P. C., or decided by this Court on an appeal from the order of the District Judge appointing a guardian under the Guardians and Wards Act, is the matter to be considered. In the procedure under S. 491, Criminal P. C., this Court will have to decide merely on affidavits, but on an appeal from the District Judge this Court will have before it the record of the evidence of witnesses on either side who have been subjected to cross-examination. In such an appeal this Court will have very much more material and better material to enable it to form an opinion on the matter. Procedure by affidavit is only suited for interlocutory matters in which only a temporary decision is to be given. Where there is to be a decision of a permanent nature such as the permanent custody of this child, I am of opinion that procedure by affidavit is eminently unsuitable. Consequently it is much better that the procedure should be under the Guardians and Wards Act, and that after a full inquiry the matter should come to this Court. That procedure will be final procedure and the disadvantage of two proceedings, one criminal and one civil, will be avoided.

(7) I find that the rulings on which learned counsel for applicant relies, reported in 12 Bom L R 891 (1), refers not to S. 491, Criminal P. C., but to certain rules made by the Bombay High Court under that section. On p. 894 the learned Judge stated:

"And while it appears by S. 491 to be left entirely to the discretion of the Court, whether it should or should not direct the person to be brought before it to be dealt with according to law, where the person has so been brought before it, R. 794 appears to deprive the Court of all further discretion and commands that in the absence of cause being shown against the rule, which of course is a very different thing from allowing the Court to exercise its discretion, even where technically the cause is inadequate, the Court shall pass an order that the person or persons improperly detained shall be delivered to the person entitled to their custody."

On p. 895 the Court observed:

1. Zara Bibi v. Abdul Razzak, (1910) 12 Bom L R 891=8 I C 618=11 Cr L J 687.

"Now were we in the same position as the English Courts are under writs of Habeas Corpus under S. 491, I should have had, I think, very great difficulty in acceding t othe argument of Mr. Jinnah for the opponent, an argument which has all along had my complete sympathy. But I have felt throughout a very great difficulty arising out of the actual words of S. 491 read with R. 794."

These questions show that the Court acted because it felt itself constrained to act by virute of the R. 794 of the Bombay High Court Rules, and that if it had had a discretion in the matter the Court would not have acted under S. 491, Criminal P. C. In the present case there are no rules framed by this Court under S. 491, Criminal P. C., Cl. (2), and therefore the discretion of this Court under S. 491, Criminal P. C., is not fettered. The ruling therefore is no authority for the proposition that the Bombay High Court would have acted under S. 491, Criminal P. C., in the present case. For all these reasons I consider that this Court ought not to exercise its powers under S. 491, Criminal P. C., and I leave the applicant to apply for her remedy to the District Judge of Gorakhpur. I therefore refuse to take action on this application.

Learned counsel applies for permission to file a Letters Patent Appeal under S. 10, Letters Patent, and at the same time he informs me that he considers that such permission is not necessary for him to file an appeal. All that I can say in this matter is that in Letters Patent, S. 10 of this Court it is laid down that a Letters Patent Appeal does not lie from an order passed in the exercise of criminal jurisdiction of one Judge. Accordingly I consider that I cannot grant permission for a Letters Patent Appeal.

(N. B.—For Letters Patent Appeal under Cl. 10 and for the application under Cl. 12, Letters Patent, for the guardianship of the minor child: see A I R 1934 All 606 and 722 (2), respectively, Ed.).

R.K. *Application dismissed.*

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KENDALL, J.

Rambohor Misir—Applicant.

v.

Chaturghun Rai—Opposite Party.

Civil Revn. No. 57 of 1934, Decided on 9th October 1934.

(a) Evidence Act (1872), S. 91—"In proof of such matter" includes "in disproof of it."

The term "in proof of such matter" must carry with it the term "in disproof of it," because if evidence were to be admitted on one side, it would have to be admitted on the other. [P 59 C 1]

(b) Limitation Act (1908), S. 20—Debtor making payment for purposes of saving limitation - Payment is of principal.

Where both parties agree at the time of endorsement of payment that it should be made for the purposes of saving limitation the intention is to appropriate payment towards principal. [P 59 C 1]

Kanhaiya Lal Misra—for Applicant.

K. Verma—for Opposite Party.

Order.—This is a plaintiff's application under S. 25, Small Cause Courts Act. The trial Court has dismissed his suit on the ground that it is barred by the law of limitation. He sued on a promissory note, dated 18th June 1930. A few days before the expiration of the three years' period, an endorsement was made on the promissory note purporting to be a recital of the payment of Rs. 10, and it was claimed that this saved limitation. The Court however has found that in spite of the endorsement and in spite of the fact that both parties at the time intended the endorsement to save limitation no payment was actually made, and in consequence the claim of the plaintiff-applicant had become time barred when the suit was filed.

The decision is attacked on several grounds which I may take in order. In the first place, it is argued that as the endorsement was made on the promissory note and purported to recite a payment of Rs. 10, no evidence should have been admitted to prove that the payment had not been made and the Court in allowing such evidence violated the provisions of S. 91 Evidence Act. The position was that the parties had arranged that the endorsement should be made in order to attract the provisions of S. 20, Limitation Act, and this was a matter that was "required by law to be reduced to the form of a document," and no evidence was admissible in proof of such matter except the document itself, namely, the endorsement. There is no doubt to my mind that the matter was one which was required by the provisions of S. 20, Limitation Act, to be reduced to the form of a document; and no evidence could be given in proof of that matter except the document itself. It has certainly been argued by Mr. Kamla Kant Verma for the opposite party that the evidence that was offered was not in proof of the matter, but in disproof of it, namely, to show that no payment had been made. I think however that the term

"in proof of such matter" must carry with it the term "in disproof of it," because if evidence were to be admitted on one side, it would have to be admitted on the other; and I am therefore of opinion that S. 91, Evidence Act precludes this oral evidence, and in consequence it must be assumed for the purposes of this case that the payment was made.

The next point taken is that, this being the case, part payment of the principal has been proved under S. 20, Limitation Act, and consequently a fresh period of limitation had to be computed from the date of the endorsement. It has been pointed out that in the plaint the plaintiff-applicant claimed that the payment was a part payment not of principal, but of interest. That part of the plaint has has been read out to me, and it appears that although the plaintiff did not in terms state that the payment was one towards the interest, he did at any rate in the figures which he gave at the foot of the plaint imply that the payment had been appropriated towards interest and not towards the principal. The argument then used for the opposite party is this. Under sub-S. (1), S. 20:

"Where interest on a debt is .... paid as such by the person liable to pay the debt...."

the payment will save limitation, but it must be paid as such by the debtor, that is to say, the debtor who makes the endorsement must specify that the payment is towards interest if it is to be effective payment under this subsection.

It is clear that there was no such specification in this case and the applicant's case is that the alleged payment was made towards the principal, so that there was no necessity for any specification by the debtor. But Mr. Varma's argument is that the payment was not one towards principal, because the creditor, i. e., the plaintiff-applicant, did appropriate it towards interest, and the consequence is that S. 20 Limitation Act, will not apply at all. There is some support for this argument in the case of 1933 All 453 (1) which has been followed more recently by a Single Judge of this Court. But I think it is possible to distinguish the present case, because both parties agreed at the time of the endorsement that it should be made for the purpose of saving limitation, and therefore I think there can be no doubt that at that time the intention was to appropriate the payment (which we must assume to have been made) towards the principal and not towards interest. It was held in a Division Bench of this Court in the case of 1930 All 392 (2), that where there has been no specification of such a payment to show whether it is to be appropriated towards principal or interest it must be held to have been intended that the payment was forwards principal. There might be some difficulty in applying this principle to every case, because of the manner in which the Act is worded, and because of the later decision of a Bench of this Court to which I have already referred. In the circumstances of the present case however I think it is clear that the payment was intended to be made towards principal, and no matter whether the plaintiff afterwards changed his mind and chose to regard the payment as one towards interest as he apparently did at the time of drafting the plaint, it was nevertheless on 29th May 1933 effective to start a fresh period of limitation.

This being so, it is unnecessary for me to consider the further contention of the applicant that the endorsement amounts to an acknowledgment under S. 19, Limitation Act. I allow the application with costs in this Court, set aside the decree order of the trial Court and direct that the suit be decreed. As the question relating to the admission of the oral evidence was not raised in the trial Court, I pass no order as to costs in that Court.

K.S. *Application allowed.*

1. Ramprasad v. Binaek Shukul, 1933 All 453 =144 I C 899=55 All 632.

2. M. B. Singh & Co. v. Sircar & Co., 1930 All 392=127 I C 581=52 All 459.

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BENNET, J.

Phonsia—Applicant.

v.

Emperor —Opposite Party.

Misc. Criminal Case No. 603 of 1933, Decided on 3rd November 1933.

Criminal P. C. (1898), Ss. 369, 403 and 526—Accused discharged — Application to review order of discharge refused — Another complaint on same facts to same Magistrate—Transfer application — Held review application was against provisions in S. 369 —Proper procedure was not to file fresh complaint but to apply to Sessions Judge to set aside order of discharge.

On a previous complaint the Magistrate summoned the accused and after hearing the evidence of the complainant discharged the accused. After that the complainant made an application

to the Magistrate to review his order of discharge. This was refused by the Magistrate, whereupon the complainant filed another complaint on the same facts in the same Court and applied for transfer of the case:

Held : that the application for review was clearly against the provision laid down in S. 369.

Held further : that under S. 403, explanation, the discharge of the accused is not acquittal for the purpose of that section which would prevent the accused being again tried for the same offence. But if the transfer application is granted and the case is transferred to another Magistrate and that Magistrate convicts the accused, the situation would arise that the accused would have been discharged by one Magistrate and without that order of discharge being set aside, the accused would be convicted by another Magistrate on the same charge. The correct course for the complainant to adopt would have been to make an application under S. 439 to the Sessions Judge or the District Magistrate asking for the order of discharge to be set aside and further inquiry to be made. [P 60 C 1, 2]

Ambika Prasad Dube— for Applicant.

Order.—This is an application for transfer of a criminal case on a complaint which was made under Ss. 494 and 498 Penal Code. The applicant is the complaint. On a previous complaint the Magistrate in question summoned the accused and after hearing the evidence of the complainant discharged the accused on 15th June 1933. After that the complainant made an application to the Magistrate to review his order of discharge. Such an application was clearly against the provision laid down in S. 369 Criminal P. C., which states that no Court, when it has signed its judgment, shall alter on review the same except to correct a clerical error. The Magistrate refused to review his judgment on 3rd July 1933. After that the complainant filed another complaint on the same facts in the Court of the Joint Magistrate. It is true that under S. 403 explanation, the discharge of the accused is not acquittal for the purpose of that section which would prevent the accused being again tried for the same offence. But if the present application is granted and the case is transferred to another Magistrate and that Magistrate convicts the accused, the situation would arise that the accused would have been discharged by one Magistrate and without that order of discharge being set aside, the accused would be convicted by another Magistrate on the same charge. I do not think that that is a desirable result. The correct course for the complainant to adopt would have been to make an application under S. 436, Criminal P. C., to the Sessions Judge or the District Magistrate asking for the order of discharge to be set aside and further enquiry to be made. It is still open to the complainant to adopt that course as apparently there is no limitation for such an application. That being so, I do not consider that the transfer should be granted and I think it is desirable for the complainant to pursue the remedy laid down in S. 436 Criminal P. C., and that he should not be allowed to have his case transferred to another Magistrate until action has been taken under that section and further enquiry has been ordered by the Sessions Judge or the District Magistrate. I do not think that I am called upon to decide what course the complainant should pursue in regard to the second complaint for which he now asks for transfer. The application therefore is refused.

K.S. *Application refused.*

A. I. R. 1935 Allahabad 60

BENNET, J.

Kunji Lal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 830 of 1933, Decided on 23rd January 1934.

(a) Criminal P. C. (1908), S. 561-A and S. 369—Scope of —Power of review is not allowed in criminal cases — Remedy of aggrieved party is to move Local Government.

There is no definite provision for a review of judgment in S. 561-A, Criminal P. C. Review is a definite method of procedure and if the legislature intended by the Amending Act 18 of 1923 to make a provision in the Code for review, there would have been a definite section dealing with a right of review and laying down the conditions under which that right could be exercised. S. 561-A does not confer any new powers but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. There never has been an inherent power in the High Court to alter or to review its own judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits. The remedy of a person aggrieved by an order of the High Court is to apply to the Local Government to exercise its powers : 1927 *Lah* 139; **Held Overruled by** 10*Lah* 1=110 *IC* 221=1928 *Lah* 462 and 1928 *Oudh* 402, *Diss from.*

[P 61 C 2; P 62 C 1, 2]

(b) Criminal P. C. (1898), S. 403—Trial of second complaint after order of discharge on first complaint is not barred —Court has jurisdiction to transfer second complaint to another Court for trial.

There is no bar to the trial of a second complaint by the same Magistrate who had dismissed the first complaint and passed an order of dis-

charge. Where a Magistrate has jurisdiction to try a second complaint, he has jurisdiction to transfer it to another Magistrate for trial : 9 *All* 85; 1895 *A W N* 86; 29 *All* 7 and 1914 *All* 179, *Ref to*. [P 63 C 1]

Din Dayal—for Applicant.

Judgment.—This is an application on behalf of one Kunji Lal asking for review of an order of this Court dismissing an application in Criminal Revision which had been signed and sealed before the application for review was made. The first question was whether such an application for review lies as learned counsel contends under S. 561-A, Criminal P. C., or whether such an application is barred by the provisions of S. 369, Criminal P. C. In the Criminal Procedure Code, Act 10 of 1882, S. 369, appeared in the form:

"No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in S. 395 or to correct a clerical error."

This section was reproduced in somewhat similar terms in the Criminal Procedure Code of 1898:

"No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Ss. 395 and 484 or to correct a clerical error."

In 1923 there was introduced into the Code a new S. 561-A which laid down:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

It was contended by learned counsel that this section gave a right of review and that the section being perfectly general would apply to S. 369 and override it. At the same time that this section was introduced in 1923, there was an alteration made in S. 369 which now reads as follows:

"Save as otherwise provided by this Code or by any other law for the time being in force, or in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except * * * to correct a clerical error."

It is to be noted that in S. 369 there is no reference to review being allowed by S. 561-A. The reference in S. 369 as it stands at present to the Letters Patent is in the case of Allahabad to Ss. 18 and 19 which provide that where there is an original criminal trial by the High Court the trial Court may reserve any point or points of law for the opinion of the High Court and on such a reservation:

"The said High Court shall have full power and authority to review the case or such part of it as may be necessary."

This is also provided in the Criminal Procedure Code in S. 434 and the same words "review the case" are used in Sub-S. (2), S. 434. There is also provision in S. 395 for a review of an order where a sentence of whipping cannot be inflicted and in S. 484 there is provision for the Court accepting an apology for an interruption. These three sections of the Code, 395, 484 and 434 are evidently the sections which are referred to by the words "save as otherwise provided by this Code" in S. 369. Learned counsel however argued that S. 561-A could also come under these words "Save as otherwise provided by this Code," but in S. 561-A there is no definite provision for a review of judgment. I am of opinion that review is a definite method of procedure and that if the legislature intended by the Amending Act, Act 18 of 1923, to make a provision in the Code for a review there would have been a definite section dealing with a right of review and laying down the conditions under which that right could be exercised. In the case of the Civil Procedure Code there is a definite provision for review in S. 114 and there is an order of the Code, O. 47, dealing with the circumstances under which a review is permitted. If a review were intended by the Criminal Procedure Code there would have been some definite provision of this nature.

I now come to the rulings on the point. Learned counsel relied on two rulings: one reported in 1927 Lah 139 (1). and the other in 1928 Oudh 402 (2). Each of these rulings was by a Single Judge. The Oudh ruling referred to the Lahore ruling as authority for the proposition that a right of review exists under S. 561-A, Criminal Procedure Code. But the Lahore ruling has been definitely overruled in 1928 Lah 462 (3). This was a ruling by two Judges and they specifically held that the previous ruling by Broadway J., was incorrect, and one of the Judges stated that Broadway, J:

"has authorized me to say that he is not satisfied with his judgment in that case and he is inclined to the view which I have just expressed."

On p. 463 it was held in regard to S. 561-A:

1. Mathura Das v. Emperor, 1927 Lah 139=99 I C 1039=28 Cr L J 239.
2. Emperor v. Shiva Datta, 1928 Oudh 402=111 I C 573=29 Cr L J 893=3 Luck 680.
3. Raju v. Emperor, 1928 Lah 462=110 I C 221=29 Cr L J 669=10 Lah 1.

"It does not confer any new powers, but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code . . . There never has been an inherent power in the High Court to alter or review its own judgment in a criminal case once it has been pronounced and signed except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits. With this view all the Courts in India are in accord. Mr. Mehtab Singh contends that the introduction of this section has altered the law and given to the High Court power to do something which it could not do before. As I have already pointed out, this is not the case. The instances of inherent powers possessed by the High Court given in S. 561-A, namely, to make such orders as may be necessary to give effect to its decisions, or to prevent an abuse of the process of any Court, have always been assumed by Courts of Record."

There is a long series of rulings prior to 1923 holding that there is no power of review in Criminal Courts. In 7 All 672 (4), a Bench laid down that the provisions of S. 369, Criminal P. C., merely referred to S. 434, Cr. P. C., and Ss. 18 and 19 of the Letters Patent and that the High Court had no power to review an order dismissing an application for criminal revision. In 21 All 177 (5) and 27 All 92 (6) it was held that when a judgment in a criminal case had been signed by a Judge of the High Court but not sealed, then he could alter it. In 1916 All 183 (7) a Bench of this Court held to the same effect, and that when judgment had been signed and sealed it could not be altered and no review lay. A similar dictum was laid down in 1923 All 473 (8). In 5 W R 61 Cr (9) a Full Bench of the Calcutta High Court held that a review of judgment will not lie from a sentence or judgment of the High Court in criminal appeal and:

"that it was the intention of the legislature that the Court should not exercise the power of reviewing its own judgment in criminal cases."

In 10 Bom 176 (10) a Full Bench of the Bombay High Court held that the Division Bench of the High Court has not got power under S. 439, Criminal P. C., of 1882, to review its judgment pronounced in revision in a criminal case. The above authorities make it clear that prior to 1923 all the High Courts were in agreement that no power of review lay in criminal cases. The judgment of the Lahore High Court in 1928 Lah 462 (3) gives good reasons for holding that the alterations in the Code in 1923 did not have the effect of allowing any power of review. Accordingly I hold that no review lies. The remedy of a person aggrieved by an order of this Court is to apply to the Local Government to exercise its powers. In case any such application is made I may point out that the main basis on which this application was made is incorrect. Learned counsel lays stress on grounds 4 and 5 of his affidavit and he claims that the trial Court had no jurisdiction to entertain the present complaint in view of the fact that there had been a previous order by the City Magistrate discharging the accused on 27th April 1933. The facts are incorrectly stated. As pointed out by the learned Sessions Judge in his order:

"the previous application was thrown out by the Magistrate on the police report without summoning the accused."

It was therefore not an order of discharge. Now the complaint in the present case was made on 2nd May 1923, and the complaint was filed in the Court of the same City Magistrate Mr. Evans. Learned counsel has referred to a judgment of a learned Single Judge of this Court in 1934 All 87 (11). That judgment deals with the question of how far a previous complaint bars a subsequent complaint. The learned Judge says:

"A subsequent complaint can be filed either (1) before the same Court presided over by the same Magistrate who had dismissed the former complaint or (2) before the same Court presided over by the successor-in-office of the Magistrate who had dismissed the former complaint, or (3) before a Court other than a Court which had dismissed the former complaint."

"It is well settled that there is no bar to the trial of a second complaint by the same Magistrate who had dismissed the first complaint and passed an order of discharge."

To this effect are the decisions of this Court in 9 All 85 (12), 1895 A W N 86 (13) 29 All 7 (14) and 1914

4. Queen-Empress v. Durga Charan, (1885) 7 All 672=(1885) A W N 177.
5. Queen-Empress v. Lalit Tewari, (1899) 21 177=(1899) A W N 15.
6. Emperor v. Kallu, (1904) 27 All 92=(1904) A W N 195=1 A L J 495.
7. Emperor v. Gobind Sahai, 1916 All 183=32 I C 335=38 All 134=17 Cr L J 47.
8. Emperor v. Kale, 1923 All 473=74 I C 270=24 Cr L J 766=45 All 143.
9. Queen-Empress v. Godai Raou, (1866) 5 W R 61 Cr=Beng L R Sup Vol 436.
10. Queen-Empress v. C. P. Fox, (1886) 10 Bom 176.
11. Ramanand v. Sheri, 1934 All 87=150 I C 373=1934 Cr C 150=35 Cr L J 1062.
12. Queen-Empress, v. Puran (1886) 9 All 85=(1886) A W N 307.
13. Queen-Empress v. Umedan, (1895) A W N 86.
14. Emperor v. Mehrban Husain, (1906) 29 All 7=3 A L J 562=(1906) A W N 245=4 Cr L J 59.

All 179 (15). Now the present case comes within the first clause as the subsequent complaint was filed before the City Magistrate who had dismissed the first complaint. The City Magistrate had jurisdiction to try the second complaint. If he had jurisdiction to try the second complaint, he had jurisdiction to transfer it to another Magistrate for trial. Accordingly there is no doubt that the trial in the present case was with jurisdiction.

Reference was also made to 1935 All 59 (16) in which I refused to transfer a case on 3rd November 1933. There had been a previous complaint before the same Magistrate and the Magistrate had discharged the accused after recording all the evidence of the prosecution witnesses. For these reasons I held that it was undesirable that the subsequent complaint should be transferred from the same Magistrate. That case differed from the present case because the evidence had been fully heard on the first complaint whereas in the present case the evidence was not heard at all on the first complaint. The attitude of the complainant was that he desired that his evidence should be heard and it was not unreasonable for the City Magistrate to accede to such an application.

For these reasons I dismiss this application in revision.

R.K. *Application dismissed.*

15. Emperor v. W. C. Keymer, 1914 All 179=22 I C 145=15 Cr L J 1=36 All 53.
16. Phonsia v. King-Emperor, 1935 All 59.

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BAJPAI, J.

Sarnam Singh and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 559 of 1934, Decided on 11th September 1934, from order of Sess. Judge, Etah, D/- 9th June 1934.

(a) Penal Code (1860), S. 368—Offence under S. 368—It is not triable exclusively by Sessions Judge.

Neither on the wording of S. 368, nor on the policy of the Legislature can it be argued that an offence under S. 368 should be tried by a Court of Session when the girl was wrongfully confined or concealed for the purpose of forcing her to illicit intercourse. [P 64 C 1]

(b) Criminal P. C. (1898), S. 428—Offence under S. 368, I. P. C.—First report to police not placed before Court—Accused should be allowed to let in additional evidence in Sessions Court when he comes to know about it.

It is the duty of the prosecution in a case under S. 368, I. P. C., to place the first report to the police before the Court and if the prosecution does not do so and if the accused had not come to know of this report at an earlier stage, in the interest of justice it is necessary that additional evidence should be taken by the appellate Court. [P 64 C 2]

T. A. Bradley and *K. D. Malaviya*—for Applicants.

Asst. Govt. Advocate—for the Crown.

Order.—This is an application by Sarnam Singh, Kishen Lal and Ram Phool alias Man Phool who were tried by a Magistrate of the first class under S. 368, Penal Code, and sentenced to one year's rigorous imprisonment and Rs. 100 fine. Their conviction and sentence were affirmed in appeal by the learned Sessions Judge.

In revision it has been argued before me that the learned Magistrate had no jurisdiction to try this case. It is said that under S. 368, Penal Code, the accused who wrongfully conceals or keeps in confinement a kidnapped or abducted girl shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge or for the same purpose as with that or for which he conceals or detains such person in confinement. The argument is that it is possible that according to circumstances an offence under S. 368, Penal Code, might be punishable in the same manner as an offence under S. 363, Penal Code, or as an offence under S. 366, Penal Code. An offence under S. 363, Penal Code, is triable by a Court of Session, Presidency Magistrate or Magistrate of the First Class, but an offence under S. 366, Penal Code. is triable exclusively by a Court of Session.

In the present case the prosecution case is that the girl in question was wrongfully concealed for the purpose of forcing her to illicit intercourse and therefore the present accused would be liable to punishment in the same manner as an accused under S. 366, Penal Code. The present offence under S. 368, Penal Code, according to the contention of the learned advocate for the applicants, was triable exclusively by the Court of Session, inasmuch as an offence under S. 366, Penal Code, is exclusively triable by a Court of Session.

I am unhesitatingly of the opinion that the contention of the applicant, though plausible, has no substance. S. 368, Penal Code, according, to the Schedule is triable by a Court of Session, Presidency Magistrate or Magis-

trate of the First Class and not exclusively by a Court of Session. Learned counsel however argues that three classes of Courts are given in the Schedule and the meaning of the legislature is that a particular offence will be triable by a particular Court according to the knowledge or the intention of the accused. The words used in the section however are "shall be punished in the same manner" and not "shall be tried and punished in the same manner." Punishment begins after the trial is over and does not commence with the initiation of the trial. It was then said that if a particular offence under S. 368, Penal Code, can be punished, by reason of his intention, knowledge or purpose, to imprisonment of either description for ten years and fine then he should be tried exclusively by a Court of Session. That, it was said, was the policy of the legislature. Here again, I find that the factor which determines the Court by which an offence is to be tried is not the amount of punishment to which the offender may be liable but the seriousness of the offence itself. For instance, several offences where the punishment provided is up to seven years are triable by a Court of Session, Presidency Magistrate or Magistrate of the First Class (S. 325, Penal Code, may be mentioned) and as against this, under S. 218, Penal Code, the punishment is only three years and yet the offence is triable by a Court of Session exclusively.

I am therefore of the opinion that neither on the wording of S. 366, Penal Code, nor on the policy of the legislature can it be argued that an offence under S. 368, Penal Code, should be tried by a Court of Session when the girl was wrongfully confined or concealed for the purpose of forcing her to illicit intercourse. It might be mentioned here that in connection with S. 109, Penal Code, it has been distinctly stated in the Schedule that the offence will be tried by the Court by which the offence abetted is triable and there was nothing to prevent the legislature from using the same phraseology in the Schedule when S. 368, Penal Code, was mentioned. The applicants' contention does not gain any strength because of the expression "in the same manner" in S. 368, Penal Code.

The next contention that was advanced before me was that the learned Sessions Judge should not have rejected the application of the accused under S. 428, Criminal P. C. It appears that on 4th April 1934, two months before the appeal was actually heard, the applicants presented a petition to the learned Sessions Judge by which they prayed that further evidence on the following particulars: (a) the production and proof of the first information report about the case and further examination of the complainant with respect to it, her age and her alleged concealment (b) the production of the record of the case—Pem Singh, complainant, versus Ram Chander and others accused under S. 498, Penal Code—and proof of certain papers in that record such as report, etc., if necessary, be taken. This application was supported by an affidavit in which it was stated that the applicants were not aware of a report made by Mt. Renuka before the Police. It was mentioned in the application that the statement of Mt. Renuka made before the Police Officer at Barla Police Station was in direct conflict with the evidence given by her in the present case and that if that report had been before the Court then the accused could not have been convicted.

The learned Judge thinks that the applicants could have known of the existence of this report if they had used due diligence. The proceedings in this case in the presence of the accused commenced in the Court of the trial Magistrate on 21st January 1934, and finished on 29th January 1934. It may be that the applicants were in great trouble during these eight days and they could not find out even with due diligence that Mt. Renuka, the complainant, had made a statement before the Police at Barla on or about 20th May 1933.

I am of the opinion that the application of the accused dated 4th April 1934, ought to have been granted, and my reasons are that it was the duty of the prosecution in the present case to have placed that report before the Court and if the prosecution did not do so and as the accused had not come to know of this report at an earlier stage, in the interest of justice, it was necessary that additional evidence should have been taken by the learned Sessions Judge. I have not gone into the merits of the case and I am not prepared either to differ from the findings of the Courts below or to agree with them at this stage.

The result is that I allow this application, set aside the order of the learned Sessions Judge and allowing

the application of the applicants to the learned Sessions Judge, dated 4th April 1934, which application was reiterated before me orally, I direct the learned Judge to take the evidence mentioned in the application himself and re-hear the appeal after taking into consideration the materials on the record and the additional evidence taken by the learned Judge.

K.S. *Application allowed.*

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NIAMATULLAH, J.

Sukhan Singh and *others*—Objectors—Appellants.

v.

Uma Shankar Misir and *others*—Decree-holders—Respondents.

Execution First Appeal No. 102 of 1934, Decided on 21st September 1934, from decision of Addl. Sub-Judge, Benares, D/- 21st February 1934.

(a) Civil P. C. (1908), S. 144 — Winning party is entitled to be restored to property free from all encumbrances—Restitution can be claimed not only against party but also against persons deriving title from him.

Section 144 makes it imperative, where a decree passed by the Court of first instance is reversed on appeal, that the Court should place the winning party in the position which he or she would have occupied but for such decree. The winning party is entitled to have her land restored to her free from all encumbrances, including any tenancy that might have been created in the meantime by the party who was successful in the first Court but eventually was found to have no title to the land. Restitution under S. 144 can be claimed not only against the opposite party, but also his representatives or persons deriving title from him. [P 66 C 1]

(b) Agra Tenancy Act (1926), S. 19—Admitting tenants during pendency of suit is dealing with land — Person in wrongful and temporary possession of land cannot create statutory right by admitting others as tenants.

It cannot be contended that, during the pendency of a suit, in which certain lands are in dispute, admitting tenants to those lands is not "dealing with" the lands. There is no distinction between a case in which a person taking forcible possession of land lets it out to tenants during the pendency of the suit brought for its recovery and the case of a person who takes possession of it in execution of a decree passed by the first Court but subsequently reversed on the finding that he has no right to the land erroneously decreed to him. In either case the character of his possession is the same, viz., wrongful. S. 19 confers statutory rights upon tenants who are admitted as such by the person having the right to let. A person in wrongful and temporary possession of land has no right to let, and cannot consequently create statutory rights by admitting others as tenants. [P 67 C 1]

(c) Agra Tenancy Act (1926), S. 230 — Restitution application under S. 144, Civil P. C.—Applicant praying for actual possession against Collector—S. 230 has no application.

Where a successful party in proceedings under S. 144, Civil P. C., applies for restitution and in doing so prays for actual possession against the Collector claiming title from him, S. 230 has no application and the civil Court has jurisdiction to entertain suit. [P 67 C 2]

N. C. Vaish—for Appellants.

Judgment.—These two appeals arise out of proceedings under S. 144, Civil P. C. The appellants objected to restitution being made under S. 144, Civil P. C., to a lady named Chandrajota Kunwar, so far as it was claimed in denial of the appellants' rights as statutory tenants. The lower Court dismissed the appellants' objection and delivered actual possession of the lands in dispute to Mt. Chandrajota Kunwar. It appears that the Collector of the Benares, who was in charge of the estate known as Sakaldiya estate, instituted a suit, against Mt. Chandrajota Kunwar for setting aside an agreement and for possession of property of which the lands now in dispute were parts. It is not necessary to enter into the details of the controversy between the parties to that suit. Suffice it to say, that it was a suit for inter alia, the relief of possession against Mt. Chandrajota. The suit was decreed by the Court of first instance on 17th March 1930, and possession was delivered to the Collector on 26th May 1930. Chandrajota preferred an appeal to this Court, which reversed the decree of the Court of first instance on 5th September 1933, and dismissed the Collector's suit. Mt. Chandrajota then applied for restitution under S. 144, Civil P. C., praying for delivery of possession of the property which had been taken possession of by the Collector in execution of the decree of the first Court, since reversed by the High Court. She impleaded in her application the present appellants who claimed to be tenants admitted by the Collector in the interval after delivery of possession to him before the decision of the High Court.

It is not disputed that the lands now in dispute were originally cultivated by certain tenants who were actually in possession when the Collector took delivery of possession. It is mentioned in the judgment of the learned Sub-Judge that those tenants were dispossessed and the officials of the Court of Wards let the lands to the appellants at lower rents. The learned ad-

vocate for the appellants has referred me to the statement of the patwari, who says that the original tenants themselves relinquished the lands in dispute and thereupon the officials of the Court of Wards let the lands to the appellants. In my opinion it makes no appreciable difference if the case is decided on the assumption that the out-going tenants had voluntarily relinquished the land, which was subsequently let to the appellants by the officials of the Court of Wards. The appellants claim that Mr. Chandrajota Kunwar is not entitled to actual possession as against them, as they became statutory tenants under S. 19, Agra Tenancy Act, because they were admitted as tenants by the Collector, who was then in possession as proprietor. The principal question between Mt. Chandrajota and the appellants in the lower Court was whether they were statutory tenants, as claimed by them; if not, Mt. Chandrajota's right to take actual possession can hardly be said to be in doubt.

Section 144, Civil P. C., makes it imperative, where a decree passed by the Court of first instance is reversed on appeal that the Court should place the winning party in the position which he or she would have occupied but for such decree. Mt. Chandrajota is entitled to have her land restored to her free from all encumbrances, including any tenancy that might have been created in the meantime by the party who was successful in the first Court but eventually was found to have no title to the land. Restitution under S. 144 can be claimed not only against the opposite party, but also his representatives or persons deriving title from him. The terms of S. 144 present no difficulty to my mind and I have no hesitation in holding that, unless S. 19, Agra Tenancy Act, on which reliance is placed by the learned advocate for the appellants, leads to a different conclusion, S. 141, Civil P. C., in terms applies to the facts of this case.

My attention has been drawn to 1932 Lah 29 (1), which is strongly relied on by the learned counsel for the appellants. The facts of that case are complicated, and it may be that, in the peculiar circumstances thereof, the conclusion arrived at by the learned Judges was correct. There are however some observations which, I regret, I am unable to accept. In that case one Rajjabali had instituted a suit for possession against the defendant and obtained an ex parte decree. He executed certain sub-leases in favour of third persons. Subsequently the ex parte decree was set aside, and Rajjabali's suit was eventually dismissed. The successful defendant applied for restitution against the sub-lessees let into possession by Rajjabali. The learned Judges held:

"That the sub-leases were created by Rajjabali in favour of the opposite parties Nos. 13 to 23 not under the decree nor as a direct or immediate consequence of it, and, as the said defendants were strangers to the litigation and were in no sense the legal representatives of Rajjabali, no order of restitution should have been made against them."

With all respect I am unable to accept the view that the lessees cannot be considered to be the "representatives" of their lessors as against a person who is found to be the real owner of the land and who was temporarily dispossessed by the lessor. The words "legal representatives" have not been used in S. 144, but it casts a duty on the Court to place the parties in the position which they would have occupied but for the decree subsequently reversed. This cannot be done, unless the lessees introduced after the decree of the first Court be removed from possession. In the case noted above the learned Judges have made some remarks on the use of the words "so far as may be" in S. 144.

There might have been difficulty in that case in removing the sub-lessees having regard to the provisions of the tenancy law there in force. I do not see any difficulty in removing the appellants in this case unless they are protected by S. 19, Agra Tenancy Act, which I shall presently consider.

Section 19, Agra Tenancy Act, provides that subject to the provisions of Sub-S. 3, S. 8 (which need not be considered in this case), every person who is, after the commencement of this Act (Act No. 3 of 1926), admitted as tenant without a right of occupancy to land other than sir, grove-land, pasture-land, or land covered by water and used for the purpose of growing singhara or other similar produce, shall be called a statutory tenant and, subject to the provisions of this Act, shall be entitled to a life-tenancy of his holding. It is contended that the section does not expressly state as to who is entitled to "admit" to tenancy. It is said that any one for the time being in possession of a proprietary tenure—though he may be subsequently

1. Rajjabali Khan v. Faku Biri, 1932 Cal 29= 1932 Cr C 66=134 I C 906=58 Cal 1070.

found to have no title to it—has power to admit to tenancy. In my opinion this line of reasoning is untenable. If a trespasser takes forcible possession of land belonging to another, and during the pendency of the suit brought by the owner against the trespasser, the latter admits third persons as tenants, it is, in my opinion, an impossible proposition that the successful plaintiff cannot take actual possession. If the contention put forward before me, be accepted as sound, the person for the time being in possession though a trespasser can saddle the real owner, who is struggling for the recovery of his property with tenants, who may be highly undesirable from his point of view. Such a view is not only opposed to natural justice but, in my opinion, offends against S. 52. T. P. Act, which clearly provides that, during the pendency in any Court of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question the property cannot be transferred or otherwise dealt with. It cannot be reasonably contended that, during the pendency of a suit, in which certain lands are in dispute, admitting tenants to those lands is not "dealing with" the lands. I can make no distinction between a case in which a person taking forcible possession of land lets it out to tenants during the pendency of the suit brought for its recovery and the case of a person who takes possession of it in execution of a decree passed by the first Court but subsequently reversed on the finding that he has no right to the land erroneously decreed to him. In either case the character of his possession is the same, viz., wrongful. In my opinion, S. 19, Agra Tenancy Act, confers statutory rights upon tenants who are admitted as such by the person having the right to let. A person in wrongful and temporary possession of land has no right to let, and cannot consequently create statutory rights by admitting others as tenants.

It is argued that Mt. Chandrajoti, was entitled to receive rent from the tenants who occupied the lands before the Collector took delivery of possession and that she is entitled to receive it now from the present incumbents, so that she would be practically restored to the position which she occupied, even if the appellants are recognized as statutory tenants. I am unable to accept this view. The amount of rent is not the only consideration which weighs with a landholder. The appellants may be undesirable tenants from her point of view and, in any case, they may not be as good as the tenants who occupied the land when she lost possession. I hold that the position of the appellants as tenants, statutory or otherwise, is not consistent with the position which Mt. Chandrajoti Kunwar occupied when she lost possession.

The learned counsel for the appellants argues that the appellants are, at the worst, persons taking or retaining possession of the lands in dispute without the consent of the landholder under S. 44, Tenancy Act, and that a suit for their ejectment must be brought in the Revenue Court, which has exclusive jurisdiction. It is true that S. 230 provides that all suits and applications of the nature specified in Sch. 4 shall be heard and determined by the Revenue Courts and that in Sch. 4, Group B, suits under S. 44 for ejectment of trespassers are mentioned. If Mt. Chandrajoti Kunwar had instituted suits in a civil Court for recovery of possession against the appellants, treating them as trespassers, the argument would fall to be considered. In the case before me, the position is materially different. The lady is applying for restitution, and in doing so prays for actual possession under S. 144 against the Collector and those claiming title from him. In my opinion S. 230, Tenancy Act, relied on, has no application to the circumstances of the present case.

For the reasons stated above, I hold that the lower Court took a correct view of the rights of the parties. These appeals are dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeals dismissed.*

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NIAMATULLAH AND COLLISTER, JJ.

Suraj Kumar—Plaintiff—Appellant.

v.

Jagannath and *others* — Defendants—Respondents.

First Appeal No. 547 of 1930, Decided on 3rd August 1934, from decision of Second Sub-Judge, Cawnpore, D/- 30th October 1930.

(a) Hindu Law— Joint family — Brothers conducting themselves as brothers of joint family — Ancestral property not divided— Mere residence in different places for pur-

pose of employment held did not prove intention to separate.

Though the exigencies of their employments required that the brothers should reside at different places, the ancestral property belonging to them was never divided; there was no allegation that any of them ever expressed an unequivocal intention to separate. It was in evidence that on ceremonial occasions they conducted themselves as if they were members of a joint Hindu family:

Held : in the absence of evidence showing an intention on the part of one or the other of the members to separate and the constitution of the family being consistent with the joint character thereof, it could not be said that they were not members of joint family. [P 69 C 1]

(b) Hindu Law — Joint family—Presumption as to jointness—Property acquired with aid of uncleus is joint family property.

There is a presumption that a Hindu family is joint and undivided. There is however no presumption that a joint family is possessed of joint family property or that a particular property is joint family property, having been acquired with the aid of family funds. But where it is proved or admitted that a joint family possessed such nucleus as could lead to the acquisition in question, it may be presumed that the later acquired property belongs to the joint family, having been acquired with the aid of the nucleus. Mere existence of a nucleus, however small or insignficant is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be a part of the joint family property. [P 71 C 1, 2]

K. N. Katju and *M. N. Kaul*—for Appellant.

S. N. Sen, *G. S. Pathak* and *N. C. Tewari*—for Respondents.

Judgment.—The contest in this appeal is between two rival claimants to mortgagee rights under a deed dated 12th December 1913, executed by Chhadammi Lal, father of defendant 1, in favour of Sheo Adhar for a sum of Rs. 3,000. The position of the contending parties will be presently explained. Two suits were brought in the Court of the Subordinate Judge, Cawnpore, one by the present appellant, Suraj Kumar for enforcement of the aforesaid mortgage, and the other by the respondent, Mt. Chandra Kala, for the same purpose. The two suits were tried together. In the result a decree was passed in the suit brought by the respondent, Mt. Chandra Kala. The present appellant's suit was dismissed. The mortgagor has acquiesced in the decree passed against him. The present appeal was preferred by the appellant, Suraj Kumar and is directed solely against the respondent, Mt. Chandra Kala as regards her right to enforce the mortgage.

The following pedigree will explain the position of the parties inter se:

SADA NAND
(died in 1918)

Suraj Kumar (plaintiff-appellant)	Sheo Adhar (died 8th September 1923)

Sheo Kumar (died 25th September 1926) = Mt. Chandra Kala (defendant-respondent).

Jagat Narain
(died 27th September 1927)

It will be seen from the above pedigree that Sheo Adhar's branch has no male descendant left and that, on the death of Jagat Narain, the last surviving male descendant of his branch, his interests, whatever they might have been, devolved upon his mother, Chandra Kala, the defendant-respondent. The mortgage-deed in question was executed in favour of Sheo Adhar. The plaintiff-appellant's case, as set out in his plaint, is that he and Sheo Adhar were members of a joint Hindu family and that the mortgage in suit formed part of their joint family property, that after Sheo Adhar's death he and Sheo Kumar with his son, Jagat Narain, formed a joint Hindu family and that on the death of Jagat Narain, he is the sole surviving member of the family and therefore entitled to the mortgagee rights under the deed in question. As regards the defendant-respondent, Mt. Chandra Kala, he alleges that she is not entitled to anything, but maintenance, being the widow of a deceased member of the joint family.

The defendant, Mt. Chandra Kala, on the other hand, contends that the mortgage in suit belonged exclusively to Sheo Adhar, on whose death his interest devolved upon his son Sheo Kumar and, on the latter's death, on his son Jagat Narain, on whose death the mortgagee rights became vested in herself as the mother of Jagat Narain. It will thus appear that the principal question in the case is whether the mortgagee rights under the deed in suit belonged to a joint Hindu family consisting of Suraj Kumar and Sheo Adhar or to Sheo Adhar alone as his exclusive property. The defendant-respondent contested the plaintiff's claim on the ground that Sheo Adhar and Suraj Kumar were not members of a joint Hindu family and that, in any case, the mortgage in suit did not form part of the joint family property, assuming they had any.

The learned Subordinate Judge set down two main questions for decision: (1) whether the appellant, Suraj Kumar and Sheo Adhar together with his descendants, formed a joint Hindu family, and (2) whether the mortgagee rights in controversy belonged to such joint family. He found on the first question in favour of the plaintiff-appellant, holding that the joint family character of the family wich existed from the time of Sada Nand, never disappeared. But on the second question he arrived at a definite finding that the sum advanced under the mortgage-deed belonged exclusively to Sheo Adhar and that the plaintiff-appellant had no interest therein. The learned advocate for the defendant-respondents not only supported the decree of the lower Court on the ground on which it proceeds, but also by challenging the finding as regards the undivided character of the family. The whole case was thus open before us, and we shall proceed to record our findings on the two questions.

We may briefly dispose of the question whether the appellant and Sheo Adhar together with his descendants formed a joint Hindu family. We are clearly of opinion that the finding arrived at by the learned Subordinate Judge is a good one. It is not disputed that Sada Nand, whose ancestral house was in Narain Khera in the Unao District, possessed a small zamindari property, which belonged to him and his brothers. It is equally undeniable that Sheo Adhar and Suraj Kumar on their births, acquired an interest in such property, so that Sada Nand and his sons formed a joint Hindu family possessing ancestral property. Sada Nand was employed with a wealthy family possessing zamindari and other property in the Cawnpore District. After his death Sheo Adhar was appointed in his place. Later on Suraj Kumar was also employed in the same estate. Though the exigencies of their employments required that Suraj Kumar and Sheo Adhar should reside at different places, the ancestral property belonging to them was never divided. There is no allegation that any of them ever expressed an unequivocal intention to separate. It is in evidence that on ceremonial occasions they conducted themselves as if they were members of a joint Hindu family. In the absence of evidence showing an intention on the part of one or the other of the members to separate and the constitution of the family being consistent with the joint character thereof, the finding of the learned Subordinate Judge is, in our opinion, unassailable. Accordingly we uphold it.

The second question, which is of greater importance, has been hotly debated before us. A short history of the family and of the properties acquired by Sheo Adhar will materially help in appreciating the force of the circumstances relied on by one or the other of the parties. As already stated, Sada Nand was employed in the estate of Tewariji in the Cawnpore District. He was in receipt of a salary of Rs. 136 a year. It is common ground that, on his death in 1880, Sheo Adhar was appointed in his place on the same salary. He was however promoted to the rank of sarbarkar or manager of the estate in 1900 on a salary of Rs. 50 per mensem and Suraj Kumar was appointed in the place left vacant by Sheo Adhar's promotion. Suraj Kumar was in receipt of a salary of Rs. 160 a year. During the lifetime of Sada Nand no acquisition appears to have been made by any member of the family. Though the plaintiff has alleged that Sada Nand had some money-lending business, there is no evidence in support of that allegation. The plaintiff himself has no personal knowledge on his own showing. We do not think Sada Nand had any money-lending business, nor is there evidence to prove that Sada Nand left any cash. So far as the evidence indicates, the only property which existed in the family at the time of Sada Nand's death was his ancestral zamindari property in Narainkhera in the Unao District. It is in the evidence of the plaintiff himself that the net profits of this property did not exceed Rs. 50, which was shared by at least one collateral branch.

So long as Sheo Adhar occupied the position of his father as a "karinda" in receipt of a salary of Rs. 136 a year, he does not appear to have made any investment or acquired any immovable property. The first acquisition, which he appears to have made, was on 19th March 1907, when he purchased a share in village Amritpur for Rs. 2,500, that is to say, he acquired a share in Amritpur seven years after his appointment as "sarbarakar" or manager. On 4th March 1909, he lent Rs. 425 to a lady named Munnan on the security of some zamindari property in village Selhupur. This mortgage was with possession. On 28th June 1900, he advanced two sums of Rs. 2,000, each to two members of

the same family, who executed mortgage-deeds of that date. The next day, on 29th June 1909, he advanced another sum of Rs. 2,000 to another member of the same family. In all the three mortgage-deeds shares in village Newazi Khera were hypothecated. These mortgages probably merged in a sale-deed which however is not on the record. The khewat shows that Sheo Adhar had purchased a share in Newazi Khera.

The next acquisition was made in 1917, under a mortgage-deed, dated 14th July 1917, executed by one Abul Hasan in favour of Sheo Adhar and Suraj Kumar, the plaintiff-appellant, for a sum of Rs. 8,500. It will be seen that this is the first occasion when any acquisition was made in the name of both. As a matter of fact, this was the only occasion on which any property was acquired in the joint names of Sheo Adhar and Sheo Kumar. Mutation of names was effected in favour of Sheo Adhar in respect of all the property acquired under the deeds above referred to. There were numerous other deeds for smaller amounts standing in the name of Sheo Adhar. They were executed during the period ranging from 1916 to 1921. It is not necessary to give a detailed account of these transactions.

Sometime before 1918 a partnership business was started under the name and style "Parmatmadin Sheo Kumar." The exact date on which this firm commenced its business does not appear from the record; but it appears from the plaint of a suit instituted in 1921 that certain transactions to which the firm was a party had taken place as far back as 1918. That firm incurred a liability to pay Rs. 27,000 to a firm named Gopal Das-Har Narain of Bombay. The latter instituted a suit on the original side of the Bombay High Court on 18th July 1921, and obtained a decree on 3rd October 1922, for Rs. 32,000 odd. Sheo Adhar died in 1923. Execution of the decree was taken out in 1924 and satisfaction obtained partly by sale of Sheo Kumar's property and partly by sale of that of the other partner Parmatmadin.

After the death of Sheo Adhar, applications for mutation of names were made jointly by Sheo Kumar and the appellant Suraj Kumar in respect of Amritpur and Newazi Khera properties. We have already referred to the mortgage-deed in respect of Newazi Khera and as already mentioned a certain share in that village was subsequently sold to Sheo Adhar, who obtained mutation of names. After the death of Sheo Adhar, mutation of names in respect of Newazi Khera was also applied for by Sheo Kumar and Suraj Kumar. All the applications for mutation of names stated that the two applicants were the heirs of the deceased Sheo Adhar; mutation of names was accordingly ordered in terms of the applications, which are strongly relied on by the appellant as showing that the shares purchased by Sheo Adhar were, in fact, joint family property in which the plaintiff-appellant had an interest. It also appears that in appeal pending in this Court Sheo Adhar was a respondent and that Sheo Kumar made an application praying for substitution of his own name and that of Suraj Kumar as the legal representatives of his father, Sheo Adhar.

Besides the documents referred to above, there is a good deal of oral evidence produced by both parties. We may say at once that the oral evidence is of no value. Each set of the witnesses states in general terms either that the properties acquired by Sheo Adhar were joint family ones or that they exclusively belonged to Sheo Adhar. The question involved in this appeal, has therefore to be determined on the documentary evidence above referred to. We have referred to all the documents that throw any light on the question whether the mortgagee rights in dispute belonged to Sheo Adhar alone or to the joint family of which the plaintiff was also one of the members.

The case, as put forward on behalf of the plaintiff-appellant, was this: It is said that Sada Nand left some cash, that after his death Sheo Adhar and Suraj Kumar threw their earning in a common purse and had money lending business on behalf of the family, that all the properties acquried in the name of Sheo Adhar from time to time were, in fact, acquired with funds belonging to the joint family and that if any property was acquired with funds initially proceeding from Sheo Adhar, it was treated by him as joint family property, he having abandoned his separate interests therein. The conduct of Sheo Kumar in joining the plaintiff in the application for mutation of names in respect of Amritpur property and Newazi Khera and in applying for substitution of names in the appeal pending in this Court is relied on by the plaintiff-appellant as showing that the properties acquired in the name of

Sheo Adhar alone were, in fact, joint family properties. The application for substitution was accompanied by an affidavit in which it was clearly stated that Sheo Kumar and Suraj Kumar were members of a joint family with Sheo Adhar.

It cannot be disputed that there is no documentary evidence which bears directly on the question whether the mortgagee rights under the deed in suit belonged to the joint family, as alleged by the plaintiff. It is argued on his behalf that Sheo Adhar treated all properties standing in his own name as joint family properties and that the conduct of Sheo Kumar in associating with the plaintiff in applying for mutation of names affords evidence of the character of all properties acquired in the name of Sheo Kumar. On the other hand, it is explained on behalf of the defendant that the applications for mutation of names and the application for substitution of names in which Suraj Kumar's right was recognized, were made for an ulterior object. It is said that Sheo Kumar apprehended that his property would be attached in execution of the decree passed by the Bombay High Court and that therefore he attempted to make out that all the properties left by his father were joint family properties belonging to himself and his uncle. Whether this explanation holds good will be discussed subsequently. We desire to stress at this place that in any case, it would not be permissible to generalise from such admissions as may be implied in the applications for mutation of names and the application for substitution of names, that all the properties acquired by Sheo Adhar including the mortgage in question were joint family properties, assuming that such applications can be construed as containing an admission that the properties to which they refer are joint family properties.

The rule of Hindu law which is applicable to such cases is well settled. There is a presumption that a Hindu family is joint and undivided. There is however no presumption that a joint family is possessed of joint family property or that a particular property is joint family property, having been acquired with the aid of family funds. But where it is proved or admitted that a joint family possessed such nucleus as could lead to the acquisition in question, it may be presumed that the later acquired property belongs to the joint family, having been acquired with the aid of the nucleus. Mere existence of a nucleus however small or insignificant is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be a part of the joint family property. In the case before us, the ancestral property left by Sadanand was very small. The plaintiff admits that its income was spent on the maintenance of Mt. Maharani, the widow of a collateral. The profits of the entire property amounted to Rs. 50, a year. The share of Sadanand's Branch was Rs. 25, a year. It is obvious that the existence of nucleus of that character by itself could not have appreciably assisted in the acquisition of any property standing in the name of Sheo Adhar. The plaintiff has attempted to show that Sadanand had left some money, of which the amount is not known to him, that he himself used to hand over all his earnings to Sheo Adhar who became the head of the family after Sadanand's death and that Sheo Adhar himself threw his own earnings in the joint purse. We have already said that there is no reliable evidence that Sadanand left any money, nor are we prepared to accept the uncorroborated and improbable statement of the plaintiff that he handed over all his earnings to Sheo Adhar. His salary was Rs. 160, a year. He lived at a village named Shahjahanpur; his wife and mother also resided with him. He does not say that he had any other emoluments attached to his post or that he had any perquisites.

The learned advocate for the appellant has appealed to our knowledge and experience and has asked us to assume that the plaintiff must have earned a good deal more than his bare salary. While it may be notorious that karindas of zamindars supplement their salaries by improper means, we cannot act on any assumption of this character in arriving at a judicial finding, particularly when the plaintiff himself, who gave his evidence at considerable length, has not alleged that he earned anything more than his salary. We think that there is no foundation for the suggestion that there was any common purse in which the earnings of the plaintiff and Sheo Adhar were thrown. The plaintiff's salary was hardly enough for the maintenance of himself and his family. We have already mentioned that Sadanand occupied the position which the plaintiff subsequently did. We have also mentioned that there is no trace in the record of Sadanand

having made any investments or acquired any property. It is also clear from the evidence that so long as Sheo Adhar worked as a karinda in place of his father, he made no investments. The properties acquired by him were all acquired under deeds executed after 1907. We think it reasonable to infer that the plaintiff who occupied the same position as his father did and which Sheo Adhar occupied before he became the sarbarakar could not have saved anything to contribute towards what he calls "joint family funds."

It is argued on behalf of the plaintiff-appellant that the conduct of Sheo Kumar after the death of Sheo Adhar shows that some properties had been so acquired as to become joint family properties. Reliance is placed on the applications for mutation of names to which we have already referred. The applications taken at their face value contain the statement that Sheo Adhar was the owner of the property to which they refer and that after his death, such properties were inherited by his son Sheo Kumar and his half brother Suraj Kumar. This is palpably incorrect if Sheo Adhar was the owner of the property referred to in the applications for mutation of names. His half-brother could not be a co-heir with his son. It may be argued that this is only an inartistic way of saying that the properties belonged to a joint family consisting of Sheo Adhar and the plaintiff and that on the former's death his interests survived to his son and brother. It may be, that if Sheo Adhar is otherwise proved to have been in possession of the properties as head of a joint family and not in his individual capacity, the applications are susceptible of that interpretation. In the absence of such proof little weight can be attached to the applications.

Assuming that the applications contain such admission as is relied on by the plaintiff-appellant, it can be explained and rebutted. The only other person besides the plaintiff who could have revealed the circumstances in which they were made was Sheo Kumar who is not alive. But if it appears, as we think it does, that before the shares in Amritpur and Newazi Khera were acquired, the family was not possessed of joint funds or of such nucleus as could have led to the acquisition of those shares, the admission said to be contained in the applications for mutation of names is of very little weight.

The learned advocate for the respondents has drawn our attention to the contents of the affidavit which accompanied the application for substitution of names made in this Court. It is pointed out that ordinarily it is the duty of the appellant to make an application for substitution of names in the place of a deceased respondent. In this case it appears that Sheo Kumar made the application and made it a point to state in the affidavit that his deceased father together with his descendants and Suraj Kumar were members of a joint Hindu family and that he himself and Suraj Kumar were the surviving members thereof. Taken literally the admission proves no more than what has been found in the present case, viz., they were all members of a joint family. But the appellant relies on implications of that statement and would have us infer that the subject-matter of the appeal pending in this Court was joint family property. It should be borne in mind that men like Sheo Kumar cannot be credited with knowledge of the niceties of Hindu law. He might well have thought, unaided by legal advice, that all acquisitions made by Sheo Adhar became joint family property. The learned Subordinate Judge considered the explanation offered on behalf of the respondents that the admissions of Sheo Kumar were due to a desire on his part to save the property from attachment in execution of the decree passed by the Bombay High Court to be at least plausible, though he was not prepared to accept it so far as to warrant a definite finding that the admission was in fact dictated by that desire. We agree with him in that view. Taking into consideration the total absence of evidence showing such nucleus as could have led to the acquisition of the properties standing in the name of Sheo Adhar and the possibility that the admissions were made as suggested on behalf of the respondents or through misconception of the legal rights of Sheo Adhar and the plaintiff, we are of opinion that no weight should be attached to the admission, assuming that it amounts to an admission of the character given to it by the appellant.

The same considerations apply to a suit brought by Sheo Kumar and Suraj Kumar in 1926, on foot of a hundi in favour of Sheo Adhar. Similarly, a suit was instituted in 1929 by Suraj Kumar and Chandra Kala, the parties to this appeal. The plaint of that suit is relied on by both parties. The appellant points to the fact that the respondents considered him to be one of the per-

sons entitled to the money due under the hundi. The respondents on the other hand lay strees on the fact that if the money be considered to belong to joint Hindu family, she could not have had any interest in it and the plaintiff would not have joined her in instituting the suit. We are of opinion that a document of this character is wholly inconclusive and no weight can be attached to it as a piece of evidence.

Taking into consideration all the evidence, oral and documentary, and inference derivable from the circumstances of the case, we are of opinion that the learned Subordinate Judge arrived at a correct finding in holding that the mortgagee rights under the deed in question belonged to Sheo Adhar alone and that the plaintiff-appellant had no interest in it. This appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

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BAJPAI, J.

Ramratanlal and *others* — Defendants —Appellants.

v.

Gangotri Prasad and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 5 of 1932, Decided on 12th April 1934, from decision of Addl. Sub-Judge, Ballia, D/- 21st August 1931.

Hindu Law—Alienation — Widow — Deed purporting to be perpetual lease but amounting to gift — Consent of presumptive reversioners at the time — Reversioners alive at time of widow's death can challenge the transaction.

Where a Hindu widow executes a document which purports to be a perpetual lease of her zamindari property and the document is not only not supported by consideration but is for all practical purposes a deed of gift, then the reversioners of the widow's husband who are alive at the time of her death can challange the transaction, although at the time when the lease deed was executed the entire body of presumptive reversioners consented to it. A surrender, in order to be effective must be of the entire rights of the Hindu widow : 1914 *P C* 128 and 1918 *P C* 196, *Rel on.* [P 75 C 2]

Haribans Sahai, K. Verma and *Janaki Prasad*—for Appellants.

Sri Narain Sahai — for Respondents.

Judgment.—This is a second appeal by the defendants against whom the plaintiffs' suit for recovery of possession of the plaint property has been decreed by the Courts below. The facts are that one Mt. Anjora Kuar was the widow of Ram Rachha Lal and was, as a Hindu widow, possessed of a certain zamindari property and a house. On 18th February 1878, she executed a document which purported to be a perpetual lease in favour of her brother's son by which she leased out the zamindari property to him. Mt. Anjora Kuar died in October 1925. The plaintiffs who are the reversioners of Ram Richha Lal brought the present suit in 1929 for recovery of possession over the leased property and the house owned by Mt. Anjora Kuar. It is conceded by the appellants that so far as the house is concerned, the appellants cannot, in view of the findings of the Courts below, lay any claim and the suit has been rightly decreed regarding the same. It has however been strongly contended that the plaintiffs are not entitled to recover possession of the leased property. There is a pedigree given at the foot of the plaint and it is said that a perusal of the pedigree will show that when the lease was executed in 1878 the entire body of presumptive reversioners, namely Pyare Lal, Jagdamba Sahai, Naubat and Jawahar Lal consented to the lease. Pyare Lal who was the next reversioner actually drew up the document, presented it for registration and identified the lady before the Sub-Registrar. Naubat, Jawahar Lal and Jagdamba Sahai were attesting witnesses to the document. A translation of the lease has been given to me and from that it appears that the facts stated above are correct. There is a slight error in the names of the attesting witnesses inasmuch as Mohan Lal has been put down for Naubat, but there can be no doubt that Mohan Lal is a mistake for Naubat. It is then argued that the transaction, inasmuch as it was consented to by the entire body of presumptive reversioners, cannot be challenged at the instance of the reversioners who happen to be alive at the time of the Hindu widow's death.

The first question that arises for determination is to find out exactly the nature of the transaction evidenced by the document of 1878. The plaintiffs styled it a deed and the Courts below have come to the conclusion that the document is not supported by any consideration. The Court of first instance at issue 8 says as follows:

"It is obvious that the lease in question is without consideration and that the lady had no necessity to execute it."

The lower appellate Court on issue 2 says:

"In this case there was no valuable consideration paid at the time of the lease and hence the question of legal necessity did not arise."

I am also of the opinion that the document is not supported by consideration and is far all practical purposes a deed of gift. There is intrinsic evidence in the document itself for this conclusion. The lady after reciting her right in the property says:

"Chandi Prasad, my own brother's son of Bhiku Lal has been living with me like a son since the death of my husband. I have brought him up like a son and educated him. Having regard to the transitory state of life, it is necessary that I should execute an absolute document in his favour . . . . . I covenant that the said lessee shall remain in possession of all the rights aforesaid and out of Rs. 30 the fixed amount he shall pay Rs. 23-5-3 the Government revenue every year and pay Rs. 6-11-0 (the balance) of the assessed rent to me and my heirs and representatives year after year and he shall bring to his use the balance of the profits, produce or income . . . . I or my heirs and representatives shall have no kind of right or claim or dispute as regards the property, except realising the fixed amount of rent aforesaid nor shall we have a right at any time to make any enhancement or alteration in the fixed jama or cause any interference. If we do so, it shall be unlawful in Court."

The above passages in the document clearly indicate that the intention of the lady was to execute a permanent document in favour of her brother's son because of her natural love and affection for him and to bind herself and her heirs from ever obtaining reentry and to allow the lessee to appropriate the balance of the profits. The Government revenue of the property in a permanently settled District was Rs. 23-5-0 and the rent that was reserved exclusive of this Government revenue was only Rs. 6-11-0, the obvious inference is that there were appreciable profits in the year 1878, and and considerable profits at the present moment. The defendants in their written statement alleged that the value of the leased property should at least be fixed at Rs. 2,700. No premium was paid for the transaction. The finding of the Courts below that the transaction is not supported by consideration is therefore a perfectly sound finding.

It was contended by the appellants that as the document was executed with the concurrence of the entire body of presumptive reversioners, it cannot be avoided by the present plaintiffs. It is well settled that one reversioner does not claim through another and even if I were to hold that the transaction was consented to by all the reversioners then living, I cannot hold that the plaintiffs are estopped owing to the conduct of the consenting reversioners, even if they happened to be the ancestors of the present plaintiff. It is argued on behalf of the respondents that a look at the pedigree will show that there were quite a number of other persons who have not figured as attesting witnesses to the document and it cannot therefore be presumed that the entire body of presumptive reversioners attested the document. The reply of the appellants is that those persons were dead. There is no evidence on this point and the burden obviously was on the appellants to show that the other persons figuring in the pedigree were dead and the entire body of living reversioners consented to the transaction. Further on the authority of 1914 P C 90 (1), and the case of 1922 P C 20 (2), it is submitted on behalf of the respondents that mere attestation of a deed by itself does not estop any person from denying anything except that he has witnessed the execution of the deed, and knowledge of the contents of the deed ought not to be inferred from the mere fact of the attestation and mere attestation does not necessarily import concurrence. The contention of the appellants however is that the share of the lady was partitioned about the time when the document was executed and the other cosharers, when they figured as attesting witnesses, must be deemed to have knowledge of the contents of the documents and must be considered to have consented to the transaction, more so when the next reversioner Pyare Lal went so far as to scribe the document and to present it before the Sub-Registrar. There is considerable force in the contention of the respondents, but even if I were to assume that the concurrence of the reversioners has been proved, I am of the opinion, in view of what I have said before, namely, that the document was for all practical purposes a gift, the defendants are not entitled to resist the plaintiffs' suit.

If a sale or mortgage or any other alienation supported by consideration is effected by a Hindu widow with the concurrence of the entire body of presumptive reversioners then it cannot be challenged by the reversioner who might be living at the time of the

1. Har Kishen v. Kashi Prasad Singh, 1914 P C 90=27 I C 674=42 I A 64=42 Cal 876 (PC).
2. Pandurang Krishnaji v. Markandaya Tukaram, 1922 P C 20=65 I C 954 = 49 I A 16=49 Cal 334=18 N L R 1 (PC).

death of the Hindu widow not on the simple ground of the consent, but on the ground that that consent affords evidence of legal necessity or propriety of the transaction, and the alienee is relieved from the necessity, of proof, the burden being cast upon the reversioner to show that in fact there was no legal necessity for the transaction. Mr. Pandey on behalf of the appellants drew my attention to a passage in "Principles of Hindu Law" by Sir D. F. Mulla, Edn. 6, p. 189, where the learned author, while discussing the powers of a Hindu widow to execute a lease, says that she has no power to grant a permanent lease or a lease for long term so as to bind the reversioner unless it is justified by "legal necessity" or it is for "the benefit of the estate" or "made with the consent of the next reversioners," and relying upon that passage the argument has been that the third head "with the consent of the next reversioners" is distinct from the head of "legal necessity" and the head of "the benefit of the estate." With all respect for the learned author I am of opinion that this statement of law is a little loosely expressed, and the authorities which have been cited in support of this proposition in the book do not support the same. The ordinary rule is that a Hindu widow is entitled to alienate the property of the last male owner for legal necessity, that term not necessarily implying only a pressure or danger to the estate which has got to be averted, but also embracing possibly within its scope benefit to the estate. A Hindu widow therefore according to my view, is entitled to alienate the property when there is a danger to the estate and that danger has got to be averted or when in the exercise of due husbandry she finds it necessary to make the alienation in question. The consent of the next reversioners can only be evidence of the fact that there was such necessity or benefit to the estate and by proving such consent the transferee is not compelled to prove legal necessity aliunde. In the case of 1914 P C 128 (3), their Lordships of the Privy Council observed that:

"as against them (the reversioners) it is a fair inference from their conduct that they believed that the arrangement had been made in good faith, and that under such circumstances of necessity as would give it validity according to Hindu Law, and it has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

Again in the case of 42 Mad 523 (4), at p. 536, their Lordships of the Privy Council said as follows:

"The result of the consideration of the decided cases may be summarised thus : (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde and the "alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioner as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

It is therefore impossible to argue that mere consent would validate the transaction irrespective of the nature of the transaction. Indeed in 42 Mad 523 (4), their Lordships said at p. 537* that:

"Being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows therefore that the deed taken by itself cannot stand."

As stated before, the document of 1887, is not an alienation for value because no premium was paid for property of the value of Rs. 2,700 on the defendants' own showing and the profits which were to go to the lessor were out of all proportion to the profits that were to go to the lessee, and the entire phraseology of the document goes to show that it was intended to benefit the transferee for whom the lady had great affection.

It was then argued that the transaction of 1878 might be looked at from a different point of view. It might be said to be a surrender in favour of the next reversioner Pyare Lal and then a document of lease by Pyare Lal. There are two obvious answers to this contention. First of all the document is not couched in that manner. It is not a surrender of the next reversioner and then a lease by him in favour of the defendants' ancestors. Secondly, the lady obviously had other property,

3. Bijoy Gopal v. Girindra Nath, 1914 P C 128=23 I C 162=41 Cal 793 (PC).

*Page of 42 M—[Ed.]

4. Rangasami Goundan v. Nachiappa Goundan, 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (PC).

were openly sold at an auction to Indar Man whose son sold the property, claiming to be the unqualified owner thereof, to Sadiq Husain and Karimuddin. The latter transferred the same to Afridunnisa, who in her turn transferred it to the present defendant-appellant. There was no suggestion by any intermediate transferor that he was not the owner of the property. The application of Afridunnisa made to the Settlement Deputy Collector in 1902, definitely asserted that the sites belonged to her in full ownership. Both the plaintiff-respondents were parties to that application along with the rest of the proprietary body. The assertion of proprietary right by Afridunnisa was, therefore to their positive knowledge. The fact that her application was dismissed cannot, in any way, detract from her assertion of proprietary right. Subsequently she reiterated her right in the civil suit which she instituted. The fact that the suit was subsequently withdrawn is of no consequence. If she had not been in possession and had to bring a suit founded on the same cause of action, the withdrawal of the suit might have operated as a bar; but the fact of withdrawal cannot neutralize her assertion of proprietary title on that occasion. It is not disputed that Afridunnisa and, after her, the defendant-appellant have been in continuous possession of the lands in dispute. The plaintiffs have treated the defendant as a trespasser, though according to them he has been in possession without their consent from the date of partition at which part of the sites of the factories and houses was allotted to each co-sharer. As already stated they have not alleged that Ram Prasad or any of his successors attorned to the plaintiffs or their predecessors. In all these circumstances, I am of opinion that the possession of the defendant and his predecessors has been adverse at least since 2nd September 1902, when Afridunnisa applied to the Settlement Deputy Collector for entry of her name as proprietress.

The learned Additional District Judge laid tress on the fact that Sadiq Husain, the predecessor-in-interest of the defendant was recorded as a tenant of 11 years' standing in the khasra of 1308 Fasli, and again as a tenant of 33 years' standing in the khasra of 1333 Fasli. The learned Judge infers from these entries that the defendant is a tenant. In my opinion this inference is wholly unjustified in view of the plaintiffs' admission that the defendant, or his predecessor, never paid any rent and of the previous history of the case showing that the original occupier, Ram Prasad, was in possession of the lands in dispute as occupier of factories and houses. A person who is in adverse possession of specific plots of land in a mahal and has obtained no mutation of names has to be entered in the khasra as a tenant or occupier. There is no other column for persons in adverse possession against the recorded proprietor. In the absence of other evidence, the entry in the khasra would have been taken to be prima facie evidence of the fact that such occupier is a tenant, as he is recorded; but where the evidence shows all the circumstances in which he entered into possession, the entry cannot be accepted as proof of tenancy in the teeth of admitted facts and circumstances showing the contrary.

The learned advocate for the plaintiff-respondent complains that the lower Courts did not record finding on the question whether Aliganj is an agricultural village. In the findings of the Munsif I find that there is a reference to the evidence which establishes that Aliganj is a notified area administered by a committee of which one of the plaintiffs is the chairman. The question is not one which could be the subject of a separate issue though it is natural for the determination of the defendant's right by adverse possession. It is true the Additional District Judge did not consider this aspect of the case, but I do not think it necessary, in all the circumstances of the case, to remit an issue. The plaintiffs themselves admit that Aliganj is a "Qasba." It is in evidence that it is administered by a notified area, of which one of the plaintiffs is the chairman. Apart from this, a clear assertion of proprietary rights in 1902 by Afridunnisa, followed by more than 12 years' exclusive possession has perfected her right of ownership by adverse possession, even though Aliganj may not be considered to be an urban area or a "Qasba."

For the reasons stated above, I allow these appeals, set aside the decrees appealed from and restore those of the trial Court. The defendant shall have his costs throughout.

R.K. *Appeal allowed.*

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BAJPAI, J.

Ram Sahai and *others*—Applicants.

v.

Uttama Debi & others—Opposite Parties.

Criminal Revn. No. 533 of 1934, Decided on 12th September 1934, from order of Sess. Judge, Meerut, D/- 30th May 1934.

(a) Criminal P. C. (1898), S. 139—S. 139 (a)—Court is not under obligation to force particular party into civil Court—It has inherent power to stay proceedings.

There is no direction in S. 139 (a) as to which of the parties is to be directed to go to the civil Court. The Court is not directed to quash the proceedings altogether but to stay the proceedings. Nor is there any obligation on the Magistrate to force the opposite party or any particular party into Court. It is clearly within its inherent jurisdiction to stay those proceedings until the matter has been decided by a competent civil Court on such conditions as may seem to it fit in the varying circumstances of each case : 1929 *All* 220, *Foll.* [P 80 C 1]

(b) Criminal P. C. (1898), Ss. 133 and 143—Order under S. 133 binds only person against whom it is passed—Order under S. 143 cannot be passed against person not party to prior proceedings.

Section 143 contemplates the prevention of a repetition, or the continuance of a public nuisance by the party against whom an order under S. 133 has already been passed. There can be no doubt that an order under S. 133 binds the person against whom the order is passed and nobody else. Hence an order under S. 143 cannot be passed against a person who was not a party to the prior proceedings when order under S. 133 is passed : 1928 *All* 300, *Rel on.* [P 80 C 1,2]

S. B. L. Gaur and *K. D. Malaviya*—for Applicants.

Kumuda Prasad and *Vishva Mitra*—for Opposite Parties.

Order.—This is an application in revision by Ram Sahai and others against an order passed by a Magistrate under S. 139 (a), Criminal P. C., and confirmed by the learned Sessions Judge.

The facts may be briefly stated. One Srimati Uttama Debi, wife of Chaudhari Raghubir Narain Singh, is the owner of a kothi No. 5133 called the "Aziz Manzil" situate on the western Kutcherry Road in Meerut. After she had acquired this property one Bulaqi applied under S. 133, Criminal P. C., against one Ratan Lal, said to be a karinda of Srimati Uttama Debi, (it is however alleged before me by counsel for Srimati Uttama Debi that Ratan Lal is not her karinda but the karinda of her husband) for the removal of a pucca wall erected by Ratan Lal across a certain path which was alleged to be a public path in which the public had a right of way. It might be mentioned here that Srimati Uttama Debi was not a party to these proceedings. Notices of those proceedings were served on Ratan Lal by affixation and the learned Magistrate on 8th June 1932, passed an ex parte order ordering the demolition of the wall. The wall was subsequently demolished. In July 1933, a kachha wall was erected and the path was again obstructed with the result that an application was filed by eleven persons under S. 133, Criminal P. C., against Chaudhari Raghubir Narain Singh. Once again notice was served on Chaudhari Raghubir Narain Singh by affixation and on 18th July 1933, the Joint Magistrate ordered the wall to be demolished and the way to be opened. This order was carried out on 19th July 1933. Some time afterwards Srimati Uttama Debi petitioned the Magistrate that she was the owner of the kothi and she had no knowledge of the above proceedings and therefore the proceedings might be revived. The learned Magistrate re-opened the case on 7th August 1933, and the matter was referred to arbitration but the arbitration proved infructuous.

In 1934 the path was again blocked and this time it was blocked by certain brambles. The applicants before me applied to a Magistrate for taking proceedings under S. 133, Criminal P. C., against Srimati Uttama Debi, Chaudhari Raghubir Narain Singh and Ratan Lal. Srimati Uttama Debi in pursuance of the notice issued to her filed a statement and denied the existence of a right of way. The learned Magistrate commenced an enquiry on such denial under S. 139 (a), Criminal P. C., and came to the conclusion that there was reliable evidence in support of the denial. He therefore stayed the proceedings until the matter of the existence of such right was decided by a competent civil Court. He went a step further and directed:

"the applicant to proceed to obtain a declaration from the competent civil Court that there is a public right of way from the Western Kutcherry Road through the compound of kothi "Aziz Manzil" past the out-houses alongside Bulaqi's disused well across fields beyond this well to the west to join up with the recently constructed road to Rao Bahadur Girraj Singh's new house from the Roorkee Road, as shown in the plan filed by the applicant."

In revision the main contention of the applicants is that the learned Magistrate should not have directed any particular party to obtain a declaration from the civil Court. This contention is

supported by several authorities of this Court. In 1929 All 220 (1), Boys, J., observed that:

" there is no direction in S. 139 (a) as to which of the parties is to be directed to go to the civil Court but that appears to me to give rise to no real difficulty. The Court is not directed to quash the proceedings altogether but to stay the proceedings. Nor do I find any obligation on the Magistrate to force the opposite party or any particular party into Court. It is clearly within its inherent jurisdiction to stay those proceedings until the matter has been decided by a competent civil Court on such conditions as may to it seem fit in the varying circumstances of each case."

In 1930 All 658 (2), Dalal, J., quashed the order of the Magistrate by which a direction was given to a particular party to file a suit for declaration in a competent civil Court. In Cr. Ref. No. 333 of 1932 (5) decided on 13th July 1932, Bennet, J., modified the order of the trying Magistrate, by which the defendants were directed to establish their rights in the civil Court within three months of the order, by substituting the following order:

" The proceedings are stayeduntil the matter of the existence of such right has been decided by a competent civil Court."

I am in complete agreement with the views expressed by three learned Judges of this Court in the above cases.

It was further contended before me that the learned Magistrate should in the present case have taken proceedings under S. 143, Criminal P. C. The simple answer to this is that the learned Magistrate was not moved in this direction. The petition of the applicants, in so many words, asked for proceedings being taken under S. 133, Criminal P. C. Moreover, S. 143 contemplates the prevention of a repetition or the continuance of a public nuisance by the party against whom an order under S. 133, Criminal P. C., has already been passed. There can be no doubt that an order under S. 133, Criminal P. C., binds the person against whom the order is passed and nobody else. This was held in 1928 All 300 (4), Ashworth J., held that:

" an order under S. 133, Criminal P. C., and any order under the subsequent sections is an order against a particular individual."

It is therefore clear that no order could have been passed under S. 143, Criminal P. C., against Srimati Uttama Debi who was not a party in any earlier proceedings when orders under S. 133, Criminal P. C., were passed. As I said before, the first order under S. 133, Criminal P. C., was passed against Ratan Lal and the second order was passed against Chaudhari Raghubir Narain Singh and, even if Ratan Lal be held to be the karinda of Srimati Uttama Debi, a fact which is denied, an order passed against Ratan Lal cannot bind Srimati Uttama Debi. This was held by Niamatullah, J., in 1934 All 853 (5), the only difference being that in that case the learned Judge was considering the force of an order passed under S. 145, Criminal P. C., and it was held that when the real dispute was between the matter of the complainant and another person and if the Court issued notice to the agent and the case proceeded between the agents then the master was not bound. A subsidiary question was argued before me and it was to the effect that the learned Magistrate had no jurisdiction to re-open the proceedings on 7th August 1933, on the application of Srimati Uttama Debi, when an absolute order was passed on 18th July 1933, against Chaudhari Raghubir Narain Singh and the order was actually carried out on 19th July 1933. This matter does not necessarily arise in the present proceedings, but for the benefit of the Subordinate Courts I might mention that an order passed by a Criminal Court is not liable to be reviewed. It is true that the application for revival was made by Srimati Uttama Debi on the ground that she was not a party to the proceedings, but the proper order to pass on such an application was to say that she was in no way bound by the order dated 18th July 1933, and not set aside that order (when that in effect had been carried out) and to direct the matter to be referred to arbitration. There can be no doubt that the learned Magistrate was satisfied that there was reliable evidence produced by Srimati Uttama Debi which, in the opinion of the Magistrate, satisfied him that the denial made by Srimati Uttama Debi, was well founded in the circumstances of the case, and it is not possible for me in revision to interfere with the view of the learned Magistrate on this point.

1. Manohar Singh v. Emperor, 1929 All 220= 116 I C 786=30 Cr L J 670.
2. Rozan v. Emperor, 1930 All 658=1930 Cr C 907=125 I C 452=31 Cr L J 839=52 All 592.
3. Haji Rahmat v. Municipal Board, Ghaziabad, Cri Ref No. 332 of 1932 decided on 13th July1932.
4. Jugul Kishore v. Emperor, 1928 All 300= 108 I C 565=29 Cr L J 445.
5. Peare Lal v. Emperor, 1934 All 853=1934 Cr C 1043=152 I C 500.

The result is that I allow this application to this extent that for the order passed by the learned Magistrate I substitute the following order:

"The proceedings are stayed until the matter of the existence of such right has been decided by a competent civil Court."

K.S. *Application allowed.*

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NIAMATULLAH AND COLLISTER, JJ.

M. Maqbul Ahmad—Plaintiff— Appellant.

v.

Mt. Fatma Bibi and *others* — Defendants—Respondents.

Second Appeal No. 388 of 1933, Decided on 3rd September 1934, from decision of First Sub-Judge, Saharanpur, D/- 8th December 1932.

Civil P. C. (1908), O. 2, R. 2— Cause of action refers only to grounds set forth in plaint —It has no relation to defence or relief asked — Plaintiff's claim for contribution of expenses in Privy Council case without reference to having acted as manager or agent of defendant—Alternative relief based on having acted as manager — Previous suit based solely on either ground—Second suit is barred to extent of alternative relief.

The cause of action of a suit has no relation whatever to the defence which may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at conclusion in his favour : 16 *All* 165 and 16 *Cal* 98, *Rel on.* [P 82 C 1, 2]

The ground of the plaintiff's action was the liability of the defendant to contribute towards liability of the defendant towards the expenses of a Privy Council appeal and the costs paid to the opposite party and had no reference to the plaintiff having acted as a manager to the defendant. In a previous case, the ground on which the plaintiff had claimed rendition of accounts, was that in the discharge of his duties as manager or agent he spent certain sums of money for his principal and was therefore entitled to recover them from the latter :

Held : that in the second case the plaintiff did not allege and it was not necessary for him to allege that he acted as manager or agent on behalf of the defendant and hence the two grounds of claim were wholly different. But as there was no difference between the ground on which the previous suit was based and the plaintiff's allegation in para. 2 of the plaint in the second suit, where he alleged that he managed the affairs of the defendant and had to pay costs of Privy Council appeal, the second suit, so far as it was based on the alternative ground contained in plaint, was barred by O, 11, R. 2, Civil P. C. [P 82 C 2]

P. L. Banerji and *Shiva Prasad Sinha* —for Appellant.

Akhtar Husain Khan — for Respondents.

Judgment.—This is a plaintiff's appeal and arises from a suit brought by him for recovery of Rs. 2,764-5 on certain allegations which will be presently mentioned. Both the lower Courts dismissed the suit in respect of some items on the preliminary ground that it is barred by O. 2, R. 2, Civil P. C. It is said that the plaintiff might and ought to have included this part of his claim in the subject-matter of the previous action.

The plaintiff and his deceased brother Nehal Ahmad were joint owners of certain properties which do not appear to have been divided. Nehal Ahmad died sometime before 24th November 1924, leaving a number of heirs, some of whom were minors. The plaintiff managed the entire property and all the affairs of the family on behalf of himself and the heirs of Nehal Ahmad. He instituted a suit on 30th August 1929, against the heirs of Nehal Ahmad for rendition of account. His case was that the disbursements being set off against the income which he received as manager on behalf of the defendants, a certain sum of money would be found due to him which he was entitled to recover from them (the defendants). It does not appear from the paper-book whether the suit was decreed to any extent. We are however informed by the learned counsel for the respondents that the suit was eventually compromised.

The suit, which has given rise to the present appeal, was instituted by the appellant on 8th December 1930. It was alleged in the first two paraphs of the plaint that the plaintiff and Nehal Ahmad entered into an agreement with Mahmud Hasan and Mt. Quraishi Begam, under which the latter promised to sell a certain village to the former but that the promisors, in breach of the agreement sold the property to one Saadat Ali. Thereupon the plaintiff and Nehal Ahmad instituted a suit for specific performance of the contract for sale. Their suit was decreed by the Court of first instance but dismissed by the High Court. A further appeal to the Privy Council was unsuccessful. The plaintiff alleges that he had to defray all the expenses of the Privy Council appeal and had, besides, to pay the costs of the opposite party awarded against

himself and Nehal Ahmad. Accordingly the plaintiff claimed certain items, which represent the share of Nehal Ahmad, his co-promise under the agreement of sale. The plaintiff goes on to allege, in para. 3 of the plaint, that he managed all the joint affairs of the heirs of Nehal Ahmad and of himself and had to pay the entire costs of the Privy Council appeal, implying that he is entitled to receive what he spent on behalf of Nehal Ahmad and his heirs.

Both the lower Courts have held that the plaintiff's cause of action in respect of the present claim is identical with that in the earlier suit. It seems to us that the lower Courts gave undue importance to the allegations contained in para. 3 of the plaint already referred to. As we read the plaint, the main ground on which the plaintiff claims relief is that he and Nehal Ahmad were joint promisees under an agreement of sale and that the plaintiff, having defrayed the costs of the Privy Council appeal and paid the entire costs awarded to the opposite party, is entitled to be reimbursed by the heirs of Nehal Ahmad to the extent of their shares. In other words, he professes to claim contribution by one who was jointly interested with him in making certain payments which he alone had to make. The reference in para. 3 of the plaint to the plaintiff being the manager of the affairs of Nehal Ahmad's heirs may either be considered to be wholly superfluous, or was intended to form an alternative ground for the relief claimed by the plaintiff. If it is superfluous, it may be ignored. If it was intended as an alternative ground for the same relief, we think that, so far as the plaintiff's suit is based on that ground, it is barred by O. 2, R. 2, Civil P. C. It does not however follow that the plaintiff's suit, which is mainly based on the allegations contained in the first two paragraphs of the plaint, should be dismissed altogether.

The plaintiff's cause of action disclosed in the first two paragraphs of the plaint, is totally different from the cause of action on which the earlier suit was based. The expression "cause of action" is sometimes understood to imply merely the infringement of a legal right. It has however a much wider significance. It was defined by a Full Bench of this Court in 16 All 165 (1), as implying every fact which it would be necessary for the plaintiff to prove if traversed in support of his right to the judgment of the Court. Similarly, it was observed by their Lordships of the Privy Council in 16 Cal 98 (2), that:

"the cause of action has no relation whatever, to the defence which may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

Now, in the case before us, the ground of the plaintiff's action is the liability of the defendant to contribute towards the expenses of the Privy Council appeal and the costs paid to the opposite party. It has no reference to the plaintiff having acted as the manager or agent on behalf of Nehal Ahmad or his heirs. In the previous case the ground, on which the plaintiff had claimed rendition of account, was that in the discharge of his duties as manager or agent he spent certain sums of money for his principals and was therefore entitled to recover them from the latter. So far as the main ground of the plaintiff's action is concerned, he does not allege and it is not necessary for him to allege that he acted as manager or agent on behalf of the defendant. It is clear to us that the two grounds of claim are wholly different. There is however no difference between the ground on which the previous suit was based and the plaintiff's allegation in para. 3 of the plaint in the present case. As already stated, the plaintiff's suit, so far as it is based on the alternative ground contained in para. 3 of the plaint, is barred by O. 2, R. 2, Civil P. C.

We may make it perfectly clear that the view that the plaintiff's claim is based on the ground mentioned on paras. land 2 of the plaint does not imply that the plaintiff is necessarily entitled to succeed on that ground. The lower Court will have to decide all the issues arising in the case, including the one raised by the defendants in reference to the plaintiff's right to succeed. It will be open to defendant to show that the plaintiff is not entitled to succeed on the ground mentioned in paras. 1 and 2 of the plaint. All we decide at the present stage is that the plaintiff's claim, so far as it is based on the allegations found on

1. Murti v. Bhola Ram, (1894) 16 All 165= 1894 A W N 65 (FB).

2. Chand Kour v. Partab Singh, (1889) 16 Cal 98=15 I A 156=5 Sar 243 (PC).

paras. 1 and 2 of the plaint, is not barred by O. 2, R. 2, Civil P. C.

The result is that we allow this appeal with costs, set aside the order of the lower Court and remand this part of the case to the Court of the first instance for disposal on the merits. The court-fee shall be refunded. The cross-objection is dismissed with costs.

R.K. *Appeal allowed.*

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SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Daljit—Defendant—Appellant.

v.

Kacheru and *others*—Plaintiffs—Respondents.

Second Appeal No. 56 of 1931, Decided on 13th August 1934, from decision of Dist. Judge, Meerut, D/- 11th December 1930.

Agra Tenancy Act (3 of 1926), Ss. 242, and 271—Dispute between parties one of proprietary right—S. 271, Expl. 2, does not apply to case where proprietary right itself is in dispute between parties—Plaintiff alleging defendant's possession as trespasser—Claim resisted—S. 242, held governed case—Appeal from decision of Assistant Collector held lay to District Judge.

Where the dispute between the parties is one of proprietary right, the plaintiff denying that the defendant had any proprietary interest whatsoever, while the defendant asserts that he had, a question of proprietary right is in issue between the parties, S. 271, Expl. 2 does not apply to a case where the proprietary right itself is in dispute between the parties. It applies to a case where, land being in the actual possession of a proprietor, the question is whether such proprietor, holds it as his sir or khudkasht or as tenant or sub-tenant. For the explanation to be applicable it must be an admitted fact between the parties that the land is in the actual possession of a proprietor. Where these facts are not admitted, Expl. 2 would not apply, and in such an event the body of S. 271 would be applicable. The fact that the defence is that the defendant holds land as khudkasht is not sufficient to bring the case within the explanation when the plaintiff is denying the defendant's title as a cosharer and the defendant is setting up such title. [P 85 C 2]

K alleged that under a registered deed of 14th June 1917, an arrangment had been arrived at between him and *A* under which certain plots were divided between them. *K's* case was that by virtue of this agreement he became the owner of the plots in suit and *D* was holding them without his consent and was in possession as a trespasser. *D* resisted the claim. He pleaded that as after the execution of the aforesaid deed there had been no partition of plots through the Revenue Court. *K* was not entitled to maintain the suit. The suit was thrown out by Assistant Collector who tried it. Against his decree there was an appeal to the District Judge who came to the conclusion that *K* was entitled to a decree and he accordingly decreed the appeal :

Held : that S. 271 did not apply to the case and that the case was governed by the general provisions of S. 242 under which in any case in which a proprietary question was involved an appeal would lie to the Court of the District Judge. [P 85 C 1]

S. B. L. Gaur—for Appellant.

L. M. Roy—for Respondents.

Rachhpal Singh, J.—This is a second appeal arising out of a suit instituted by the plaintiff under the provisions of S. 44, Agra Tenancy Act.

The plaintiff alleged that under a registered deed of 14th June 1927, an arrangement had been arrived at between him and the defendant under which certain plots were divided between them. The plaintiff's case was that by virtue of this agreement he became the owner of the plots in suit, and the defendant was holding them without his consent and was in possession as a trespasser. The defendant resisted the claim. He pleaded that as after the execution of the aforesaid deed there had been no partition of plots through the Revenue Court, the plaintiff was not entitled to maintain the suit. The suit was thrown out by the learned Assistant Collector who tried it. Against his decree there was an appeal to the District Judge of Agra who came to the conclusion that the plaintiff was entitled to a decree and he accordingly decreed the appeal.

The principal question for consideration in this appeal is whether an appeal to the Court of the District Judge was competent. In order to decide the question we have to bear in mind that we find that the deed was executed by the parties under the terms of which the plots in suit were allotted to the plaintiff. The effect of the deed was that the parties exchanged some plots among themselves. They were cosharers before but under the terms of the deed each of them agreed to hold certain plots exclusively. The deed was registered and it conferred a title upon the plaintiff in respect of the plots. The position of the defendant after the execution of the deed was that he was holding the plots without the consent of the landholder and his possession was that of a mere trespasser who was liable to be ejected under the provisions of S. 44, Agra Tenancy Act.

The question for consideration is whether in a case like this the appeal

lay to the District Judge. S. 242, Cl. 3, runs thus:

"In addition to the provisions of S. 271, an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class or of a Collector in all suits, except suits under Ch. 11, in which (a) a question of proprietary right has been in issue between the parties claiming such right in the Court of first instance, and is in issue in the appeal, (b) a question of jurisdiction has been decided and is in issue in the appeal."

According to this clause where the question of proprietary right has been in issue between the parties claiming such rights in the Court of first instance, and is in issue in appeal or a question of jurisdiction has been decided and is in issue in appeal, an appeal shall lie to the District Judge. At this stage it is necessary to consider what is the meaning of the expression "In addition to the provisions of S. 271" used in Cl. 3 of S. 242, Agra Tenancy Act. To me it appears that the meaning of this expression is that if a case comes within the provisions of S. 271, then the question as to whether an appeal lies to the District Judge or to the Commissioner will depend on the procedure adopted in the case. S. 271, provides that if in any suit or application filed in a Revenue Court against a person alleged to be the plaintiffs' tenant or under S. 44, the defendant pleads that he is not a tenant, but has a proprietary right in the land, and this question has not already been decided, then the Courts are enjoined to follow the procedure laid down in that section.

The Revenue Court shall frame an issue on the question of the proprietary right and submit the record to the competent civil Court for the decision of that issue. The civil Court shall decide the issue and send its findings on that issue to the Revenue Court. The Revenue Court shall then proceed to decide the suit accepting the findings of the civil Court on the issue referred to it. Sub-Cl. 4, S. 271, Agra Tenancy Act, runs as follows:

"Every decree of a Revenue Court passed in a suit in which an issue involving a question of proprietary right has been decided by a civil Court under sub-S. 2 of this section shall . . . (a) If the question of proprietary right is in issue also in appeal, be appealable to the civil Court which has jurisdiction to hear appeals from the Court to which the issue of proprietary right has been referred, (b) if the question of proprietary right is not in issue in appeal, be appealable to the Revenue Court."

This sub-clause presupposes two things: one is that issue regarding proprietary title was referred to the civil Court, and the other is that there has been findings on it. It may be that when an issue is sent down to the civil Court, it may come to the conclusion that a question of proprietary right is involved in the case. In that case an appeal would lie to the civil Court, that is to say, the District Judge, or it may be that the civil Court's finding may be that no proprietary right was involved in the case in which case the appeal lay to the Revenue Court. Before the provisions of S. 271, Agra Tenancy Act, can be applied, it is to be proved that the case comes within the purview of that section. We find that in Cl. 1, S. 271, the expression used is where:

"The defendant pleads that he is not tenant but he has a proprietary right"

This is to be read with Expl. 2 attached to that section which is as follows:

"A question of proprietary right does not include the question whether land in the actual possession of a proprietor thereof is held by such proprietor as his sir or khudkasht or as a tenant or subtenant."

Now ordinarily where a man says that he is in actual possession as proprietor, and is holding the land as his khudkasht or sir then it may be said that the question of proprietary right is involved, but it appears to me that for some reason an arbitrary rule of law has been made by the legislature that for the purposes of considering whether a case comes within the provisions of S. 271 where a defendant says that he has co-sharer and holds the land as his khudkasht or sir then this will not be considered as a question of the proprietary right. The reason is that in some of the decided cases which are found noted in Agarwala's Agra Tenancy Act, 1933 edition, p. 705 in note 2, it had been held that a plea of this nature involved a question of proprietary right. The legislature changed the law with the result that those rulings are no longer good law. In the case before us the plea raised by the defendant was that he was a co-sharer in the village and was holding the plots as his khudkasht. Explanation 2 to S. 271 clearly shows that such plea will not be taken as involving a question of proprietary right. So it must be held that S. 271, Agra Tenancy Act, has no application to the case.

The plea that an appeal does not lie to the High Court cannot be accepted. That plea could have been valid only if it had been shown that question of proprietary title within the

meaning of S. 271 was involved in the case. But I have already mentioned S. 271 is not applicable because explanation 2 of that section is opposed to the contention raised by the learned counsel for the appellant. Reliance was placed on behalf of the appellant on 1928 All 764 (1). I do not think that that case can be of any help to the appellant. The learned Judge in their judgments say that having regard to the provisions of S. 271, Explanation 2, Agra Tenancy Act:

"The question involved in the case is not on of proprietary title, the appeal therefore lay to the Commissioner not to the District Judge."

It appears to me that the learned Judges assumed that a plea of proprietary title has been raised within the meaning of S. 271, Agra Tenancy Act, and had been found against the defendant therefore they were of the opinion that the appeal lay to the Commissioner. In order to make the above mentioned decision applicable, it is necessary to establish the following points: (1) that the defendant raised a question of proprietary title, that matter was referred to the civil Court (2) that Court held that no question of proprietary title was involved in that case. Under these circumstances appeal would lie to the Commissioner. But the facts of the cases before us are altogether different. Here in view of Expl. 2, S. 271, Agra Tenancy Act, it cannot be said that the question raised by the defendant was one of proprietary title. This being so, S. 271 has no application to the case. The present case would be governed by the general provisions of S. 212, Agra Tenancy Act, under which in any case in which a proprietary question is involved an appeal would lie to the Court or the District Judge. The difference has to be clearly understood. The term proprietary title is very wide. but somehow, the legislature had decided that for the purposes of S. 271 the raising of a question men- Act. and had been found against the sidered to be such a question in order to bring the case within the provisions of S. 271. It may seem a sort of anomaly that for the purpose of bringing the case within S. 242 we should hold that a particular plea gives rise to the consideration of a proprietary title, but for the purpose of S. 271 a particular form of an assertion of a proprietary title will not be deemed, in view of Expl. 2, to be one in which a question of proprietary title has been raised. But this is in accordance with the law as laid down by the legislature in Expl. 2 and so the Courts have to fellow the law as it stands. In view of Expl. 2 defendant-appellant can never argue that his case was governed by S. 271, Agra Tenancy Act.

Another contention raised was that the alleged partition was invalid and ineffectual unless it was confirmed by a competent authority. A reference was made to the provisions of S. 131, U. P. Land Revenue Act. This contention has no force. Ch. 7, Land Revenue Act, is applicable to the partition and union of mahals and it does not in any manner affect the rights of co-sharers to enter into a binding agreement under which they may agree to hold certain plots exclusively.

In my opinion the appeal in this case rightly lay to the District Judge. I would accordingly dismiss the appeal with costs.

Sulaiman, C. J.—I fully agree that S. 242 (3) directly applied to this case. The dispute between the parties was one of proprietary right, the plaintiff denying that the defendant had any proprietary interest whatsoever, while the defendant asserted that he had. In these circumstances it seems obvious that a question of proprietary right had been in issue between the parties in the Court of first instance and was in issue in appeal.

Strictly speaking S. 271 has no application to the question whether an appeal lay to the District Judge or not. But I agree that Expl. 2 to that section would never apply to a case where the proprietary right itself is in dispute between the parties. It applies to a case where, land being in the actual possession of a proprietor, the question is whether such proprietor, holds it as his sir or khudkasht or as a tenant or sub-tenant. For the explanation to be applicable it must be an admitted fact between the parties that the land is in the actual possession of a proprietor. Where these facts are not admitted. Expl. 2 would not apply, and in such an event the body of S. 271 would be applicable. The mere fact that the defence is that the defendant holds land as a khudkasht is not sufficient to bring the case within the explanation, when the plaintiff is denying the defendant's title as a co-sharer and the defendant is setting up such title. It is further to be noted

1. Net Ram v. Hargovind, 1928 All 764=113 I C 755.

that an appeal lies to the District Judge under S. 243 (3) in addition to the provisions of S. 271. I may also add that no plea has been taken in any of the Courts below nor is it taken before us that the Revenue Court should have framed an issue and sent it to the civil Court for determination. Had such a plea been taken it would have been for the trial Court to say whether there was a previous decision of a Court of competent jurisdiction or not. In any case, when all the materials were before the District Judge and an appeal lay to him he would have been competent to dispose of the appeal under S. 268 of the Act.

As to the question of the supposed partition, the position is equally clear.

It is not the plaintiff's case that there has been a Revenue Court partition within the meaning of Chap. 7, Land Revenue Act, which has spilt up their liabilities for the payment of Government revenue. All that has happened under a registered agreement is that the interest of one party has been extinguished in one plot in lieu of the extinction of the right of the other party in another plot. The transaction is more of the nature of an exchange than a Revenue Court partition. The lower appellate Court was therefore justified in recording a finding that the defendant has lost all interest as proprietor and that the plaintiff is the proprietor under this registered deed. The plaintiff can therefore treat the defendant who is holding on possession without his consent as a trespasser without title.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

R.K. *Appeal dismissed.*

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KENDALL, J.

Gorakh Nath and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 546 of 1934, Decided on 22nd October 1934, from order of Sess. Judge, Fatehpur, D/- 26th June 1934.

Criminal Trial—Accomplice—Independent evidence is necessary for conviction—It need not be direct — Circumstantial evidence is sufficient.

The evidence of accomplices is always open to suspicion and their statements should only be accepted if there is independent testimony of them which affects the accused by connecting or tending to connect them with the crime. The independent evidence need not be direct evidence, it is sufficient if it is merely circumstantial evidence but there must be such evidence, and it must be reliable : *King* v. *Baskerville*, (1916) 2 *K B* 658, *Rel on.* [P 89 C 1, 2]

Kumuda Prasad and *Ram Narain Verma*—for Appellants.

S. M. Misra—for Respondents.

Government Advocate—for the Crown.

Judgment.—Of the three appellants Baijnath has been convicted of offences under Ss. 380 and 414, Penal Code, and sentenced to two years' rigorous imprisonment under each. The other two appellants, Gorakh Nath and Sarju Singh have been convicted of offences under S. 414 and sentenced to two years' rigorous imprisonment, and all the three appellants have also been convicted under S. 120-B, Penal Code, and sentenced to two years' rigorous imprisonment under this section as well. The sentences are all concurrent.

The case for the prosecution is that Baijnath stole a package of Rs. 1,800 in Government currency notes from the safe of one Sat Narain, who is the local agent at Bindki, Fatehpur District, for the firm of Ramjiawan Munni Lal of Calcutta. The notes were missed soon after they were taken, and Baijnath, on whom suspicion fell, made two confessions in the presence of some witnesses, but retracted them. He afterwards dug up the notes from a field and gave some of them to Gorakh Nath, the appellant, and some to Babu Lal a witness, who says that he handed them over to Sarju Singh, appellant. Such in a very brief form is the story of the offence which has been held to be proved by the Sessions Judge. The evidence is however complicated, and the judgment, though very full, contains a good deal of unnecessary matter. The case for the prosecution falls naturally into two parts: firstly, the circumstances relating to the theft of the notes and the way in which suspicion fell on Baijnath and secondly, the production of the notes by Baijnath in the presence of Gorakh Nath and Babu Lal, who is said to have handed them over to Sarju Singh. The first part is supported by the statements of witnesses who appear to have been reliable and whose evidence has not been shaken in cross-examination. The second part largely rests on the evidence of Babu Lal, who as I shall show, must be regarded practically as an accomplice, so that his evidence has to be scrutinised extremely carefully in every detail and corrborated in such a way as to prove

not only that the offences were committed, but that each of the present appellants took part in them or some of them.

Sat Narain, who is really the complainant made a statement to the following effect. On 8th January 1934, about 7 or 8 p. m., he put notes to the value of Rs. 1,840 in his iron safe. Of course Rs. 1,800 were done up in one bundle. When he put the notes away Raja Ram his "munib," Baijnath the appellant and Deokumar Chaubey were present. Deokumar, like Baijnath had come to Bindki on business and had been staying at Sat Narain's shop for about two months. The iron safe itself was shut by a padlock which has a single lock. There is however an inner lock to the safe, and the key of this was put in a separate box, and this box was also locked. The key of the padlock of the safe and that of the wooden box were tied to the "janeo" which Sat Narain was wearing, and this he explains was his ordinary practice. After locking the money away Sat Narain went to sleep on what is called the "gaddi" of his shop and Baijnath and Deokumar also went to sleep there. Next morning Sat Narain and Beokumar went to the bazar leaving Baijnath alone in the shop. At about 3 p. m., Sat Narain returned; and as he wanted to get money out of the safe, he searched for his keys, but found that they had disappeared from his "janeo." He ordered a search and attended to other business. He evidently at first did not suspect that anything had been taken out of the safe. At about 8 p. m., however he sent for a "mistri" to break it open and then he found that the bundle concontaining Rs. 1,800 in notes had disappeared, whereas all the other money and valuables in the safe remained intact. Baijnath was present when the safe was broken open. On realising his loss Sat Narain consulted Sheobalak, a military pensioner, who lives on the premises and appears to be a man of character and respectability. Sheobalak took up the inquiry, and after he with Sat Narain, Deokumar, Baijnath and Raja Ram Munib had gone to the upper story he pointed out that the money must have been taken by someone in the shop, and recommended whoever had taken to return it, otherwise there would be trouble with the police. Sheobalak appears to have suspected Baijnath, who at first denied having taken the notes, so that the others left him on the upper story with Raja Ram "munib" for a time. Presently Raja Ram called Sheobalak back. From this stage the story is taken up by Sheobalak. He says that he went back to the shop, when Baijnath fell at his feet and confessed that he had made a great mistake and promised to hand over the notes to Sheobalak, but implored him not to go to the police. In answer to an inquiry he further confessed that he had put the notes in the shop of Jaidayal Madangopal. Raja Ram, the "munib," it should be mentioned, was present when Baijnath made his confession, and went along with the other two. When they arrived at the "kothri" outside the gate of Jaidayal Madangopal they found that Sarju Singh, the appellant, and Babu Lal were taking food inside. They appeared to be surprised, but both came out to meet the visitors and then all went in together. Sheobalak told Sarju Singh and Babu Lal what had happened, and Baijnath caught Sarju Singh by the hand and took him aside and said something to him which the others could not overhear. Sarju Singh, however told Baijnath to give back the notes if he had taken them.

On this Baijnath denied that he had taken the notes. Sheobalak said that he must pay the money or go to the police. After a good deal of hesitation Baijnath asked Sheobalak to wait for five minutes and went to talk with Sarju Singh again. However nothing came of it, and Sheobalak took him towards the "thana" accompanied by Sat Narain and Raja Ram. When they reached the "thana" Baijnath said that he had handed the notes over to Girdhari in the firm of Baldeo Prasad Debi Dayal and the party therefore proceeded to that shop. But Girdhari denied that he had to do anything with the notes. Raja Ram and Sheobabalak again started to take Baijnath to the "thana." On the way they met Gorakh Nath, Constable, the appellant, who asked them to hand over Baijnath to him for half an hour, assuring them that within that period he would return with him and the notes for Rs. 1,800. Sheobalak was very unwilling to do so, but on Gorakh Nath swearing on oath to the effect that he would bring Baijnath and the notes, he allowed Gorakh Nath to go away with Baijnath. At the end of an hour, when Gorakh Nath did not return, Sheobalak again went to the "thana"; and Gorakh Nath coming out told him that the "work was complete" and that he should wait for another half hour.

Sheobalak came away, and again after waiting fruitlessly for an hour went to the "thana." It was now about 1 or 2 a. m. He learnt that Gorakh Nath was no longer at the "thana," so he went back to his room. Before sunrise Sat Narain and Raja Ram came to inquire as to progress, and Sheobalak told them what had happened, and asked them to go to the Post Office to find out if any Benares man had sent an insured letter or money order. As he was waiting in the verandah, however Sheobalak saw a man in a green "chadar" going to the Post Office, and suspecting that it was Baijnath he went after him and met him near the Post Office. He recognized him as Baijnath and tried to catch him but Baijnath ran away towards the "thana" leaving his "chadar" in Sheobalak's hands. The latter pursued Baijnath who was stopped and asked him where he had been all the night. Baijnath replied that he had been in the bungalow of the Sub-Inspector. He also said he did not know Gorakh Nath. Sheobalak then spoke to the Sub-Inspector and reported the story. When he named Gorakh Nath, the Sub-Inspector did not wish this to be recorded, because he was a Constable; but Sheobalak insisted. As Gorakh Nath had gone out they waited for his return. He returned at about 10 a. m., Gorakh Nath denied all knowledge; but when Sheobalak repeated his story, he "hung down his head and stood silent." The report was then written in full by the the Sub-Inspector at Gorakh Nath's dictation, and is Ex. A, on the record. It is easy to understand from the above how it came to be dictated by Sheobalak, and not by Sat Narain, the victim of the theft. Sheobalak also explained that he was afraid that Baijnath would make a report against him, as in fact he had done. It will be seen that the report accuses Baijnath of the theft, and also accuses Gorakh Nath of failing to fulfil his promise to bring Baijnath and the money to him, but it does not in terms suggest that Gorakh Nath himself had been a party to the theft or the concealment of the notes, nor does it make any complaint against Sarju Singh. Nor, indeed, does there seem to have been any reason why Sarju Singh should have been suspected by Sheobalak at that stage.

The statement of Sheobalak is a very circumstantial one, and it is supported by the persons mentioned in it, except of course the appellants. Sat Narain and Raja Ram espacially have made long statements, and all these three witnesses were subjected to long and searching cross-examination without however being shaken in any material respect. It should be mentioned that the cross-examination of Sat Narain does not challenge either the story about the loss of the notes or the confessions of Baijnath, and although the defence attempted to show that Sat Narain could not have been in possession of such a sum as Rs. 1,800 they utterly failed to do so. It appears therefore that implicit reliance is placed on the statements of these witnesses. I will now pass on to the second part of the case. Babu Lal is a "munib" in the shop of Jaidayal Madangopal and works under Sarju Singh, the appellant, who is the head "munib" of the firm. His statement is to the following effect:

About five months before his statement, that is to say, about 9th January, he and Sarju Singh were taking food in the "kothri" when Sheobalak. Raja Ram and Baijnath came there and then he gives a description of what happened very much to the same effect as Sheobalak's. He mentions that Sarju Singh and Baijnath had some conversation apart and that Baijnath said "I have taken, but I would not return to the salas," and that Sarju recommended him to return the notes. It was about 9 or 9-30 p. m., when Sheobalak and others left, and a little later Ram Prasad "palladar" called out from the gate and Sarju Singh told him to go and bring Gorakh Nath on an urgent matter. Ram Prasad came back from Gorakh Nath with an excuse; but Sarju Singh again sent a message that he would get Gorakh Nath to get some money. About 2 a. m., Sarju Singh awakened Babu Lal, who found Baijnath and Gorakh Nath sitting on Sarju Singh's cot. Sarju Singh told Babu Lal to go with Gorakh Nath and Baijnath and to bring what they made over to him to Sarju Singh. So Babu Lal went off with the other two to a field at the back of the "thana" and there after some search Baijnath dug up the earth and took out a bundle of notes tied up in a piece of cloth. Gorakh Nath and Baijnath then sat down and began to divide the notes, and Baijnath handed Rs. 1,000 to Gorakh Nath and offered the rest to Babu Lal, who at first refused, saying that they were stolen property, but Gorakh Nath said "take the notes as he had spoken to Sarju Singh about them." Babu Lal, then took the notes

—which he did not count and Baijnath and Gorakh Nath went off to the "thana" while Babu Lal went to the go-down, the gate of which was opened by Ram Prasad. Sarju Singh was lying on a cot. He was said to have a boil on his testicles which prevented him from walking and Babu Lal made over the notes to Sarju Singh, who wanted Babu Lal to keep them; but when he refused, Ram Prasad was persuaded to do so. Ram Prasad palladar made a statement which supports Babu Lal to some extent, that is to say, he deposed to taking a message to Gorakh Nath and to hearing Sarju Singh tell Babu Lal to go with Gorakh Nath and Baijnath and to give what they made over to him. He also states that at about 2 a. m., Babu Lal came alone, and that after he had handed over the notes to Sarju Singh, the latter made Ram Prasad take them and keep them for two or three days, after which he took them back again.

Now, it is quite clear that the statements of Babu Lal, and in a lesser degree that of Ram Prasad, are open to grave suspicion. Supposing the story of the conspiracy between Baijnath, Sarju Singh and Gorakh Nath to be true, it is in the highest degree improbable that they should have taken two others as confederates without any object in doing so and without handing over any of the money to them. Such a course would only increase the number of conspirators and the danger of discovery. It was quite unnecessary for Babu Lal to go with the other two in order to bring notes to Sarju Singh. Either Gorakh Nath or Baijnath could have done this; and if Sarju Singh was afraid of keeping the notes and therefore handed them over for a few days to Ram Prasad, why should he arrange to have them handed over to himself at all. Therefore either the statements are wholly untrue, or both Babu Lal and Ram Prasad were members of the consiracy to a far greater extent than they have admitted and have concealed a part of the story. The evidence of an accomplice is always open to suspicion, and I agree with the learned counsel for the appellants that the statements of these two witnesses must be regarded in this light, that is to say they are open to suspicion as the statements of accomplices, and they are also open to further suspicion on the ground that they undoubtedly do not state the whole truth, because they conceal the part that Babu Lal and Ram Prasad themselves had in the conspiracy.

The Sessions Judge has summed up the evidence against the three appellants separately on the last three pages of his judgment, or rather he has stated the facts proved by the prosecution but he has not particularized the evidence by which these facts are said to have been proved. For some of his facts he appears to have relied solely on the statements of Babu Lal and Ram Prasad. For the reasons I have given however these statements should only be accepted if there is independent testimony of them with affects the accused by connecting or tending to connect them with the crime. The independent evidence need not be direct evidence—it is sufficient if it is merely circumstantial evidence, but there must be such evidence, and of course it must be reliable. It may be said that the statement of Babu Lal plus the statements of Ram Prasad is more valuable than the statement of either of them alone; but the evidence of both together is not sufficient for the conviction of any of the appellants. For these principles I rely on the judgment of Lord Reading in the case of (1916) 2 K B 658 (1). It appears therefore that the case against each of the appellants stands as follows:

Baijnath has been proved to have been present when Sat Narain put away the notes in the safe. He slept that night in the same room with Sat Narain, who had the two necessary keys concealed on his person. When Sat Narain went out early next morning, he left Baijnath alone in the shop. Sometime before 3 p. m., the keys had disappeared from Sat Narain's "janeo." The notes were taken from the safe between 8 p. m., on the night of 8th January, and about the same hour on 9th Januray, when the safe was broken open. The circumstances point to the conclusion that they were abstracted in a hurry, for the packet containing Rs. 1,800 which was compact, easy to remove and easy to conceal, was taken. whereas the rest of the cash, notes and valuables of the safe were left alone. Baijnath twice confessed to having taken the notes, before witnesses whose testimony has been believed and is, to the best of my judgment, unimpeachable. His conduct, as described by Sat Narain, Sheobalak and Raja Ram, subsequent to the confessions was

1. King v. Baskerville, (1916) 2 K B 658=86 L J K B 28=60 S J 696=25 Con C C 524=80 J P 446=115 L T 453.

strongly suggestive of guilt. His defence was that he had a quarrel with Sat Narain, Raja Ram and others, because they wanted to cheat his master at Benares about the price of flax; and that Sheobalak accused him falsely because Sheobalak had joined Sat Narain and others in cheating Baijnath with the result that Baijnath had made a report about this at the "thana" on the morning of 10th January. It is a fact that Baijnath did make a report at the thana about the assult, but from the narrative given above it is easy to see that this was merely a piece of "peshbandi." The evidence against Baijnath therefore appears to be quite sufficient to establish his guilt as regards the offence under S. 380 without the statement of Babu Lal and Ram Prasad.

The case against Gorakh Nath is that he was sent for, in the first place, by Sarju Singh, and as a result of this, he accosted Sheobalak and Raja Ram as they were taking Baijnath to the thana and asked to be allowed to take the latter away for half an hour. Instead of keeping Baijnath for half an hour, he kept him for the greater part of the night and, if Babu Lal is to be believed, he went with Baijnath and Babu Lal to the field from which Baijnath produced the notes and took away Rs. 1,000 in notes from Baijnath. For this part of the story, that is to say, his going to Sarju Singh both before he had taken away Baijnath and on the second occasion when he went with Baijnath to dig the notes out of the field, we have to rely on the statements of Babu Lal and Ram Prasad. If these are to be believed, they establish against him that he assisted Baijnath in disposing of property which he knew to be stolen. The question for me to decide in appeal is whether the evidence of Sheobalak and Raja Ram is sufficient corroboration of the statements of Babu Lal and Ram Prasad. Sheobalak and Raja Ram both say that when Gorakh Nath met them taking Baijnath to the thana, he begged them to hand over Baijnath to him for half an hour and promised to return Baijnath at the end of that time with the notes of Rs. 1,800 and that he swore a great and very offensive oath to this effect. Sheobalak has also stated, that, when he met Gorakh Nath on the first occasion of his going to the thana after this, Gorakh Nath came out and told him that the work was complete and asked him to wait for another half an hour, and that when Sheobalak again went to the thana an hour later, Gorakh Nath was no longer there. Finally, Sheobalak testified that on the following morning, when Gorakh Nath had returned from his tour of the village he showed great confusion in the presence of the Sub-Inspector when Sheobalak made his report. This evidence proves clearly that Gorakh Nath brought pressure to bear on Baijnath in private and that he had told Sheobalak in the presence of Raja Ram that he would restore Rs. 1,800. It may be questioned how Gorakh Nath intended to restore Rs. 1,800 if he had any dishonest intention, but the answer appears to be that he had no intention of restoring the money. This evidence, that is to say, the statements of Sheobalak and Raja Ram, is good evidence, and it proves circumstances that show Gorakh Nath's complicity with Baijnath in the disposal of the stolen property, and I am, therefore of opinion that the Judge was right in convicting Gorakh Nath.

As regards Sarju Singh however there is no corroborating evidence of any value. It has only been proved by reliable witnesses that he told Baijnath to restore the notes if he had taken them. He cannot be convicted solely on the direct evidence of Babu Lal and Ram Prasad. The final result then is that the appeals of Baijnath and Gorakh Nath are dismissed and that the appeal of Sarju Singh is allowed, his conviction and sentence are set aside, and he should be released at once.

R.K. *Order accordingly.*

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KENDALL, J.

Tara Prasad Singh and *another* — Plaintiffs—Applicants.

v.

Raja Singh and *others*—Defendants—Opposite Parties.

Civil Revn. No. 503 of 1933, Decided on 21st September 1934, against order of Second Additional Munsif, Azamgarh, D/- 11th May 1933.

Arbitration— Arbitrators arriving at decision but waiting for signing award— One of them changing his mind and not signing it— No misconduct is constituted — Civil P. C. (1908), Sch. 2, para. 15.

The failure of one of several arbitrators to sign an award may have a different effect in different cases, but if one of the arbitrators withdraws from the arbitration altogether and refuses to cooperate with his colleagues, and they nevertheless proceed to give an award without his help, that must amount to misconduct. But if the

arbitrators had arrived at a decision but merely waited to sign the award, and in the interval between the decision and the signing of the award, one of them changed his mind and refused to sign it, it does not necessarily follow that the arbitrators have been guilty of misconduct in framing the award and filing it in Court: 1922 *All* 233, *Rel on.* and 7 *All* 523, *Ref.*

[P 91 C 2]

N. Upadhiya for *K. L. Misra*—for Applicants.

Shambhu Prasad for *Shiva Prasad Sinha*—for Opposite Parties.

Judgment.—Mr. Upadhiya who holds the brief of Mr. Kanhaiya Lal Misra, counsel for the applicant, appeared before I signed my first order, and I have allowed the case to be argued on the merits.

This is an application for the revision of an order of the Additional Munsif of Azamgarh dismissing an objection to an award made by certain arbitrators. The facts are given in the order of the learned Additional Munsif. The objection has been made on the ground that one of the three arbitrators who had been appointed by the parties re- refused to sign the award. It was indeed stated on behalf of the applicant that he had not taken any part in the arbitration proceedings. The Court has found as a fact that all the arbitrators had arrived at a decision with respect to the subject-matter of dispute, that they waited to give the award in the hope that the parties might compromise, and then, when there was no compromise, one of the arbitrators refused to sign the award and filed his resignation. After considering the matter the Court has found that this did not amount to misconduct on the part of the arbitrator.

It has been argued by Mr. Upadhiya on behalf of the applicant that an important question of law is raised here and that there is considerable conflict of opinion about it, namely, whether the absence of the signiture of one of several arbitrators would vitiate an award. In support of this contention he has referred me to the case of 7 All 523 (1), 1928 Pat 231 (2) and 33 Cal 498 (3). There are other decision of other Courts to which however I did not wish him to refer me, as on a point of this kind the authority of the Allahabad High Court would seem to be sufficient. It was certainly held in the case of 7 All 523 (1), that the presence of all the arbitrators at all the meetings was necessary, and especially at the last meeting when the final act of arbitration is done. Consequently, where three arbitrators were appointed and one subsequently refused to act and withdrew from the arbitration, then in spite of the fact that the reference had provided for a decision by a majority of the arbitrators, it was held that the Court could not pass a decree on the award of the arbitrators who remained after the resignation of the one. This is a decision of two Judges dated 1885.

On the other hand there is a later Bench decision, the case of 1922 All 233 (4), dated 1922 in which it was decided that where one of several arbitrators had agreed to an award, but wilfully refused to sign it, it was held that though the absence of his signature was a legal flaw, the Court was justified in affirming the award.

It appears to me that the failure of one of several arbitrators to sign an award may have a different effect in different cases, but that if one of the arbitrators withdraws from the arbitration altogether and refuses to cooperate with his colleagues, and they nevertheless proceed to give an award without his help, that must amount to misconduct. But if, as has been found to have been the case here, the arbitrators had arrived at a decision, but merely waited to sign the award, and in the interval between the decision and the signing of the award, one of them changed his mind and refused to sign it, it does not necessarily follow that the arbitrators have been guilty of misconduct in framing the award and filing it in Court. The trial Court has considered the matter carefully and has come to the conclusion that there has been no misconduct. If this decision was obviously wrong in law, the result would have been that in accepting the award and basing a decre on it the Court would have been exercising a jurisdiction with which it is not vested by law. If, on the other hand, the decision is not obviously wrong in law and has been arrived at after a judicial consideration of the circumstances, it cannot be said that the Court has acted without jurisdiction, and no application under S. 115, Civil P. C., will lie. The application therefore is dismissed with costs.

R.K. *Application dismissed.*

1. Nand Ram v. Fakir Chand, (1885) 7 All 523=1885 A W N 139.
2. Ramdas Sahu v. Judagi Lohar, 1928 Pat 231=107 I C 532.
3. Ramesh Chandra Dhar v. Karunamoyi Dutt, (1906) 33 Cal 498.
4. Ram Sundar Tewari v. Kulwanti, 1922 All 233=66 I C 499=44 All 642.

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SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Sudama Rai and *others* — Defendants —Appellants.

v.

Bisheshar Prasad and *others* — Plaintiffs—Respondents.

Second Appeal No. 130 of 1931, Decided on 7th September 1934, from decision of Dist. Judge, Ghazipur, D/- 17th October 1930.

(a) Appeal—Abatement — Appeal pending in Court having no jurisdiction—Question of abatement does not arise.

Question of abatement arises only when the appeal is pending in a Court which has jurisdiction to entertain it. Where the Judge had no jurisdiction to hear an appeal in his Court, it will be deemed, for the purpose of deciding the question of abatement, that no appeal had been pending in his Court. [P 92 C 2 ; P 93 C 1]

(b) Limitation Act (1908), Ss. 14, 5 and 3 —S. 14 does not apply to appeals — Defence not pleading bar of limitation — Court must dismiss it in absence of sufficient cause under S. 5.

Section 14 is not applicable to appeals. But under S. 5 it is competent to a Court to admit an appeal after the expiry of the period of limitation if the appellant satisfies the Court that he had sufficient cause for not perferring an appeal within the prescribed time. The duty is of the Court to see that an appeal has been filed within time even if the defence did not take up a plea of limitation and should dismiss it if filed beyond limitation unless sufficient cause is shown by the appellant for its admission under the provisions of S. 5. [P 93 C 1, 2]

Haribans Sahai—for Appellants.

K. Varma—for Respondents.

Judgment. — This is a defendants' second appeal arising out of a suit for ejectment. The plaintiffs sued the defendants for ejectment under the provisions of S. 58, old Agra Tenancy Act, 1901. The case set up by the plaintiffs was that the two plots in suit were their sir and that the defendants had been holding them as their sub-tenants. On the refusal of the defendants to vacate the plots, the plaintiffs instituted their suit.

The defendants pleaded that the relationship of landlord and tenant did not exist and that they themselves were the proprietors of the two plots. The learned Assistant Collector found that the plaintiffs were the owners of the plots in suit and that the defendants were holding them as trespassers. In his opinion, a trespasser could not be ejected under the provisions of S. 58, of the old Tenancy Act, 1901. He therefore dismissed the suit. The plaintiffs preferred an appeal against the decision of the Assistant Collector to the Court of the Commissioner. During the pendency of the appeal in his Court, Bindra Rae, one of the respondents, died. More than 90 days after his death, an application was made by the plaintiffs to the Commissioner praying that as Bindra Rae had died, the names of his legal representatives should be brought on record. No objection was taken by the respondents that as the application had been made more than 90 days after the death of Bindra Rae it could not be entertained. Eventually, the Commissioner held that he had no jurisdiction to hear the appeal as a question of proprietary title was involved in the case. He returned the appeal to the plaintiffs for presentation to the Court having jurisdiction to entertain it. The plaintiff-appellants presented their appeal to the District Judge. Along with the appeal an application was made praying that the time spent in carrying on proceedings in the Court of the Commissioner under a bona fide belief that the appeal lay in that Court should be excluded in computing the period of limitation. It appears that the Office Report made on this appeal was that it had been presented within time.

It would appear that when the appeal came up for hearing before the learned District Judge, the plea that the appeal had been filed in Court after the expiry of the period of limitation was not taken up specifically. On the other hand a preliminary objection to the hearing of the appeal was taken by the respondents that the appeal had abated because no application had been made to the Commissioner to bring on record the names of the legal representatives of Bindra Rae within a period of 90 days of his death. The learned District Judge repelled this objection. He held that as the respondents had not taken his objection in the Court of the Commissioner, when he ordered on the application of the plaintiffs that the names of Bindra Rae's legal representatives should be brought on record, they could not be permitted to raise this plea in the appeal before him. The learned District Judge held that the plaintiffs were entitled to a decree for ejectment against the defendants. The appeal was decreed. The defendants have come up to this Court in second appeal. The plea about the abatment of appeal raised on behalf of the defendant-appellants has no force. The Commissioner in whose Court the appeal of

the plaintiffs had been filed held that he had no jurisdiction to entertain it. So there can be no question of abatement. The question of abatement can only arise when the appeal is pending in a Court which has jurisdiction to entertain it.

In the case beofre us the appeal was properly filed only when it was presented to the Court of the learned District Judge who had jurisdiction to entertain it. In view of the fact the Commissioner had no jurisdiction to hear the appeal it will be deemed, for the purpose of deciding the question of abatement, that no appeal had been pending in his Court. Now, when the appeal was filed in the Court of the District Judge, Bindra Rae had already died. So, there could be no question of an abatement of the appeal. When before filing an appeal, a respondent dies, then all that the appellant can do is to inform the Court the names of the legal representatives of the deceased respondent and to ask that their names be brought on record. In the case before us, the real question for the determination, before the appeal could be heard on merits, was whether the appeal had been presented in the Court of the learned District Judge within time. The suit was decided by the trial Court on 9th April 1929. Admittedly, the appeal was filed in the Court of the District Judge long after the period of 30 days within which it should have been presented. The Office of the learned District Judge made a wrong note to the effect that the appeal was filed within time. We have already mentioned that when the appeal was presented it was accompanied by an application by the appellants in which it was prayed that the period during which the appeal had been prosecuted in the Court of the Commissioner should be excluded in computing the period of limitation. It is possible that the Office of the District Judge may have thought that the appellants were entitled to exclude the aforesaid period under the provisions of S. 14, Limitation Act. But it does not appear that any order was passed by the learned District Judge on this point.

Section 14, Limitation Act, is not applicable to appeals. But under S. 5, Limitation Act, it is competent to a Court to admit an appeal after the expiry of the period of limitation if the appellant satisfied the Court that he had sufficient cause for not preferring an appeal within the prescribed time. When the appellants presented their appeal to the District Judge, it was open to him to admit it, having regard to the provisions of S. 5, on being satisfied that the appellants had shown good cause for not filing the appeal within the time allowed by law. Now, we find that this aspect of the case was not at all considered by the lower appellate Court. Very probably, the point was not raised before the learned Judge, but having regard to the provisions of S. 3, Limitation Act, it was the duty of the Court to see that an appeal which had not been filed within time should be dismissed even if the defence did not take up such a plea unless sufficient cause was shown by the appellant for its admission under the provisions of S. 5.

In our opinion, it is necessary that the case should be sent back to the lower appellate Court for consideration of the question whether it is a fit case in which having regard to all the circumstances, it should give the benefit of S. 5, Limitation Act, to the appellants. We accordingly remand the case to the lower appellate Court with directions that it should re-admit the appeal on its original number and permit the appellants to make an application under S. 5, Limitation Act. The respondents will be given an opportunity to put in their objections. The lower appellate Court will then decide whether sufficient cause for the admission of the appeal though filed beyond time has been made out by the appellants. If it finds this point in the affirmative, then it will re-hear the appeal and dispose of it according to law. The appellants will be entitled to a refund of the court-fee paid in this Court. As the appellants in this Court never raised the point on which the case is being remanded, we direct that both parties should bear their own costs in this Court.

R.K. *Case remanded.*

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SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Ajodhia Kalwar and *another*—Decree-holders—Appellants.

v.

Balkaran and *others* — Judgment-debtors—Respondents.

Letters Patent Appeal No. 29 of 1933, Decided on 24th September 1934, against judgment of Kendall, J., in Ex. S. A. No. 733 of 1932.

(a) Agra Tenancy Act (1926), Ss. 203, and 3 (6) — Deed specifically granting rights of transfer and inheritance—Thekadar or lessee can acquire such rights — Lessor full proprietor and rights in perpetuity granted by deed — Transaction is not mere agricultural lease — Long term lease falling short of perpetual lease—Intention of parties is to be inferred from terms of document.

Under S. 203 of the new Act unless the terms of the theka provide otherwise, the provisions as to non-transferability or non-saleability would be wholly inapplicable. If therefore the deed specifically grants the right of transfer and inheritance, such rights are acquired by the thekadar or lessee. A thekadar not being a tenant the prohibitions contained in Ss. 23 and 24 are not applicable to him. Where the lessor is admittedly the owner of the plots and professes to grant a perpetual lease to hold on possession generation after generation and the right to sell and mortgage the same, and without any right in the lessor to eject the tenants, and premium is received as consideration for the grant of the perpetual lease, the lease must of necessity be a lease of proprietary interest in land, and not merely agricultural lease for a short term. Where the lessor is not the proprietor of the land, but a mere thekadar or a tenant-in-chief or perhaps a mere cosharer, a grant by him even though ostensibly a perpetual lease may not amount to such lease; but where the lessor is the full proprietor and he for consideration grants right of inheritance and transfer to the lessee in perpetuity, it is impossible to hold that the transaction amounts to a mere agricultural lease, which makes the lessee a non-occupancy tenant, who can be ejected at will and who acquires no more rights in the land than an ordinary non-occupancy tenant. To hold otherwise would mean that an owner of land can sell, mortgage or gift away his land, but is incompetent to grant a perpetual lease of it.[P 95 C 1, 2]

Where therefore the primary object of a lease is to confer rights in perpetuity, both of inheritance and transfer, and to give full liberty to the lessees either to cultivate the land themselves or to get it cultivated by others or to build houses or plant groves on the said land, it is impossible to hold that the lease embodies anything other than a lease of proprietary rights in the land. But this does not apply to a case of a long-term lease, which falls short of a perpetual lease. In such a case the answer will depend on the particular terms of the document from which the primary intention of the parties will have to be inferred. Nor can it be said that the power of a sole-proprietor to grant a perpetual lease of plots belonging to him, would be the same where he is not the sole owner but is holding exclusive possession of the lands with the consent, express or implied, of other cosharers. [P 96 C 1]

(b) Agra Tenancy Act (1926), S. 199 — Thekadars — All farmers and lessees of proprietary rights are included.

Section 199 does not restrict the definition of the thekadar to the particular case of the grant of the right to receive rents and profits but applies to all farmers and other lessees of proprietary rights in the land. [P 96 C 1]

Mushtaq Ahmad Gadadhar Pasad and *Shankar Sahai Verma*—for Appellants.

S. S. Shastry—for Respondents.

Judgment.—This is a decree-holder's appeal arising out of execution proceedings. The decree-holder had obtained a simple money decree against the judgment-debtors, and in execution of it they attached three plots of land belonging to the judgment-debtors. The latter objected that they were mere non-occupancy tenants of these plots and their rights were not saleable. The decree-holders' contention was that the judgment-debtors had acquired the rights of perpetual lessees under a registered document executed by a zamindar on 23rd September 1927. The first Court held that the rights of the judgment-debtors were not transferable in spite of a provision to that effect in the lease. The lower appellate Court came to a contrary conclusion. A learned Judge of this Court in second appeal has agreed with the view of the first Court and has dismissed the decree-holder's application.

The sole question before us for consideration is whether, under the terms of this particular document, the judgment-debtors acquired transferable rights, which can be attached and sold, or whether the rights possessed by them are not attachable and saleable. Prior to the Tenancy Act of 1901, they was not any clear restriction on the power of the zamindar in granting rights in perpetuity to tenants. But S. 20 of Act 2 of 1901, provided that the interests of certain tenants would not be transferable, and also provided that

"the interest of a thekadar is, subject to the terms of his lease, heritable, but not transferable."

This last mentioned sub-S. (3), with its rather ambiguous language, was the subject of an interpretation in two cases in which slightly different meanings were attached to it. In the case of 1926 All 432 (1), it was held by at least one of the Judges that there was no prohibition against the transferability of the rights of a thekadar, if under the terms of the document a right of transfer was specifically conferred. In the case of 1926 All 412 (2), it was held by the Letters Patent Bench affirming the decision of a Single Judge of this Court that under S. 20 (3), it was not open to the zamindar to create a theka with transferable rights. It does not however appear

1. Ballabh Das v. Murat Narain Singh, 1926 All 432=95 I C 1048=48 All 385.
2. Majid Husain v. Kurban Ali, 1926 All 412=93 I C 1005.

that although the latter case was decided a few days after the first, the former decision was cited before the Letters Patent Bench. We may point out that the decree-holder's case also receives considerable support from the observations made in the cases of 1930 All 315 (3) and 1931 All 534 (4).

It may be pointed out that the words "subject to the terms of his lease," in the old section were prima facie applicable to both "heritable" and "not transferable," as there was only one verb "is" in the sentence. If the language of the corresponding section in the new Tenancy Act had not been changed, we might have felt inclined to refer this case to a larger Bench. But in the new Tenancy Act (3 of 1926), there have been radical changes in the provisions so far as a thekadar or a lessee of proprietary rights is concerned. Under the old Act a thekadar came within the definition of a tenant and used to be treated as a non-occupancy tenant. In S. 3 (6) of the new Act, a tenant excludes a thekadar "save as otherwise expressly provided by this Act." It follows that, unless in the relevant section a thekadar is specifically included in the word "tenant," the provisions would be inapplicable to him. A separate chapter (Chap. 13) specifically deals with the rights of a thekadar, and S. 199 contains the definition of thekadar as being

"a farmer or other lessee of proprietary rights in land, and in particular of the right to receive rents or profits."

Then S. 203 is very clear in its language, and is headed by an exception:

"Except as may be otherwise provided by the terms of the theka"

which governs the whole section, including the provisions as to the non-transferability or non-saleability in execution of a decree, and non-heritability, unless the theka has been given on payment of a premium.

Under S. 203 therefore there can now be no doubt that, if the terms of the theka provide otherwise, the provisions as to non-transferability or non-saleability would be wholly inapplicable. It therefore follows that if the deed specifically grants the right of transfer and inheritance, such rights are acquired by the thekadar or lessee. A thekadar not being a tenant, the prohibition contained in Ss. 23 and 24 are not applicable to him.

It is strenuously contended on behalf of the respondents that even a perpetual lease of sir plots would be a mere agricultural lease, making the lessee an ordinary agricultural tenant, and would not amount to a theka, unless the document specifically purports to transfer proprietary rights. It seems to us that where the lessor is admittedly the owner of the plots and professes to grant a perpetual lease of those plots to the lessee with the right to hold on possession, generation after generation, and the right to sell and mortgage the same, and without any right in the lessor to eject the tenants, and premium is received as consideration for the grant of the perpetual lease, the lease must of necessity be a lease of proprietary interest in land, and not merely an agricultural lease for a short term. Where the lessor is not the proprietor of the land, for instance, he may be a mere thekadar or a tenant-in-chief, or perhaps a mere co-sharer, a grant by him, even though ostensibly a perpetual lease, may not amount to such lease, but where the lessor is the full proprietor and for consideration grants rights of inheritance and transfer to the lessee in perpetuity, it is impossible to hold that the transaction amounts to a mere agricultural lease, which makes the lessee a non-occupancy tenant, who can be ejected at will and who acquires no more rights in the land than an ordinary non-occupancy tenant. To hold otherwise would mean that an owner of land can sell, mortgage or gift away his land, but is incompetent to grant a perpetual lease of it.

The present case is particularly strong. The document in question recites that the lessor is the full owner of certain plots, and on receipt of Rs. 1,000 as premium purported to grant a perpetual lease to the lessees, giving them the right to hold possession, generation after generation, and the right to sell and mortgage the plots, either to cultivate the plots themselves or to get them cultivated by others, to erect houses, pucca and kachcha, plant trees of every kind, without any rights in the lessor to eject them, and to have their names entered in the Government papers and the document is called a perpetual lease. There can be no doubt that the rights conferred on the lessees were much more than mere rights of an agricultural non-occupancy tenant. In this particular case, the primary object of the lease was to confer rights in

3. Raghunath Tewari v. Buddhu Ram Tewari, 1930 All 315=127 I C 516.
4. Mahesh Narain Singh v. Bisheshar Lonia, 1931 All 534=133 I C 532.

perpetuity, both of inheritance and transfer and to give full liberty to the lessees either to cultivate the land themselves or to get it cultivated by others, or to build houses or plant groves on the said land. It is, in our opinion, impossible to hold in this case that the lease embodied anything other than a lease of proprietary rights in the land.

It may, in his connexion, be pointed out that S. 199 does not restrict the definition of the thekadar to the particular case of the grant of the right to receive rents or profits, but applies to all famers and other lessees of proprietary rights in the land. We therefore regret that we are unable to accept the conclusion of the learned Judge of this Court that the judgment-debtors acquired no saleable interest in these plots at all. We would guard ourselves against being understood to lay down that the same remarks would apply to a case of a long-term lease, which falls short of a perpetual lease. In such a case the answer will depend on the particular terms of the document from which the primary intention of the parties will have to be inferred. Nor should we be understood to lay down that the power of a sole proprietor to grant a perpetual lease of plots belonging to him, which in this case has been assumed and never disputed, would be the same where he is not the sole owner, but is holding exclusive possession of the lands with the consent, express or implied, of other co-sharers. No other person, who can be considered to be a co-sharer, is a party to this case, and if any such person exists, he will, of course, not be bound by this decision.

The appeal is accordingly allowed, the decree of the learned Judge is set aside and that of the lower appellate Court is restored with costs.

R.K. *Appeal allowed.*

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SULAIMAN, C. J. AND BAJPAI, J.

Chandulal—Plaintiff—Appellant.

v.

Bharat Singh — Defendant—Respondent.

Second Appeal No. 654 of 1931, Decided on 21st September 1934, from decision of First Sub-Judge, Saharanpur, D/- 28th February 1931.

Civil P. C., O. 2, R. 2 (before amendment of 1929), O. 34, Rr. 7, 8 and 10 — Suit for redemption — Plaintiff getting preliminary decree—Deposit of decretal amount — Final decree— Possession not given to plaintiff by defendant—Suit for mesne profits from date of final decree is not barred.

Under O. 34, R. 7 (before its amendment in 1929), in a suit for redemption, if the plaintiff succeeds, the Court passes a decree ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage and for his costs of the suit, if any, awarded to him on the day specified in the decree which ordinarily is six months from the date of the preliminary decree. This amount is fixed and the plaintiff is directed to pay the same. If the plaintiff pays this amount on or before the date fixed, then the plaintiff applies under O. 34, R. 8 for the preparation of a final decree. The Court when preparing the final decree has got to re-adjust the amount finally under O. 34, R. 10 and if any legitimate sums are due to other party, the Court makes proper orders and directs the defendant to re-transfer the mortgaged property to the plaintiff, and if necessary, orders the defendant to put the plaintiff in possession thereof. There is no provision for taking into consideration any mesne profits that might become due to the plaintiff by the failure of the defendant-mortgagee to deliver possession. If therefore the defendant remains in possession of the property even after a decree of the Court directing him to deliver possession of the property to the plaintiff then the defendant is a trespasser and a fresh cause of action accrues to the plaintiff and a suit for mesne profits (from the date of the final decree and not from the deposit of the plaintiff) will not be barred by O. 2, R. 2 : 30 *All* 225 ; 30 *All* 36 ; 34 *Cal* 223 and 31 *Bom* 527, *Expl. and Dist.* [P 97 C 1]

Shiva Prasad Sinha—for Appellant.

K. C. Mukerji—for Respondent.

Judgment.—This is a second appeal by the plaintiff whose suit was dismissed by the Courts below on the ground that it was barred by O. 2, R. 2, Civil P. C. The facts may be briefly stated. It appears that the plaintiff brought a previous suit for redemption of a mortgage. A preliminary decree in the suit was passed on 14th February 1927, and the date fixed for payment was 14th August 1927. The plaintiff deposited the entire amount due under the preliminary decree on 8th August 1927, and then applied for the preparation of a final decree. The final decree itself was prepared on 12th November 1927, but possession was delivered by the mortgagee on 17th February 1929. The plaintiff then brought the present suit for recovery of mesne profits from 8th August 1927 to 17th February 1929. This suit, as we stated before, was dismissed by the Courts below on the ground that it was barred by O. 2, R. 2, Civil P. C.

The Courts below have relied on three cases of this Court: 1927 All 716

(1). 30 All 225 (2) and 30 All 36 (3). So far as the case reported as 1927 All 716 (1), is concerned, it is enough to say that that has been definitely overruled by the Full Bench case of 1931 All 429 (4). It was pointed out therein that the object of O. 2, R. 2 is the prevention of the splitting up of one cause of action and not to compel the plaintiff to seek all the remedies which he can claim against the same defendants on account of several causes of action in one and the same suit. It is therefore clear that if the plaintiff obtained a cause of action for the present suit after the final decree in the previous suit was passed, then there is nothing in O. 2, R. 2, which disentitles him from bringing the present suit. We have got to decide this case on the Civil Procedure Code, Act 5 of 1908, before its amendment in 1929. Under O. 34, R. 7, in a suit for redemption if the plaintiff succeeds, the Court shall pass a decree ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage and for his costs of the suit, if any, awarded to him on the day specified in the decree which ordinarily is six months from the date of the preliminary decree. This amount is fixed and the plaintiff is directed to pay the same. If the plaintiff pays this amount on or before the date fixed, then the plaintiff applies under O. 34, R. 8 for the preparation of a final decree. The Court when preparing the final decree has got to readjust the amount finally under O. 34, R. 10, and if any legitimate sums are due to either party, the Court makes proper orders and directs the defendant to re-transfer the mortgaged property to the plaintiff, and if necessary, orders the defendant to put the plaintiff in possession thereof.

It would therefore appear that there is no provision for taking into consideration any mesne profits that might become due to the plaintiff by the failure of the defendant mortgagee to deliver possession. Indeed that question would be outside the scope of the inquiry in a mortgage suit for redemption. Any amounts that may be payable to either of the parties before the passing of the final decree will of course, be taken into consideration, but it cannot be in the contemplation of the Court that the defendant mortgagee will not deliver possession of the mortgaged property to the plaintiff after the passing of the final decree. If therefore the defendant remains in possession of the property even after a decree of the Court directing him to deliver possession of the property to the plaintiff, then the defendant is a trespasser and a fresh cause of action accrues to the plaintiff.

It is contended by the learned counsel for the plaintiff that he is entitled to mesne profits from 8th August 1927, the date when he deposited the amount fixed by the preliminary decree and not from 12th November 1927, when the final decree was passed. We are of opinion that the relationship of a mortgagor and mortgagee subsisted till the passing of the final decree. The suits continued up till the passing of the final decree and the contractual relationship between the parties passes from the domain of a contract into the region of a judgment only after the final decree has been passed, and the rights of the parties have to be adjusted finally up till that date and any amount due to either party ought to be included at the time of the passing of the final decree and the plaintiff's claim for mesne profits up to that date will be barred under O. 2, R. 2. We are therefore of the opinion that the plaintiff is entitled to mesne profits from 12th November 1927, and not from 8th August 1927.

It now remains to consider certain cases which have been cited before us. In 30 All 36 (3), Richards, J., held that in a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee right up to the time of actual redemption or sale, as the case may be. A mortgagor therefore who has obtained a decree for redemption and paid in what was found by the decree to be due from him cannot subsequently sue for profits realized by the mortgagee in possession which might and ought to have been taken into account at the time of passing the decree. It appears that a decree for redemption was obtained on 17th December 1902, but the amount for redemption was increased on appeal on 3rd February 1903. The plaintiff then paid what was due according to the latter decree and got possession sometime in the earlier part of 1903.

1. Goswami Gordhan Lalji Maharaj v. Bishambhar Nath, 1927 All 716=109 I C 736=49 All 597.
2. Ram Din v. Bhup Singh, (1908) 30 All 225=1908 A W N 96=5 A L J 192.
3. Kashi Parshad v. Bajrang Parshad, (1908) 30 All 36=1907 A W N 281=4 A L J 763
4. Ram Karan Singh v. Nakchhed Ahir, 1931 All 429=133 I C 298 (SB).

He brought a suit to recover certain mesne profits for the period beginning from August 1902 to March 1903. The claim embraced the amount due prior to the passing of the decree on 3rd February 1903, and it is obvious that this should have been claimed in the earlier suit. This case therefore does not in any way help the defendant. In 30 All 225 (2), the plaintiff brought a suit for redemption on the allegation that the mortgage was satisfied in 1874. The suit was decreed on 13th May 1906, without payment. The plaintiff then brought a suit for recovery of mesne profits from 1874. It does not appear from the reports as to up to what period exactly the claim was made, but it was held that the claim was barred by O. 2, R. 2. It is clear that as in the earlier suit the mortgagor had alleged that the mortgage money had been paid by the usufruct in 1874, he should have claimed for surplus profits from 1874 in the suit itself and his subsequent suit was clearly barred. Their Lordships said that the right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage-debt has been satisfied is inconsistent with the principles on which the law of redemption is based. In 34 Cal 223 (5), the subsequent suit for mesne profits was for the period between the date of the tender and the date of the delivery of possession to the mortgagor.

The date of the tender was not the date of deposit in pursuance of the decree, but the date when the mortgage money was tendered to the mortgagee outside the Court before an institution of the suit and it does not appear from the reports as to whether delivery of possession was made soon after the final decree or even before the final decree and that case, therefore, does not help the defendant. In 31 Bom 527 (6), it appears that the subsequent suit for mesne profits was for the period from the date of the deposit to the date when the mortgagor recovered possession of the mortgaged property. The date of the deposit was the date mentioned in S. 83, T. P. Act, that is, prior to the institution of the suit for redemption. The earlier suit was decreed on 27th May 1903, and the plaintiffs obtained possession on 15th July 1903. The claim for mesne profits was from the date of the deposit under S. 83 to 15th July 1903, when the plaintiffs got possession of the property. It might therefore be said that the subsequent suit included a short period of about two months after the passing of the decree. The attention of the learned Judges of the High Court does not seem to have been directed to this short period and they seem to have considered the right of the plaintiff to obtain mesne profits after the date of the deposit under S. 83 and in that connexion they observed that the profits derived by the mortgagee after a proper tender is made or after the amount due has been deposited in Court, are profits for which he is to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract, and as such, a claim to them by the mortgagor is one arising from and connected with his right to redeem or recover possession of the property. With this observation we are in agreement. Moreover, the case was decided under the old Transfer of Property Act before the Civil Procedure Code of 1908.

Under the present Civil Procedure Code, the suit continues up till the preparation of the final decree and an analysis of the various provisions to which reference has been made in an earlier part of our judgment shows that a fresh cause of action accrues to the plaintiff when the defendant even after the direction contained in the final decree refuses to deliver possession, and we are therefore of the opinion that the plaintiff is entitled to mesne profits from 12th November 1927, to 17th February 1929, because during that period the possession of the defendant was that of a trespasser. The Courts below found that the mesne profits from 8th August 1927, to 17th February 1929, amount to Rs. 266-5-6. As we are holding that the plaintiff is not entitled to mesne profits from 8th August 1927, but from 12th November 1927, a deduction has got to be made and parties are agreed before us that after a proper deduction, the sum due to the plaintiff, would be Rs. 220. No other point has been argued before us.

The result is that we allow this appeal. set aside the decrees of the Courts below, and decree the plaintiff's

5. Satyabadi Behara v. Harabati, (1907) 34 Cal 223=5 C L J 192.
6. Rukhmina Bai v. Venkatesh, (1907) 31 Bom 527=9 Bom L R 958.

suit for Rs. 220 with proportionate costs in all Courts.

R.K. *Appeal allowed.*

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SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Gulab Chand and *others* — Plaintiffs — Applicants.

v.

Peary Lal — Defendant — Opposite Party.

Privy Council Appeal No. 16 of 1934, Decided on 6th September 1934, for leave to appeal to His Majesty in Privy Council.

Limitation Act (1908), S. 12 (3)—Sub-S. (3) does not apply to application for leave to appeal to Privy Council — Time for extension can be allowed only under S. 5.

Sub-S. (3), S. 12 does not apply to an application for leave to appeal to Privy Council but applies only to appeals : 1926 *All* 286, *Rel on.* [P 100 C 1]

Judgment was pronounced by the High Court on 23rd January 1934, and a decree was prepared later on. An application for a copy of the decree was filed on 28th April 1934, and the copy was ready for delivery on 16th May 1934. Application for leave to appeal was filed on 21st July 1934 :

Held : that application is governed by Art. 179 and that the application would prima facie be barred by time, unless the applicant can show good cause for extension of time under S. 5. [P 100 C 2]

S. B. L. Gaur—for Applicants.

P. L. Banerji, Panna Lal and *Kamta Prasad*—for Opposite Party.

Judgment.—A preliminary objecttion is taken to this application for leave to appeal to His Majesty in Council that it is barred by time. Judgment in this case was pronounced by the High Court on 23rd January 1934, and a decree was prepared later on. An application for a copy of the decree was filed on 28th April 1934, and the copy was ready for delivery on 16th May 1934. This application for leave to appeal was filed on 21st July 1934. It is therefore obvious that if the time required for obtaining of the decree be not excluded from the period of limitation prescribed for such applications, the application is beyond time. Indeed the time expired before the long vacation commenced, and therefore the applicant is not entitled to add to that period the period of the long vacation.

The learned advocate for the applicants contends before us that under S. 12 (3), Limitation Act, he is entitled to exclude the time requisite for obtaining a copy of the judgment also in addition to the time requisite for obtaining a copy of the decree. He has to concede that there is a ruling of this Court in 1926 All 286 (1,) which is directly against him. But he urges before us that the Patna High Court and the Madras High Court have taken a contrary view and that therefore the matter may be referred to a higher Bench.

In 1922 Pat 255 (2), Dawson Miller, C. J., of the Patna High Court in delivering the judgment of the Court in which Ross, J., concurred undoubtedly held that sub-S. (3) of S. 12 was applicable. But the learned Chief Justice also referred to the practice of his Court under which it was necessary that a copy of the judgment from which it is sought to appeal should always be filed with the petition applying for leave. This view appears to have been adopted by the Madras High Court in 1925 Mad 1241 (3). The learned Judges remarked:

"But we think that though sub-S. 3 does not in terms apply, the language used in it really covers the present case."

and put an interpretation on sub-S. (3) so as to give it a wider scope and make it applicable to all the categories mentioned in sub-S. 2. The main basis of the decision was that a proper application for leave to appeal cannot be drawn up unless a copy of the judgment has been obtained. On the other hand, in 1926 All 286 (1), it was distinctly held by this Court that the language of sub-S. (3) when contrasted with sub-S. (2) clearly contemplates the exclusion from the scope of sub-S. (3) of the case of an application for leave to appeal and that in this Court it is not at all necessary that the applicant should at the time of filing his application for leave file also a copy of the judgment on which the decree is founded. A similar view was in the same year expressed by a Division Bench of the Sind Judicial Commissioner's Court in 1925 Sind 60 (4).

It seems to us that the point becomes clear when it is borne in mind what the position was prior to the Limitation Act of 1908. As laid down

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1. Wilayati Begam v. Jhandu Mal-Mithu La 1926 All 286=92 I C 897.
2. Mahabir Prasad Tiwari v. Jamuna Singh, 1922 Pat 255=66 I C 88=1 Pat 429.
3. In re, Secy. of State, 1925 Mad 1241=90 I C 601=48 Mad 939.
4. Nur Muhammad v. Hassomal, 1925 Sind 60=78 I C 953=17 S L R 306.

in 10 Mad 373 (5) and 15 Mad 169 (6) and pointed out in 1915 All 335 (7), under the old Act, appeals to His Majesty had to be brought within the prescribed time from the date of the decree and the applicant was not at liberty to exclude any time for the purpose of obtaining a copy of the decree of judgment. Thus there was no exclusion either of the time for obtaining a copy of the decree or of the time required for obtaining a copy of the judgment. Sub-S. (3) of S. 12 was held not to be applicable to an application for leave to appeal to His Majesty in Council although there was in one sense an appeal preferred from a decree of the High Court. In 1908 the Legislature on the one hand reduced the period prescribed for an application for leave to appeal from six months to ninety days and on the other deleted certain words from sub-S. (2) so as to make it applicable to all applications for leave to appeal including an application for leave to appeal to His Majesty in Council. The Legislature did not think it fit to amend sub-S. (3) at all. It is a significant fact that as the section now stands there are three categories of cases to which sub-S. (2) applies: (i) an appeal; (ii) an application for leave to appeal and (iii) an application for review of judgment. Two of these categories are practically reproduced in sub-S. (3), but there is a deliberate omission of an application for leave to appeal in sub-S. (3). The Legislature has therefore clearly intended that sub-S. (3) should not apply to an application for leave to appeal, but should apply only to appeals.

The matter that is before us at this stage is an application for leave to appeal only and it is only when the leave is granted that the appeal would be admitted. There is a specific article, Art. 179, Limitation Act, which applies to an application for leave to appeal to His Majesty in Council. To such an application sub-S. (3) does not apply. It seems to us therefore that we cannot stretch the meaning of sub-S. (3) in order to make it applicable to an application for leave to appeal, also when the Legislature has expressly omitted such cases from sub-S. (3).

We are not at all impressed by the contention that in order to draw up grounds of appeal it is essential to obtain a copy of the judgment and that therefore the section should be liberally interpreted so as to obviate this difficulty. Ordinarily, a judgment is ready on the date when it is pronounced and a copy can be applied for at once, whereas the decree is not ready on that date and has to be prepared subsequently. It happens ordinarily that the time taken for obtaining a copy of the decree is longer than that taken in obtaining a copy of the judgment. The Legislature therefore might well have thought it necessary when reducing the period of limitation to allow the time requisite for obtaining a copy of the decree to be excluded, but not the time requisite for obtaining a copy of the judgment in addition thereto.

Inasmuch as we agree with the view expressed previously in 1926 All 286 (1), we hold that the application would prima facie be barred by time unless the applicant can show good cause for extension of time under S. 5, Limitation Act. As we are informed that such an application has been filed let this be put up with that application.

K.S. *Order accordingly.*

5. Lakshmanan v. Peryasami, (1887) 10 Mad 373
6. Anderson v. Periasami, (1892) 15 Mad 169.
7. Ram Sarup v. Jaswant Rai, 1915 All 335=31 I C 906=38 All 82.

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NIAMATULLAH AND ALLSOP, JJ.

Ishwar Dayal — Defendant — Appellant.

v.

Anna Saheb and *others*—Plaintiffs and Defendants — Respondents.

First Appeal No. 508 of 1930, Decided on 1st October 1934, from decision of First Addl. Sub-Judge, Benares, D/- 25th April 1930.

Court-fees—Suit for enforcement of mortgage — Prior charge in favour of plaintiff mentioned in plaint— Prayer for selling property subject to prior charge— Court-fee on amount due on suit mortgage and Rs. 10 for declaration of validity of prior mortgage are sufficient — Ad valorem court-fee on money due on prior mortgage is not necessary — Mortgage.

A suit was brought by the plaintiff for enforcement of a mortgage. The sum claimed under that mortgage was Rs. 2,06,091-10-3. In the plaint it was alleged that besides the mortgage in suit the plaintiffs had a prior charge under a mortgage-deed. In the concluding paragraph of the plaint it was prayed that the mortgaged property be sold subject to the charge arising from the prior mortgage. The plaintiff paid court-fee on the sum of Rs. 2,06,091-10-3 alleged to be due under the puisne mortgage in suit. No separate court-fee was paid in respect of the prior mortgage :

Held : that beyond alleging the existence of the prior mortgage and claiming the relief of sale of the mortgaged property in enforcement of subsequent mortgage subject to the prior encumbrance, the plaintiffs had not claimed any consequential relief. The plaintiffs had only claimed the mortgage-money due under the puisne mortgage coupled with a declaration that the prior mortgage is valid and binding on the defendants. In this view, the plaintiff were not bound to pay court-fee ad valorem on the amount due under the prior mortgage. The plaintiffs' suit should be considered to be one for recovery of money due under the subsequent mortgage and a declaration in respect of the prior mortgage and as such they were bound to pay an additional court-fee of Rs. 10. [P. 101 C 2 ; P 102 C 1]

Government Advocate—for the Crown.

S. N. Gupta and *Gadadhar Prasad* — for Respondents.

Judgment.—This is an office report which raises the question of court-fee payable on the plaint and on the memorandum of appeal filed in this Court by the defendant-appellant. We refrain from expressing any opinion on the question of court-fee payable in appeal, as that matter will be disposed of by the taxing officer and, possibly, by the Taxing Judge. As regards the court-fee payable on the plaint, the matter has been judicially determined by the lower Court and should be disposed of by this Bench.

The suit, which has given rise to this appeal was brought by the plaintiffs-respondents for enforcement of a mortgage, dated 5th July 1924. The sum claimed under that mortgage was Rs. 2,06,091-10-3. In para. 7 of the plaint it was alleged that besides the mortgage in suit the plaintiffs had a prior charge under a mortgage deed, dated 24th June 1923. The principal sum advanced thereunder is said to be Rs. 65,000. In the concluding paragraph of the plaint it is prayed that the mortgaged property be sold subject to the charge arising from the prior mortgage of 24th June 1923. The plaintiff paid court-fee on the sum of Rs. 2,06,091-10-3, alleged to be due under the puisne mortgage in suit. No separate court-fee was paid in respect of the prior mortgage. A question of court-fee arose in the lower Court, and the learned Subordinate Judge decided that no separate court-fee was payable in respect of the prior mortgage. Eventually the plaintiffs' suit was decreed in terms of the relief claimed by them. The defendant appealed to this Court and impugned the entire decree. He also attacked the finding of the lower Court in so far as that Court held that the plaintiff was entitled to have the mortgaged property sold subject to the prior encumbrance under the mortgage deed, dated 24th June 1923, which the defendant had unsuccessfully characterised as invalid on certain grounds, which it is not necessary to mention in detail.

According to the office report, the plaintiff should have paid court-fee ad valorem not only on the mortgage money under the date in suit, but also in respect of the mortgage money due under the prior mortgage deed of 24th June 1923. The office report has been supported before us by the learned Government Advocate, who contends that the plaintiffs are, in effect, seeking a relief not only in respect of the subsequent mortgage, but also in respect of the prior mortgage and, should therefore pay separate court-fees on the amounts due under both the mortgages. We do not think that this contention is correct. The plaintiffs would have run a great risk if they had sued on the subsequent mortgage without making a mention of the existence of a prior encumbrance in their favour, to avoid a possible plea hereafter that the prior mortgage not having been specifically mentioned in the plaint the sale under the puisne mortgage should be considered to have been made free from the encumbrance under the deed of 24th June 1923. The plaintiffs therefore were advised to specifically refer in their plaint to the prior mortgage and claim the relief of sale of the mortgaged property subject to the prior mortgage, as in fact it is, assuming the prior mortgage is valid. In the plaint itself there is no allegation of anything which might indicate that the validity of the prior mortgage is at all in question, though we have no doubt that the object of the plaintiffs was to have the matter settled once for all and therefore they made a prominent mention of the prior mortgage in their plaint, so that, if the defendants did not impugne it, they would be barred in any subsequent proceeding from challenging the validity of the prior mortgage. Beyond alleging the existence of the prior mortgage and claiming the relief of sale of the mortgaged property in enforcement of the subsequent mortgage subject to the prior encumbrance, the plaintiffs have not claimed any consequential relief. We think that the plaintiffs have claimed the mortgage money due under the puisne mortgage coupled with a declaration that the prior mortgage of 24th June 1923, is valid and binding on the

The learned Sessions Judge in summing up the charge to the Jury at the very outset warned the Jury that whatever had been said in the evidence about other dacoities had no relevancy. He emphasized that in considering the charge against the accused they had to exclude from their mind anything which had been said about other dacoities and that they must not take any notice of the evidence that two of the accused had been tried in some other case and convicted and brought to the Court from Jail and further that they should not take into account the fact that Jamil Ahmad accused was appearing in Court in convict's clothes. He then discussed the evidence of the approver Anwar Ali and his previous confession. He rightly pointed out that it was the foundation of the case which had led to the naming of some of the other accused and warned the Jury to consider carefully what value they would place upon it and pointed out that if it stood by itself it would be open to criticism that as he had been offered a pardon he would be ready to say anything. He also warned them to consider whether there was any justification for an inference that such a statement had been made under the influence of any threat or promise and pointed out that it was for the Jury to consider whether the argument of the counsel for the accused was well founded. He made it pertectly clear that the Jury alone had to decide whether they accepted the statement as entirely or partly true and emphasized that if they did, they could base their verdict of guilty on that statement and a conviction based on the uncorroborated evidence of an accomplice would not be illegal. It is usually considered unsafe to convict on an approver's statement unless corroborated in material particulars and that such corroboration should be in respect of each individual accused. He asked the Jury to consider the case generally first and then to consider the case of each accused separately and find out whether the approver's statement had been corroborated in respect of each of them. He warned them to consider Anwar Ali's statement and see to what extent, if any, it was corroborated. There can therefore be no objection taken to the way in which the value of the statement of the approver was put to the Jury.

The learned Sessions Judge then dealt with the identification proceedings and pointed out that the fact that an accused was picked out by a witness in Jail is not in itself evidence and that the evidence to be relied upon is the statement made by a witness in Court that a certain accused had been seen by him taking part in the dacoity and that identification in Jail, though in itself not evidence, can be used as corroboration of what a witness says in Court. He pointed out that if a witness fails to pick out a man in Jail, his statement made in Court would lack corroboration and emphasized the importance of such corroboration. He rightly impressed upon the Jury the necessity for bearing in mind the two important questions: first whether the witnesses, who had never seen the dacoits before, had sufficient opportunity of seeing their faces during the dacoity to enable them to recognise them again and whether the identifications in Jail were a real test. He then referred to the evidence that although it was a dark night, there was a lantern and there was some light from the burning cloth on Brij Lal's arm. Having then discussed the other circumstances he left the matter entirely to the Jury to decide whether they would accept the correctness of the identification. He reminded the Jury that if the results of the identifications showed that any particular witness had identified a certain number of the accused and also made a proportionately large number of mistakes the question would arise whether his identification is not fortuitous and therefore less reliable. He got the chart placed before the Jury which showed how accused persons were identified in Jail, in the Magistrate's Court and in the Sessions Court.

The learned Judge then dealt with the confession of Jamil and explained to the Jury that this could not be used against the other accused in the same way as evidence but that it might be taken into consideration; but as to Jamil himself if the Jury believed the statement they might convict him on it alone but they could not convict the other accused on the retracted statement alone. The learned Judge reminded the Jury that it was necessary that in the case of the other accused there must be other evidence which they were prepared to believe and that if there was such evidence then they could take the statement of Jamil into account and use it to fortify that evidence against the other accused. In this connection he

pointed out that Jamil had retracted his statement and had stated in the Sessions Court that he had been tutored to make that statement. The Judge warned the Jury that in seeing whether this was correct they had to consider all the circumstances of the case including the fact that Jamil was arrested purely by chance and on suspicion and that he was sent to Jail and his statement was taken within two days of his arrest.

Having dealt with the case generally, the learned Judge took up the case of each of the accused separately and emphasised the evidence against each accused. It is noteworthy that in dealing with the case of the accused persons other than Jamil Ahmad, the learned Judge did not refer to the retracted confession of Jamil Ahmad at all. but when coming to the case against Jamil Ahmad he certainly said that he had given no defence and offered no explanation of his prosecution. but only denied having made the confession. The learned Judge wound up his charge by saying that if the Jury had any reasonable doubt the benefit of it should be given to the accused.

In appeal it is urged on behalf of the accused persons that there has been a misdirection to the Jury. It is said first that the learned Judge did not emphasize that there was a presumption of innocence in favour of the accused and that the burden of proof lay on the prosecution. We have no doubt that these facts must have been emphasized by the learned counsel for the accused in the first instance and the whole trend of the charge shows that the learned Judge warned the Jury that the burden of proof lay on the prosecution and they had to be satisfied whether the case had been established by the prosecution. We are not satisfied that the omission to mention it in express terms in this case amounted to any misdirection.

It is next urged that the learned Judge did not scrutinise the evidence in detail and did not place before the Jury various circumstances which might have told in favour of the accused. The learned advocate has drawn our attention to a few minor particulars. When it is borne in mind that the evidence adduced in this case covered more than 200 pages it cannot be expected that the learned Judge would refer to the entire evidence in detail when summing up the charge. Indeed such a course would confuse the Jury more than enlighten them. We are satisfied that the learned Judge has emphasized all the important and essential features of this case and drawn the attention of the Jury to the important evidence and has not overlooked any piece of evidence which would have weighed heavily against the prosecution. Discrepancies as regards the exact date of the arrest or the exact date when Anwar Ali had made his confession were trivial because these dates were not definitely ascertained at the trial.

The learned advocate for the accused has very strongly criticised the charge on the supposed discrepancy between the first remark made by the Judge that Jamil Khan had retracted his confession and had stated that his previous statement had been a tutored one and the subsequent remark that he had denied his confession. Before any verdict of the Jury can be set aside on the ground of a mistake in the charge, we have to be satisfied that such verdict is erroneous owing to a misdirection by the Judge. The error of the verdict must be the direct result of the misdirection: see S. 423 (2). Similarly it is provided in S. 537 (d) that no finding shall be reversed or altered on appeal or revision on account of any misdirection in any charge to a Jury unless such misdirection has in fact occasioned a failure of justice.

As pointed out above, the learned Judge in dealing with the case generally had reminded the Jury that Jamil Khan had retracted his confession and had put forward his explanation that his previous confession was not voluntary but that he had been tutored to make it. He did not refer to this confession of Jamil Khan at all when dealing with the case of individual accused other than Jamil Khan. He apparently excluded it from consideration and certainly warned the Jury that they should not act upon it unless they believed other evidence in the case. It cannot therefore be said that the verdict of the Jury as regards the other accused was in any way influenced by any such misdirection. It is only when dealing with the case of Jamil Khan that the Judge felt that he should refer to his previous confession and his retraction. The language used by him is to some extent unhappy but that is particularly due to the way in which the accused himself has retracted his previous confession. He first said that a statement prepared by the police had been read out to him and he was compelled to

make it and then said that if it had been his statement he would have stuck to it. Instead of saying that the accused Jamil Khan had been warned by the Magistrate that he should not make any statement while under any undue influence or any promise of reward or punishment and after stating that the Magistrate was satisfied that the statement was voluntary, Jamil Khan had made the statement at great length, giving a long and cogent story of the various dacoities, but that later on he had said that he had been tutored to make the statement and he failed to produce any evidence whatsoever to prove that he was tutored, the Sessions Judge merely said that he "denied" his previous confession. We do not think that this in any way prejudiced Jamil Khan and there is no reason to suspect that the Jury came to any erroneous verdict on account of this inaccuracy. We are certainly not satisfied that any failure of justice has been occasioned in consequence of this. In these circumstances the verdict must be accepted.

As regards the sentences we have no hesitation in saying that the sentences of transportation for life on all the accused are well merited and are by no means severe. Bearing in mind the brutality with which Brij Lal was tortured there can be no doubt that the accused are hardened criminals who would be prepared to go to any length and cause any amount of pain to inmates of the house if they expected that they would be able to extract admissions as to the place where the valuables were concealed. All the appellants, who were in this dacoity, are guilty of this cruelty. We have therefore no hesitation in saying that the the sentences of transportation for life should be upheld. The appeal is dismissed.

K.S. *Appeal dismissed.*

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SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Muhammad Ekram Khan and *another* Defendants—Appellants.

v.

Mirza Muhammad Bakar and *others* —Plaintiffs and Defendants — Respondents.

Second Appeal No. 330 of 1930, and Appeal No. 382 of 1930, Decided on 10th August 1934, from decision of Dist. Judge, Benares, D/- 15th November 1929.

(a) Civil P. C. (1908), O. 22, R. 3—Suit by more persons than one in their individual capacities—Death of one of them and appeal by defendants — When heirs of deceased respondent should be on record stated.

If a suit is brought on behalf of the plaintiffs in their individual capacities then it would be the duty of the defendants on appeal on the death of one of the plaintiffs to bring the heirs of the deceased respondents on the record only if (1) the right to sue did not survive to the surviving plaintiffs or (2) the sole plaintiff had died and the right to sue survived within the meaning of O. 22, R. 3. If the suit is not of a representative character, then the right of the deceased plaintiff could not survive to the surviving plaintiffs. [P 107 C 1]

(b) U. P. Municipalities Act (2 of 1916), S. 29—Election rules under—Only authority who can revise order of revising committee is District Magistrate—Subject to this, committee's order is final—District Magistrate's order is final and civil Court has no jurisdiction to question it—Jurisdiction.

The right conferred on people residing in a ward is merely to object to the preparation of an electoral roll within the prescribed time and to submit their grievances before the revising committee. The only other authority who can revise the order of revising committee is the District Magistrate. Subject to any order passed by the District Magistrate, the order made by the rivising committee is final. And hence a civil Court could, prima facie, have no jurisdiction to question the order of the District Magistrate which, under the rules, is declared to be final. [P 108 C 2]

(c) U. P. Municipalities Act (2 of 1916), S. 29—Election rules—Decision of District Magistrate—Omission to submit proceedings of revising committee formally before District Magistrate—Such irregularity will not vest jurisdiction in civil Court—Jurisdiction.

Such omission as the omission to submit the proceedings of the revising committee formally before the District Magistrate or similar irregularities would not vest in the civil Court jurisdiction to re-open the matter and question the propriety of any order passed by the revising committee or the District Magistrate: *Case law referred.* [P 109 C 1]

(d) Civil P. C. (1908), S. 80—Returning officer is not public officer within meaning of S. 80.

A Deputy Magistrate who has been appointed as the returning officer by the District Magistrate for the purposes of election work of the Municipality at the time, cannot be said to be a public officer who is acting in that connection in his official capacity as such public officer within the meaning of S. 80. [P 109 C 2]

(e) U. P. Municipalities Act (2 of 1916), S. 326—Relief of injunction claimed—Notice under S. 326 is not necessary.

The notice under S. 326 is not necessary in a case where the reliefs claimed are those of an injunction. [P 109 C 2]

(f) Injunction — Belated application for injunction against returning officer to stop election—Held should not be allowed.

Where a belated application for injunction is filed for injunction against the returning officer on the eve of the date fixed for the election and

such application could have been filed long before, injunction should not be granted which would put a stop to the carrying out of the election, [P 110 C 1]

A. M. Khwaja Mukhtar Ahmad and *S. N. Seth*—for Appellants.

Shiva Prasad Sinha — for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit brought by four plaintiffs jointly for an injunction restraining defendant 1 from recording his vote at a Municipal election and for a declaration that defendants 2 and 4. be ordered to have the votes already recorded declared invalid. The claim was decreed in favour of all the plaintiffs and that decree was upheld on appeal by the District Judge. While a second appeal was pending in this Court at least one of the plaintiffs-respondents, if not two, died and no steps were taken to bring any legal representatives on the record. A preliminary objection is taken on behalf of the respondents that the appeal having abated against one or two of the plaintiff-respondents who had got a joint decree, it has become infructuous and must abate in toto or, at any rate, be dismissed. We are unable to accept this contention. Either the suit brought was one brought in a representative capacity or it was brought in the exercise of the rights of the individual plaintiffs. If it was a representative suit then the observations of their Lordships of the Privy Council in 1921 P. C. 123 (1), would apply to this case, and the appeal cannot be said to have abated.

On the other hand, as appears to be the case here if the suit was brought on behalf of the plaintiffs in their individual capacities then it would have been the duty of the appellants to bring the heirs of the deceased respondents on the record only if: (1) the right to sue did not survive to the surviving plaintiffs, or (2) the sole plaintiff had died and the right to sue survived within the meaning of O. 22, R. 3. If the suit were not of a representative character then the right of the deceased plaintiff could not survive to the surviving plaintiffs. Furthermore, the claim was based on the fact that the plaintiffs were members of the Board which was a personal matter and their right to sue could not survive to their legal heirs. It is thus clear that neither of the two necessary requisites laid down in O. 22, R. 3, apply to this case and therefore the appellants could not possibly have applied under that rule for bringing on the record the legal representatives of the deceased inasmuch as no such representatives in the eye of the law existed. The omission to do what could not legally have been done cannot therefore be fatal to the appeal.

An illustration would make the point perfectly clear. Had one of these plaintiffs died soon after the decree was passed by the lower Court and before the appeal could be filed could it be said that the defendants had no right of appeal because of the death of a respondent ? It is impossible to hold that where the right to sue does not survive, the death of one of the plaintiffs whose legal representatives cannot be brought on the record is fatal to the appeal. We accordingly overrule the preliminary objection. Coming to the facts of the case; it appears that 9th December, was fixed for a Municipal election. An electoral roll was prepared sometime before 1st September 1928, and was posted at the office of the Municipality at Benares. Later on, on a report made by the office the Returning Officer directed that Mr. Hadi Hasan, a Deputy Collector, should examine the list and on his recommendation that certain names should be included the Returning Officer ordered "now enter." Accordingly a supplimentary electoral roll was prepared on 10th November 1928, under the order of the Revising Committee which confirmed the inclusion of Muhammad Ikram Khan's name previously ordered by the Returning Officer. Previous to this, objections had been filed against the inclusion of Muhammad Ikram Khan's name, but they were summarily rejected by the Revising Committee on the ground that they had not been shown in the original electoral roll. One Abdul Alim filed an application before the District Magistrate objecting to the inclusion of Muhammad Ikram Khan's name and on the same day, namely, 17th November 1928, the District Magistrate passed the following order:

"I am satisfied that Muhammad Ikram Khan possesses the necessary qualifications to be enrolled as an elector. His name rightly stands on the roll, and will stay there. Rejected."

On 20th November 1928, the present suit was instituted against Muhammad Ikram Khan, the Returning Officer, the Municipal Board as well as the Executive Officer of the Board. The reliefs

1. Raja Anand Rao v. Ram Das Daduram, 1921 P C 123=62 I C 737=48 I A 12=48 Cal 493 (P C).

claimed were those for injunctions. On 8th December, that is just one day before the date fixed for the election, the plaintiffs asked the Court to issue a temporary injunction against the defendant, Mr. Upadhia, which prayer was granted. Mr. Upadhia at the time was the Returning Officer. He ignored the injunction and did not obey it and proceeded to complete the election. On an application made by the plaintiffs against him complaining that he had not obeyed the injunction, he was asked to explain his conduct. The only explanation which he offered was a statement that he had consulted the District Magistrate and that it was his duty to carry out the orders of his superior authority. It is therefore not surprising that both the learned Munsif and the District Judge have passed strictures on the conduct of Mr. Upadhia. Both the Courts below have held that inasmuch as there were gross irregularities committed in this election, the Civil Court has jurisdiction to entertain the claim. It has been pointed out that no formal notice was issued of the preparation of the supplementary electoral roll and that the additions made by the Returning Officer were not submitted to the District Magistrate for any confirmation. The Courts below have come to the conclusion that in view of these serious irregulaties the authorities concerned refused to function as they ought to have done, and that therefore the jurisdiction of the Civil Court is not barred.

It is necessary in this case to examine the provisions of the Municipalities Act, and the rules made thereunder in order to see whether the Civil Court has any jurisdiction. In the body of the Municipalities Act, itself, as it stood in 1928, there is no provision which in express terms ousts the jurisdiction of the Civil Court as regards matters pertaining to elections; but S. 29 confers authority on the Local Government to make rules with reference to qualifications of candidates, preparation and revision of electoral rules and candidates' lists, nomination of candidates, etc. On 30th June 1928, the Local Government had notified in the Gazette the election rules which were in force on the material dates.

Under R. 3 the District Magistrate was empowered to appoint a person called the Returning Officer to perform certain duties. Under R. 4 electoral rolls have to be prepared on or before 1st September, preceeding the election. Under R. 9 copies of the electoral roll have to be fixed up at the Municipal Office. Under R. 10 certain persons are entitled to object to the electoral roll. Under R. 11 such claims and objections are heard by a Revising Committee consisting of the Returning Officer and two members of the Board. Then under R. 12 the Returning Officer is empowered to make amendments in the electoral roll, whether claims and objections have been preferred or not, after causing such notice as he considers reasonable to be given to persons affected and after making such inquiry as he deems necessary. R. 13 then provides that the proceedings of the Revising Committee in respect of each claim or objection of which notice has been given, and of the Returning Officer in respect of an irregular entry of which he has taken cognizance, shall be reduced to writing and shall, within seven days after the last sitting of the Revising Committee, be submitted to the District Magistrate whose orders thereon shall be final. R. 14 then provides:

"Subject to any orders of the District Magistrate on the proceedings of the Revising committee or the Returning Officer and to any correction in any electoral roll enjoined by the District Magistrate of his own motion or on application being made to give any time within 20 days after the last sitting of the Revising Committee (a) the orders made by the Revising Committee or by the Returning Officer shal be final (b) the electoral roll shall be amended in accordance with those orders and (c) the electoral roll so amended shall not be altered so long as it continues in operation."

There is however, a proviso in respect of persons who may be dead or who may be disqualified under S. 14 (3), Municipalities Act. It is not necessary to refer to other rules. It is quite clear that the right conferred on people residing in a ward is merely to object to the preparation of an electoral roll within the prescribed time and to submit their grievances before the Revising Committee. The only other authority who can revise the order of the Revising Committee is the District Magistrate. Subject to any order passed by the District Magistrate, the order made by the Revising Committee is final. The order of the District Magistrate also is final; and the electoral roll has to be amended in accordance with such orders and the electoral roll so amended cannot be altered.

In view of these provisions in the rules, there can be no manner of doubt that the only right which the plaintiffs

had was to prefer their objections before the Revising Committee and then ultimately to appeal to the District Magistrate. But the District Magistrate's order whether it was for or against the applicants and whether it was right or wrong has to be final. A Civil Court could therefore prima facie have no jurisdiction to question the order of the District Magistrate which, under the rules, is declared to be final. The Courts below have taken the view that because the proceedings were not submitted by the Revising Committee to the District Magistrate, no finality attached to it, but that is quite a wrong view to take for three reasons. In the first place, the order of the Revising Committee is itself final subject to any order that might be made by the District Magistrate. If the District Magistrate has not modified that order, it stands. In the next place, it is not clear that one week had expired after the last sitting of the Revising Committee. But in any case the matter was brought to the notice of the District Magistrate at the instance of Abdul Alim and he ordered that the name of Muhammad Ikram Khan was rightly entered in the electoral roll and should stay there. This was tantamount to a confirmation by the District Magistrate of the proceedings of the Revising Committee.

In the third place, under R. 14, the District Magistrate was empowered "of his own motion" to add a name and his order, to say the least, might amount to an addition of a name on his own motion. We however find it unnecessary to express any final opinion on these questions and we are prepared to assume in favour of the plaintiffs that irregularities were committed in the omission to submit the proceedings of the Revising Committee formally before the District Magistrate. But it by no means follows that such omissions or irregularities would vest in the Civil Court jurisdiction to re-open the matter and question the propriety of any order passed by the Revising Committee or the District Magistrate. In matters of procedure there are frequently non-compliances with the existing rules and it may be that sometimes irregularities are committed. Some irregularities may or may not be grounds for filing a petition before a Commissioner. In some cases arising under the Cantonments Act, and the District Boards Act this Court has recently expressed the opinion that civil suits are not maintainable. We may briefly refer to the case of 1933 All 163 (2), 1933 All 358 (3) and 1933 All 764 (4). In the second mentioned case the Bench expressly dissented from the view expressed in 1923 Mad 475 (5); and in the last mentioned case it was emphasised that where a special Tribunal is created by an Act of the Legislature which states that the decision of the Tribunal shall be final, the High Court cannot interfere by way of appeal or revision with the decisions of such Tribunals.

In this connexion we may also refer to the case of 1934 All 795 (6). We are of opinion that the orders passed by the Revising Committee or the District Magistrate under the election rules framed by the Local Government are final and cannot be impugned in a civil suit. The learned counsel for the appellants has also urged before us that S. 80, Civil P. C., applied to this case and without previous notice the suit was not maintainable. S. 80 cannot possibly apply to any of the defendants other than Mr. Shimbhu Nath who was a Deputy Magistrate, but Mr. Shimbhu Nath who had been appointed as the Returning Officer by the District Magistrate for the purposes of this election and who was doing the election work of this Municipality at the time cannot be said to be a public officer who was acting in that connexion in his official capacity as such public officer. A public officer, for the purpose of S. 80, is defined in S. 2 (17) and none of the categories mentioned therein would include such a Returning Officer. We therefore think that S. 80 is inapplicable. It has to be conceded that the notice under S. 326, Municipalities Act was not necessary in this case because the reliefs claimed were those of an injunction and came within the last proviso.

We also think that there is no force in the contention urged on behalf of the defendants that even if the Civil Court had jurisdiction to entertain the suit and grant relief to the plaintiffs, the declaration granted was ultra vires. What happened was that owing to the election having already taken place, the

2. Cantonment Board, Agra v. Kanhaiya Lal, 1933 All 163=144 I C 1016.
3. Joti Prasad v. Amba Prasad, 1933 All 358=142 I C 403=55 All 406.
4. Ghulam Nizam-ud-din v. Akhtar Hussain Khan, 1933 All 764=147 I C 148=55 All 1008.
5. Sarvothama Rao v. Chairman, Municipal Council, Saidapet, 1923 Mad 475=73 I C 619=47 Mad 585.
6. Municipal Board, Bareilly v. Abdul Aziz Khan, 1934 All 795=152 I C 792.

learned Munsif considered it to be futile to grant a decree for injunction and he accordingly substituted therefor a declaration. Had we been of the opinion that the learned Munsif had jurisdiction to entertain the suit, we would have seen nothing objectionable in this. As the learned Munsif in his judgment has drawn the attention of the High Court to the conduct of Mr. Upadhia, we think it necessary to observe that, having regard to the very belated application of the plaintiffs filed on the eve of the date fixed for the election, although they had had over two weeks' time before, the learned Munsif acted injudiciously in issuing an injunction against the Returning Officer which would put a stop to the carrying out of the election. The plaintiffs should have filed an application earlier so that if the Court issued a temporary injunction, the opposite party would have had a fair opportunity to appear and show cause before the critical date arrived. We also find that in the judgment of the learned Munsif there are several sentences which, by implication, cast a personal reflection on officers who are no parties to the suit. We have not thought it necessary to order their expunction, but we would certainly remark that they were inappropriate.

We are unable to hold that the learned Munsif had no jurisdiction to issue a temporary injunction. At the stage at which the application was made before him, he had not had the time to consider whether the suit itself was maintainable and was cognizable by the Civil Court. At that time a civil suit was pending in his Court. If he were satisfied that injury was likely to be caused to the plaintiff he had jurisdiction under O. 39, R. 2, to issue a temporary injunction. The question whether ultimately he discovered that the suit did not lie or that it should fail on some other ground did not oust his jurisdiction under that rule. If he had issued injunction against persons who were no parties before him, the position might possibly have been different, but here the injunction was issued by the learned Munsif against Mr. Upadhia who was a defendant in the suit and who was therefore under the jurisdiction of the Court. Notice of this was duly served upon him on 8th December. It was his duty to obey the injunction and to move the Court at the earliest opportunity to have the ex parte order set aside. He appears to have been ill-advised in ignoring it. He expressed no regret and offered no apology when he was called upon by the learned Munsif to explain his conduct and merely took shelter behind the statement that he acted under the advice of the District Magistrate. In these circumstances, the conduct of the defendant who disobeyed the injunction issued by the Munsif was certainly reprehensible and he might have been made liable although the peculiar circumstances of the case furnished extenuating circumstances.

The last point to be considered is whether the order of the Courts below saddling the Municipal Board with the costs of defendants 2 and 4, was right. The Municipal Board itself had really no direct concern with this dispute regarding election. The complaint was against the Returning Officer who had been appointed by the District Magistrate and against members of the Revising Committee who had belonged to the old Board. They are not parties to the suit. The order therefore was unjust. It is not necessary to say much on this point because now the claim will have to be dismissed as against the Municipal Board. We may however point out that defendants 2 and 4 having obtained a decree for costs against the Municipal Board, have not thought it necessary to appeal to the High Court. So far as Mr. Upadhia is concerned, we think that having regard to his conduct in disobeying the injunction issued by the learned Munsif, he should be made to bear his costs throughout. We however direct that the costs of Mr. Shimbhu Nath should be borne by the plaintiffs.

We accordingly allow this appeal and setting aside the decree of the Courts below dismiss the plaintiffs' suit with costs in all Courts. The surviving plaintiffs must bear their own costs and pay the costs of the Municipal Board, Muhammad Ikram Khan as well as of Mr. Shimbhu Nath. The defendant, Mr. Upadhia, will bear his own costs throughout.

K.S. *Appeal allowed.*

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KENDALL AND IQBAL AHMAD, JJ.

Mt. Zabaishi Begam—Appellant.

v.

Naziruddin Khan and *others* — Plaintiffs and others—Respondents.

Appeal No. 145 of 1930 and First Appeal No. 175 of 1930, Decided on 6th September 1934, from decision of Sub-Judge, Agra, D/- 18th December 1929.

(a) Practice — All evidence led by parties — Fresh evidence should not be admitted when other party has no opportunity to produce evidence in rebuttal.

Fresh evidence should not be admitted after the parties have led all the evidence that they wanted to produce, and when the defendants have no opportunity to produce evidence in rebuttal of the evidence newly introduced on the record. [P 112 C 2]

(b) Civil P. C. (1908), O. 1, R. 9 — Non-joinder of necessary party by itself is not ground for dismissing suit—But Court cannot pass infructuous and ineffective decree—But if Court is in a position to pass decree capable of execution in spite of absence of some parties, it can pass decree.

The non-joinder of a necessary party cannot, by itself, be a ground for dismissing the suit, and the Court is bound to adjudicate on the rights of the parties actually before it. A Court will refrain from passing a decree which would be ineffective and infructuous and the reason for this rule is obvious. It would be idle for a Court to pass a decree which would be of no practical utility to the plaintiff, and be a waste paper in the sense that the relief that it purports to grant to the plaintiff can not be vouchsafed to himbecause of the objection of some person who is not bound by that decree. But this rule has no application to cases in which, notwithstanding the fact that some of the persons interested in the subject-matter of the suit are not parties to the suit, the Court is in a position to pass a decree that is capable of execution and cannot be rendered nugatory at the instance of persons not made parties to the suit. [P 115 C 1]

(c) Civil P. C. (1908), O. 1, R. 9 — Interest of person not made party distinct from interest of persons who are parties—Rights and interest of parties actually before Court can be dealt with.

When the interest of the person not made a party to the suit is distinct from the interests of the persons who are parties to the suit, there is no justification for not dealing with the matter in controversy so far as the rights and interests of the parties actually before the Court are concerned. Hence where a Mahomedan heir who is out of possession brings a suit for possession against his co-heirs and omits to implead one of the co-heirs, there is no reason why he should not be granted a decree for so much of his share as is in possession of the heirs who are made parties to the suit, as the interests acquired by the heirs of a deceased Muhammadan in his property are always definite, distinct and ascertained, and, as such the absence of one of the co-heirs from a suit brought by another co-heir for possession of his share cannot be a ground for dismissing the suit : 1928 *All* 172 ; 1930 *All* 762, *Rel on.* ; 1921 *Cal* 622 and 1928 *Cal* 138, *Ref.* [P 116 C 1,2]

S. K. Dar, Baleshwari Prasad and *U. S. Gupta*—for Appellants.

N. P. Asthana, B. Malik, G. Agarwala, M. L. Chaturvedi and *K. N. Agarwala*—for Respondents.

Judgment.—This dispute in this and the connected Appeal No. 175 of 1930, is about the property that belonged to one Nadir Ali who died before the year 1877 A. D., leaving a widow Nadirjan and two sons, Sher Ali and Hamza Ali and a daughter named Shafat Begam. Nadirjan transferred the share that devolved on her by right of inheritance from Nadir Ali to her two sons. The plaintiffs in the suit were the heirs of Shafat Begam, viz., Nasiruddin, her husband and Fakhurddin, her son, and they are the contesting respondents in both the appeals. The claim by them was with respect to the share that on the death of Nadir Ali devolved on Shafat Begam by right of inheritance, and to which share the plaintiffs became entitled, on the death of Shafat Begam in the year 1916, as her heirs. Admittedly Shafat Begam was entitled to a 14-80 share in the property left by Nadir Ali and the plaintiffs' claim was with respect to that share.

The property owned by Nadir Ali was zemindari share in Mahal Sher Ali in village Datauji. It is not disputed that Shafat Begam was never in actual possession of that share, and it is common ground that sometime before the year 1910 a partition between Sher Ali and Hamza Ali took place. By that partition the zemindari share was divided into two holdings, holding No. 1, and holding No. 4. The former holding was allotted to Hamza Ali and the latter to Sher Ali. Between the years 1911 and 1920, by various transfers effected by Sher Ali and his widow, the whole of holding No. 4 passed bit by bit into the hands of certain transferees who have built glass factories over portions of the property transferred. Hamza Ali also sold a portion of holding No. 1 to certain persons, but practically the whole of that holding is still with Hamza Ali's heirs. Hamza Ali died in the year 1919 leaving a widow Zabaishi Begam and three sons and two daughters. One of his daughters was a lady named Muzammil Begam who was arrayed as defendant 6 in the suit. The widow and the sons and the daughters of Hamza Ali were all defendants in the suit. Sher Ali also died in the year 1921 leaving two sons who were defendants 1 and 2, in the suit. All the transferees were also impleaded as defendants. It would thus appear that the defendants in the suit were the heirs of Sher Ali and Hamza Ali and their transferees.

The case formulated in the plaint was that the brothers of Shafat Begam who were in actual possession of the zemindari share left by Nadir Ali, were qua the share of Shafat Begam, in the

position of trustees and that Shafat Begam must be deemed to have all along been in constructive possession of the share to which she was entitled. Almost all the defendants, except the sons of Sher Ali, contested the suit mainly on the allegation that on 12th April 1890, Shafat Begam executed a deed of reliquishment with respect to the share that devolved on her by right of inheritance from Nadir Ali in favour of her two brothers and thus ceased to be the owner of the share in dispute. The allegation of the plaintiffs that Shafat Begam was in receipt of the profits of the property was also denied by the contesting defendants and the plea of limitation was put forward in bar of the plaintiffs' claim. The transferees claimed to be transferees in good faith for valuable consideration and contended that they were protected by S. 41, T. P. Act. The plea of estoppel was also raised by the transferees.

During the pendency of the suit in the Court below Muzammil Begam died and an application to bring upon the record her legal representatives in the array of defendants was filed by the plaintiffs. There was however difficulty in effecting service on the proposed heirs and, by an application dated 28th July 1929, the plaintiffs prayed that the proposed heirs of Muzammil Begam be exempted from the claim, and the Court granted that application.

The Court below overruled all the pleas urged in defence. It held that Shafat Begam did not execute the deed of relinquishment; that Shafat Begam was in receipt of the profits of her share in her lifetime; that the defendants were not in adverse possession of the property in dispute and the suit was not barred by time; that the plaintiffs were not estopped from maintaining the suit and that the transferees were not entitled to the benefit of the provisions of S. 41, T. P. Act. But in vew of the fact that the whole of Sher Ali's share and a portion of Hamza Ali's share had passed into the hands of the transferees, the Court below did not grant a decree to the plaintiffs in terms of the reliefs prayed in the plaint and passed a decree as follows:

"Suit is decreed with costs. In case a partition of the specific share of plaintiffs takes place, I recommened to the partitioning Officer that he will at first allot 14 sihams of plaintiffs out of 80 sihams of the property at first from the shares remaining in the hands of Hemza Ali Khan and Sher Ali Khan, and if that is not sufficient to complete the share of the plaintiffs then their said 14 shiams be allowed from the share of the defendants who are subsequent purchasers of the property in suit from the heirs of Sher Ali Khan and Hamza Ali Khan."

The present appeal is by the three sons and the widow of Hamza Ali, and certain cross-objections in this appeal have been filed by some of the transferees. At the hearing of the appeal no one appeared to support the cross-objection filed by the defendant, Shafaraz Ali. The connected appeal is by some of the transferees. On behalf of the defendants the finding of the Court below that the execution of the deed of relinquishment by Shafat Begam was not proved has been assailed, and strong exception has been taken to the reception in evidence by the Court below of a judgment of this Court at a belated stage of the trial. Shafat Begam was a resident of the town of Ferozabad in the Agra District and it appears from that judgment that on the very date on which the deed of relinquishment is alleged to have been executed by Shafat Begam, a similar deed was executed by another lady Faiyazi Begam who also resided in Ferozabad, in favour of her brother Mirza Umrao Beg. The judgment referred to above was in a case in which the validity of the deed executed by Faiyazi Begam was in question and, in the course of the judgment, this Court, on a consideration of the evidence in the case, came to the conclusion that both the deeds were the outcome of a conspiracy entered into by certain persons to deprive both Shafat Begam and Faiyazi Begam of their shares in the estates of their fathers.

There is considerable force in the argument that the Court below was not justified either in accepting that judgment in evidence or in placing reliance on the same. The judgment was filed at a belated stage of the trial in in the Court below. The evidence of the parties concluded on 5th December 1929, and arguments were heard on 6th December. The judgment appears to have been filed and admitted after the conclusion of evidence and apparently without any notice to the defendants. We consider that the Court below was wrong in admitting fresh evidence after the parties had led all the evidence that they wanted to produce, and when the defendants had no opportunity to produce evidence in rebuttal of the evidence newly introduced on the record. Again the judgment was not

inter parts and was not relevant for the determination of the question whether the deed of relinquishment in dispute was executed by Shafat Begam. We have therefore discarded the judgment from consideration.

The deed of relinquishment purports to have been executed on 11th April 1890. It was presented for registration in the office of the Sub-Registrar of Ferozabad on 15th April, by one Raunak Ali in behalf of Shafat Begam with an application praying that the document be registered at the residence of Shafat Begam. The Sub-Registrar issued a commission to the Naib Tahsildar of Tahsil Ferozabad "directing him to only verify the particulars at the residence of the lady." The report of the Naib Tahsildar is endorsed on the back of the document and is to the effect that he verified the contents of the document from Shafat Begam at the house of Umrao Beg and that, after hearing the contents of the document, Shafat Begam admitted the same to be correct and stated that she had executed the document. It does not appear what authority Raunak Ali had to present the document for registration on behalf of Shafat Begam.

The deed was attested by three witnesses, viz., Umrao Beg, Abbas Ali and Gauhar Ali. Gauhar Ali das dead and his son Malik Ali Khan was called as a witness in the case. It is however significant that neither Umrao Beg nor Abbas Ali Khan were called to prove the deed. The learned Judge of the Court below rightly declined to accept the evidence of Malik Ali Khan. The witness admitted that he was a Mukhtar-i-am of Zabaishi Begam, defendant, for about 8 or 9 years. He took care to state that he did not see Shafat Begam appending her signature to the document. He deposed that when the document was read over, some lady said from the zenana quarters that the document was executed by her, and he recognized that voice to be the voice of Shafat Begam. The witness admitted that he was in debt and one of the plaintiffs was one of his judgment-creditors and that he was declared insolvent. It is manifest therefore that Malik Ali was not a reliable witness and, apart from this, his evidence falls short of proving the due execution of the deed by Shafat Begam.

By the deed Shafat Begam purported to relinquish her share in lieu of the receipt of Rs. 30 a year from her brothers. The profits of her share was much in excess of Rs. 30 a year. Shafat Begam was employed as a teacher in some girls' school in Aligarh for about 10 or 12 years. It may therefore be taken for granted that she was not an illiterate lady. She was however a pardanashin lady and there is no evidence on the record to show that the document was either explained to her, or that she had any independent advice for entering into the transaction evidenced by the deed. It cannot be denied that the document had a far-reaching effect on her interest. It purported to deprive her of her share in her father's property for ever and that for a nominal consideration of Rs. 30 a year. Again the proceedings taken for the registration of the document were extremely suspicious. The document was not presented for registration by the lady or by her husband. The registration on commission did not take place at the house of Shafat Begam, but at the house of one Umrao Beg who had apparently no connexion with Shafat Begam. Shafat Begam at the time of registration is alleged to have been identified by Umrao Beg and Gauhar Ali, and at that time even her signature was not taken and Umrao Beg signed on her behalf. There is no explanation why Shafat Begam's signature was not taken at the time of registration.

In view of the facts noted above we accept the finding of the Court below that the execution of the document by Shafat Begam was not proved. It was admitted by the defendants that Shafat Begam used to receive Rs. 30 a year, but they alleged that this amount was paid to her as she was entitled to the same by virtue of a deed of agreement executed by the two brothers in her favour contemporaneously with the execution of the deed of relinquishment by her. It it therefore manifest that Shafat Begam was in receipt of the profits of the property. It may be that she did not receive her full share of the profits, but that does not matter. Moreover, Shafat Begam and her two brothers were in the position of co-owners and there is no evidence of her ouster in the present case. The suit giving rise to these appeals was filed within 12 years of the death of Shafat Begam. There was therefore no substance in the plea of limitation raised by the defendants.

Similarly S. 41, T. P. Act, had no application to the facts of the case.

The transferees no doubt asserted in the written statements filed by them that they were transferees in good faith, but not one of the transferees entered the witness-box to substantiate the assertion. There was no evidence in the case to show that before taking the transfers the transferees made any bona fide enquiries as to the title of their transferors. If they had made the least inquiry they would have come to know that Shafat Begam, as one of the heirs of Nadir Ali, had a share in the property in dispute. It was not alleged by any of the transferees that they accepted the transfers on being assured that Shafat Begam had executed a deed of relinquishment. The plea of estoppel raised by the defendants was also rightly rejected by the learned Judge of the Court below. It was not suggested by any of the transferees that they were misled by any act, omission or declaration of Shafat Begam. It is obvious therefore that the mere fact that some of the transferees have spent money in making constructions cannot be utilized by them in bar of the plaintiffs' claim.

We now proceed to consider an argument based on the exemption of Mazammil Begam's heirs from the claim. It is argued on behalf of the defendants that in a suit for ejectment the omission to implead any of the persons in possession is fatal to the suit, irrespective of the fact whether the property claimed is held by tenants in common or joint tenants or by coparceners. It is said that, apart from any of the provisions in the Civil Procedure Code, relating to the non-joinder of necessary parties or the abatement of a suit, a decree in a suit for ejectment cannot be passed unless all the parties in possession of the property in dispute are before the Court, as the decree will not be binding on the person in possession who is not impleaded in the suit, and, as such, will be infructuous. It is contended that this principle also applies to the claim preferred by one of the heirs of a deceased Muhammadan against his co-heirs. In short, it is argued that if one of the heirs of a deceased Muhammadan, who is not in actual possession of the share to which he is entitled, sues his other co-heirs for possession of his shares and omits to implead one of the co-heirs in possession the suit is not maintainable. In support of this contention reliance has been placed on the decision in 1921 Cal 622 (1), 1928 Cal 138 (2), 1928 All 172 (3) and 1930 All 762 (4).

The learned counsel for the plaintiff-respondents, on the other hand points out that this point was not raised in the Court below and, accordingly, contends that the defendants ought not to be allowed to raise the point in appeal. He rightly maintains that if this question had been debated in the Court below, the plaintiffs could have met the contention of the defendants by proving that all the persons in possession were before the Court, and that Muzammil Begam had no share in the property in dispute on the date of the institution of the suit. In this connection he has invited our attention to a deed of wakf executed by Zabaishi Begam the mother of Muzammil Begam, and the brothers of Muhammil Begam on 7th February 1923. The deed is printed at p. 62 of the record of First Appeal No. 145 of 1930. It is recited in that deed that Muhammil Begam made a gift of her share in the property in dispute in favour of Zabaishi Begam. We consider that the learned counsel for the plaintiffs is justified in putting forward the contentions noted above. If an issue as regards the effect of the exemption of Muzammil Begam's heirs on the suit had been raised in the Court below, the plaintiffs could very well have met the point by proving that Muzammil Begam had no share left, and, as such, all the persons in possession of the property in dispute were before the Court. We are therefore of the opinion that it would be unfair to the plaintiffs to allow the defendants to raise this point. But as the question of law has been argued at some length before us, we propose to give our decision on the point.

The general rule laid down by the Legislature is that no suit shall be defeated by reason of non-joinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it (vide, O. 1, R. 9, Civil P. C.). It is in conformity with this rule that in O. 22 of the Code, that deals with the death of parties during the pendency of a suit or appeal, the Legisla-

1. Haran Sheikh v. Ramesh Chandra, 1921 Cal 622=62 I C 425.
2. Arunadoya Chakrabarty v. Mahammad Ali, 1928 Cal 138=106 I C 261.
3. Faqira v. Hardewa, 1928 All 172=114 I C 177=50 All 559 (FB).
4. Ram Dei Misrain v. Jurawan Misir, 1930 All 762=128 I C 8.

ture has provided in express terms that the omission to take steps to bring on the record the legal representatives of a deceased plaintiff or defendant will result in the abatement of the suit only so far as the deceased plaintiff or defendant is concerned. Similarly the rule laid down by O. 34, R. 1, Civil P. C., that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage, is "subject to the provisions" of the Code, i. e. subject to the provisions of O. 1, R. 9, Civil P. C., and of other rules in O. 1, that provide about "parties to suits." It is manifest from these provisions that the non-joinder of a necessary party cannot, by itself, be a ground for dismissing the suit, and that the Court is bound to adjudicate on the rights of the parties actually before it.

There is however another well recognized rule which, so to say, constitutes an excepting to the general rule noted above. That rule is that a Court will refrain from passing a decree which would be ineffective and infructuous, and the reason for this rule is obvious. It would be idle for a Court to pass a decree which would be of no practical ultility to the plaintiff, and be a waste paper in the sense that the relief that it purports to grant to the plaintiff cannot be vouchsafed to him because of the objection of some person who is not bound by that decree. But this rule has no application to cases in which, notwithstanding the fact that some of the persons interested in the subject-matter of the suit are not parties to the suit, the Court is in a position to pass a decree that is capable of execution and cannot be rendered nugatory at the instance of persons not made parties to the suit. The inability of the Court to pass an effective decree, when all the parties interested in the subject-matter of the suit are not before it, may be due either to the nature of the action or to the nature of the interest that the person, who is not made a party to the action, has in the subject-matter of the suit. An illustration of the former class of cases is furnished by suits for partition or dissolution of partnership and rendition of account. In such cases in the absence of all the interested parties it is impossible for the Court to deal with the matter in controversy between the parties before it and to pass an effective decree. In a suit for partition of joint property, if one of the owners is not joined as a party, the Court will withhold its hand and not proceed to pass a decree, as a decree for partition must deal with the share of all the persons interested in the property sought to be partitioned, and in the absence of one of the owners, his share can obviously be not affected by the decree. Similarly in a suit for dissolution of partnership and rendition of accounts it is impossible for a Court to have the accounts adjusted between the partners inter se unless all the partners are before it, and, as such, the omission to implead one of several partners is always fatal to the suit. It is needless to say that we are not attempting to lay down an exhaustive list of the cases in which the rule laid down in O. 1, R. 9, Civil P. C., cannot be given effect to because of the inability of the Court to pass an effective and an operative decree.

Similarly the nature of the interest in the subject-matter of a suit possessed by a person, who is not a party to the suit, may be such as to render it impossible for the Court to pass an effective decree in his absence. Such is the case when the suit is with respect to some property belonging to a joint Hindu family and all the coparaceners are not made parties to the suit. In such a case the Court cannot pass a decree granting reliefs to the plaintiff without prejudicially affecting the right of the co-parcener who is not a party to the suit, and as such, the Court cannot, but dismiss the suit. But the rules noticed above have no application to cases in which the interest of the person, who has not been impleaded as party in the subject-matter of the suit, is ascertained or ascertainable, as in such cases the decree, while binding the interests of the persons who are parties to the decree, cannot adversely affect the separate and distinct right of the person who has not been made a party to the suit. In such cases the short answer to the objection raised by the absent party is that his interest being distinct and separate from the interests of the persons who are parties to the decree, the decree, while operative against the interests of the persons who are parties to the decree, can in no way adversely affect his right or interest in the property in suit. The interests acquired by the heirs of a deceased Muhammadan in his property are always definite, distinct and ascertained, and, as such, the absence of one of the co-heirs from

a suit brought by another co-heir for possession of his share cannot be a ground for dismissing the suit.

The principles enumerated above were laid down by the decisions in 1928 All 172 (3) and 1930 All 762 (4), and these decisions, though relied upon by the learned counsel for the defendants. are of no help to him. The case of 1921 Cal 622 (1), has also no application to the facts of the case before us. In that case the plaintiffs prayed for a declaration of a right of way as a village road over the disputed land and for removal of an obstruction thereon, but omitted to implead one of the persons interested in the servient tenement, and it was held that the omission was fatal to the suit. It is obvious that a decree passed in that suit in favour of the plaintiffs would have been infructuous as the decree would not have been binding on the owner of the servient tenement who was not arrayed as a defendant. The decision in 1928 Cal 138 (2), appears to favour the contention of the defendants. It was held in that case that in an action for ejectment, if any of the persons in possession is left out, a decree passed in the suit is infructuous as the person who was not made a party remains in possession as not being affected by the decree and "the persons ejected as being bound by the decree can always come in under the person who remains in possession." The learned Judges also observed that "there is a certain amount of risk involved in not making the persons in actual possession defendants, for, in execution of the decree, persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree."

If the learned Judges intended to lay down that in every action for ejectment the omission to implead one of the parties in possession is fatal to the suit, we, for the reasons given above, are unable to agree with the decision. When the interest of the person not made a party to the suit is distinct from the interests of the persons who are parties to the suit, there is no justification for not dealing with the matter in controversy so far as the rights and interests of the parties actually before the Court are concerned. The position may well be illustrated by the following example: A Muhammadan dies leaving five sons and each of the sons inherits a 1-5th share in the property of the deceased. Four of the sons enter into actual possession of the property and the fifth son is out of possession. It is obvious that each of the four sons is in possession of (1-5× 1-4), a 1-20th share of the property in excess of his legitimate share. If the son who is out of possession brings a suit for possession and omits to implead one of the four sons, there is no reason why he should not be granted a decree for so much of his share as is in possession of the three sons who are made parties to the suit. In such a case the plaintiff can be granted a decree for 3-20th of the property and the decree can in no way adversely affect the 1-20th share of the plaintiff that is in possession of the brother who has not been made a party to the suit.

For the reasons given above we hold that the omission to implead the heirs of Muzammil Begam could not be a ground for dismissing the suit. We may however add that any decree passed in the present suit will in no way be binding on Muzammil Begam's heirs. We have stated above that there is a direction contained in the decree passed by the Court below that the share decreed to the plaintiffs is first to come out from the share in the hands of Hamza Ali Khan and Sher Ali Khan and, if the share in their hands is less than the share to which the plaintiffs are entitled, then the deficiency in the plaintiffs' share is to be made good from the share in the hands of the transferees. There is no justification for subjecting the decree in the plaintiffs' favour to the conditions noted above. The plaintiffs are entitled to get their 14-80 share from the properties in possession of all the defendants, i. e., the plaintiffs can execute the decree for recovery of their 14-80 share from both the holdings No. 1 and No. 4.

For the reasons given above we allow this appeal to this extent that we modify the decree passed by the Court below by granting to the plaintiffs a decree for possession of 14-80 share in holdings Nos. 1 and 4, mentioned above as against all the defendants. The cross-objections filed by the defendants are dismissed with costs. As the appeal has failed against the plaintiff-respondents and has succeeded against the transferees we direct that the defendant-appellants must pay the costs of the plaintiff-respondents and that the defendants transferees must pay half of the costs incurred by the defendant-appellants in this appeal. Costs of the Court below as in the decree of that Court.

K.S. *Decree modified.*

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SULAIMAN, C. J. AND HARRIS, J.

Ch. Rajender Singh— Defendant—Applicant.

v.

Uma Prasad — Plaintiff — Opposite Party.

Civil Revn. No. 446 of 1934, Decided on 26th October 1934.

(a) Contempt—High Court has jurisdiction to punish for contempt of Subordinate Courts.

Jurisdiction to punish for contempt of Subordinate Courts undoubtedly vests in the High Court. [P 118 C 1]

(b) Contempt—Sending threatening notice to defendant in pending suit to withdraw plea taken by him in written statement is contempt — Pleader who sends it himself on behalf of his client is also guilty of contempt —Legal Practitioner.

It is the duty of the Courts to protect defendants from being cowed down into submission and under pressure of threat and menace being made to abandon pleas which they can legitimately take in a pending action. Hence where an attempt is made to put pressure on the defendant to withdraw a plea which was taken in the written statement, duly filed in Court, there can be no doubt that such an action amounts to a direct interference with the administration of justice in preventing the defendant from pressing his defence and putting forward the plea which might, if established, prove fatal to the suit and amounts to a contempt of Court: And the counsel who not only advises his client to send such a notice but actually drafts the notice himself and sends the same under his own signature, although on behalf of his client, is also guilty of contempt; for a counsel is not expected to act blindly and allow himself a mere instrument or a tool in his hands. He has to exercise his own judgment and discretion, and even in case where scandalous or defamatory matters are to be communicated he has to warn his client, much more so where the offence would amount to one of contempt of Court. A counsel's capacity is not inviolable, and his privileges cannot possibly extend to interference with the administration of justice. Counsel are expected to help the administration of justice, and not to be an impediment thereto. [P 118 C 1, 2; P 119 C 1]

Tej Bahadur Sapru and *Benod Behari Lal*—for Applicant.

B. E. O'Conor, A. P. Dube, K. N. Katju, Ram Nama Prasad, K. P. Misra, Hyder Husain, L. S. Misra, H. N. Misra and *Ram Prasad Verma* — for Opposite Party.

Sulaiman, C. J. — Chaudhari Rajendra Singh under the guardianship of Chaudhari Sher Singh applied to this Court for issue of notice to the plaintiff, Mr. Uma Pershad to show cause why he should not be dealt with for contempt of the subordinate Court in respect of a notice dated 11th July 1934, sent on behalf of the plaintiff by Dr. M, his advocate. The application was directed against the plaintiff, Mr. Uma Pershad only, but as prima facie it appeared that a contempt had been committed by the service of this notice issued under the signature of the counsel, we ordered that notice should go to the counsel concerned as well. Both are now represented before us.

It appears that a civil suit was pending in the Court of the Subordinate Judge of Dehradun and had been brought by the plaintiff, Mr. Uma Pershad against Rajendra Singh minor under the guardianship of Chaudhari Sher Singh on the basis of a mortgage-deed executed by the deceased father of the minor defendant in favour of the deceased father of the plaintiff. The claim was contested inter alia on the ground that the mortgage debt was not binding on the minor defendant inasmuch as it was tainted with immorality. In para. 9 of the written statement it was specifically pleaded:

"that some unscrupulous money-lenders taking advantage of the dissolute habits of the defendant's father began running him into indebtedness and the said defendant believes that the plaintiff's father also colluded with some of these money-lenders with a similar object and the payment of earlier debts as recited in the deed is fictitious."

After issues had been settled, the plaintiff's evidence closed, and the defendant's evidence began, the notice in dispute was sent by the plaintiff to the defendant's guardian. After quoting para. 9 of the written statement in full the notice stated that that statement was defamatory per se of the plaintiff's deceased father and lowered his reputation in the estimation of his fellowmen and caused him harm in various ways and then added:

"unless within a week of the receipt of this notice you send an unqualified apology and withdraw the aforequoted statement by putting in an application to that effect in the said Court and also by publishing the said withdrawal and apology in such newspapers as my client requires in order to clear the character and conduct of his late father and unless further within the same one week you pay to my client a sum of Rs. 10,000 (ten thousand rupees) only as damages, which sum is only a rough figure for the purposes of this notice and by which he is in no way bound, if litigation becomes necessary in this regard he will take action against you both in civil and criminal Courts as advised, in which event you will further be liable to pay such damages and costs incidental thereto as may be claimed."

The question for consideration before us is whether the issuing of this notice amounted to a contempt of the Sub-

ordinate Judge of Dehra Dun. Jurisdiction to punish for contempt of subordinate Courts undoubtedly vests in this Court, and has not been challenged by learned counsel. Apart from there being inherent jurisdiction, such jurisdiction has been expressly conferred upon High Courts by the contempt of Courts Act (12 of 1926), in all cases of contempt other than those which amount to an offence under the Penal Code. There is no suggestion in this case that the action of the opposite party amounted to any offence under the Penal Code. Therefore the only point for consideration is whether this notice amounted to contempt.

Now, there can be a large variety of cases coming under the well-recognized heads of contempt in which an offence may be committed. No attempt has therefore ever been made, nor is it possible to lay down any exhaustive catalogue of cases which would amount to contempt, but one of the well recognized heads is "interference with the administration of justice." Undoubtedly it is the right of every defendant to take every legitimate plea and submit his defence with the Court for its consideration. If the pleas are in any way unnecessary, irrelevant or scandalous, there is ample provision in the Civil Procedure Code, for an application being made to the Court to have such scandalous, unnecessary or irrelevant matters struck out. But where no such attempt is made, defendants are not to be deterred from pressing their pleas and submitting them to the Court for adjudication. Of course, if the pleas are not substantiated and amount to false pleas supported by false evidence, they run the risk of being prosecuted under the criminal law.

Now, the notice in this case undoubtedly was intended to put extraneous pressure on the defendant in order to compel him under threat of drastic action being taken against him to withdraw the plea, which had been taken by him specifically in the written statement. An offer was also made to desist from taking legal action if within a certain time fixed the defendant withdrew the plea contained in his written statement. There can be no doubt that the effect that was intended to be produced on the mind of the defendant's guardian by this notice was to compel him to abandon the plea which might well have been a legitimate plea. It is unnecessary for us to express any opinion whether in the circumstances of this case the plea was relevant or irrelevant. That is a matter exclusively for the consideration of the Subordinate Court. But it is our duty to protect defendants from being cowed down into submission and under presure of threat and menace being made to abandon pleas which they can legitimately take in a pending action.

In 26 L J Ch 305 (1), an unsigned letter had been sent by the plaintiff to the defendant with a view to intimidating him in the conduct of his defence. The letter warned the defendant that he has a suit pending in Chancery and should it go up for judgment, he would at once be indicated for swindling, perjury and forgery, and thus bring disgrace on his family. It was not mentioned who would start such prosecution, but the threat was that certain legal action in Court would be taken if the matter was pressed to final conclusion. Stuart V. C. in committing the plaintiff for contempt remarked that the letter amounted to a threat for the purpose of intimidating him as a suitor, and therefore whether it had had that effect or not was unquestionably a contempt of Court.

The accused counsel for Dr. M has cited before us some English cases in which it has been held that in case of libel or defamation it is not objectionable to serve notice on the offending party giving him an opportunity to withdraw the defamatory words and threatening to take legal steps against him if he fails to do so. Such cases obviously stand on quite a different footing. We are not here dealing with the case of a private defamation. The present case is one where an attempt was made to put pressure on the defendant to withdraw a plea which had been taken in the written statement, duly filed in Court, which was the subject of consideration by the Subordinate Judge of Dehra Dun. We think there can be no doubt that such an action amounted to a direct interference with the administration of justice in preventing the defendant from pressing his defence and putting forward the plea which might, if established, prove fatal to the suit and in that way an indirect attempt was made to exclude the plea taken on behalf of the minor from the consideration of the Court.

Mr. Uma Pershad has adopted a very straightforward attitude before us. He has in his affidavit explained that he

1. Smith v. Lakeman, (1857) 26 L J Ch 305=2 Jur (N S) 1202.

acted after taking legal advice and under the direction of his advocate, and he has frankly admitted that he never realized that he was committing any offence of contempt. In addition to that, he has undertaken to abandon the criminal complaint which was filed subsequently, and has orally expressed before us his regret for what had been done. We accordingly unhesitatingly accept his apology, and under S. 3 of the Contempt of Courts Act, discharge him. We order that he should bear his own costs of this proceeding.

On behalf of Dr. M his learned counsel had strongly contended before us that in the first place there was no commission of any offence of contempt and that in the second place inasmuch as Dr. M was acting in the capacity of a counsel, he is not at all responsible. We have already given reasons for holding that the offence of contempt of the Subordinate Court was committed in this case by the issue of the notice in dispute.

As to the capacity in which Dr. M was acting, we may point out that a counsel is not expected to act blindly and allow himself to be dictated to by his client and in that way make himself a mere instrument or a tool in his hands. He has to exercise his own judgment and discretion and even in cases where scandalous or defamatory matters are to be communicated he has to warn his client, much more so where the offence would amount to one of contempt of Court. It is a novel proposition that even though the sending of the notice amounted to contempt, the counsel who sent it is protected because he was acting as counsel. A counsel's capacity is not inviolable, and his privileges cannot possibly extend to interference with the administration of justice. Counsel are expected to help in the administration of justice and not to be an impediment thereto.

The case before us is particularly strong. It is difficult to see how Dr. M can take shelter behind the act of his client, who acted entirely under his own legal advice and direction. Admittedly his advice was sought by the plaintiff and he not only gave him the advice to serve a notice on the defendant's guardian, but actually drafted the notice himself, which contained his own words, and sent the same under his own signature, although he was acting on behalf of the plaintiff. The threat having been made under the signature of a counsel and addressed to a layman was particularly serious. In these circumstances when he himself was the prime mover, and, but for his advice and action it is possible that the plaintiff might never have sent this notice and therefore not committed any offence at all, it is difficult to see how the primary responsibility can fall on the plaintiff and not on the counsel who originated the idea.

We are however satisfied on the statement filed by Dr. M that he did not, at the time when he sent this notice, realise that he was committing any offence. Lawyers, of course, are presumed to know the law, but the law may at times be forgoten or be not understood. We are satisfied that this notice would not have been sent if Dr. M, had been under the impression that an offence of contempt of Court would be committed thereby. In his statement Dr. Misra towards the conclusion has said as follows:

"If this Hon'ble Court be of opinion that the notice should not have been issued by me and it constitutes a contempt of Court, then I respectfully assure this Hon'ble Court that it was done quite unwittingly and unintentionally and express my unqualified regret for it."

This, in our opinion, is a fair attitude to take up. In these circumstances, although we find Dr. M guilty of the contempt of the subordinate Court, we remit the punishment under S. 3, Contempt of Courts Act. We however order that he must pay the costs of the applicant in this proceeding, which we assess at Rs. 100.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 119

NIAMATULLAH, J.

Jagdish Prasad Pande — Defendant — Applicant.

v.

Ram Swarup — Plaintiff — Opposite Party.

Civil Revn. Nos. 19 and 257 of 1934, Decided on 26th September 1934, against decree of Small Cause Court Judge, Bareilly, D/- 11th December 1933.

Agra Tenancy Act (3 of 1926), S. 15 (2) (3) — Ex-proprietary tenancy can be transferred under Act of 1926 if sanctioned by Assistant Collector — In absence of sanction, transaction is void as under Act of 1901.

Ex-proprietary tenancy can now be transferred if it is sanctioned by the Assistant Collector in the manner provided by S. 15, but, in the absence of his sanction, the transaction is as void now as it was when Act 2 of 1901 was in force.

[P 120 C 2]

B. Malik—for Applicant.

G. S. Pathak—for Opposite Party.

Order.—These two revisions arise out of a suit brought by the plaintiff Pandit Ram Sarup for recovery of Rs. 700, which the defendant agreed to pay as the price of assignment made by the plaintiff in favour of the defendant of certain decrees. The assignment is evidenced by a deed dated 6th November 1929. It is common ground that on that date the plaintiff executed another document in favour of the defendant which is a sale-deed in respect of his proprietary rights in a mahal in village Pandri, District Bareilly in lieu of Rs. 7,500. The sale-deed provides that the vendor would relinquish his ex-prporietary rights that would accrue in "sir" and "khudkasht" lands on transfer of his proprietary rights. The vendor undertook to have mutation of names effected in favour of the vendee in respect of the land sold free from his own ex-proprietary rights. By the other deed the vendor assigned arrears of rent then due to him and a decree against a third person in lieu of Rs. 700. The deed provided in clear terms that Rs. 700 was the consideration of the assignment. There is a covenant which provides as follows:

"The consideration herein mentioned is agreed to be received by the vendor in its entirety when the "*sir*" and "khudkhast" lands situate in Qura Biran (a hamlet within the share sold) are relinquished and when the vendor's name is expunged in respect thereof. The consideration of this deed shall then be paid on written acknowledgment of receipt by the vendor."

The vendor did not relinquish his ex-proprietary rights in spite of the covenant contained in that behalf in the sale-deed. The vendee refused to pay the sum of Rs. 700, the consideration of the assignment of the arrears of rent and the decree already mentioned for which the plaintiff (vendor) instituted the suit which has given rise to this revision. The defendant (vendee) pleaded that the plaintiff is not entitled to receive the sum claimed as he did not relinquish his ex-proprietary lands. The lower Court held that the stipulation to relinquish ex-proprietary rights is void and the plaintiff is entitled to recover the sum claimed by him. The plaintiff's suit was decreed, but parties were directed to bear their own costs. Revision No. 19 of 1934 has been preferred by the defendant who challenges the decree in so far as the plaintiff's claim has been allowed to prevail. Revision No. 257 of 1934 has been filed by the plaintiff in so far as the decree did not award costs to him. The learned advocate for the defendant-applicant has argued that the time fixed for the payment of Rs. 700 is the date on which the plaintiff relinquishes his ex-proprietary tenancy. He is not entitled to recover it so long as he does not relinquish his ex-proprietary lands. It is contended that the agreement to relinquish is not void as might have been the case before the present Tenancy Act, 3 of 1926, was passed, which, it is said, has introduced a change in this respect. S. 20 (2) and S. 21, Tenancy Act 2 of 1901 provided that an ex-proprietary tenant was not competent to transfer his holding which was declared to be non-transferable. When that Act was in force their Lordships of the Privy Council held in 1916 P C 59 (1), that:

"The Policy of Act 2 of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between cosharers in the mahal, a right of occupancy in his "*sir*" lands, and in the land which he has cultivated continuously for 12 years at the date of the transfer and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved o him or not and notwithstanding any agreement to the contrary between him and the transferee. The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his "*sir*" land or land which he has cultivated continuously for 12 years at the date of the transfer ; for a reduction of purchase-money on the vendor's failing or refusing to relinquish such lands ; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any civil Court or in any Court of Revenue."

It is contended that the present Tenancy Act, 3 of 1926, has introduced a change in this respect and that an agreement to relinquish an ex-proprietary tenancy is no longer void and opposed to the provisions of the Tenancy Act, but is permissible within prescribed limits. It may be conceded that ex-proprietary tenancy can now be transferred if it is sanctioned by the Assistant Collector in the manner provided by S. 15, but in the absence of his sanction the transaction is as void now as it was when Act 2 of 1901 was in force. S. 15 (1) declares that:

1. Moti Chand v. Ikram Ullah Khan, 1916 P C 59=39 I C 454=44 I A 54=39 All 173 (PC).

"Except as provided in sub-Ss. (2), (3) and (4), no sale of *sir* or agreement, relinquishment or other transaction having the effect of a surrender or relinquishment of ex-proprietary rights executed or carried out within six months immediately preceding or succeeding a transfer of proprietary rights, shall affect or detract from the rights created by S. 14. (Under which ex-proprietary rights accrue on transfer of proprietary rights)."

Sub-Ss. (2), (3) and (4) enact rule under which a tenant desiring to transfer or relinquish his ex-proprietary rights within six months preceding or succeeding the transfer of his proprietary rights is to apply to the Assistant Collector for permission to transfer or relinquish his ex-proprietary rights which are likely to accrue or have accrued on sale of his proprietary rights. The Assistant Collector may grant the permission asked for if he is satisfied that the applicant does not wholly or mainly depend on agriculture for his livelihood, or that the land transferred is self-acquired or has been acquired within the twenty years last preceding, or if there are reasonable grounds for sanctioning the transaction. Subject to the provisions contained in sub-Ss. (2), (3) and (4), an agreement to relinquish or relinquishment within six months preceding or succeeding the transfer of proprietary rights is prohibited. The validity or otherwise of such agreement or relinquishment made more than six months before or after the transfer of proprietary rights, need not be considered as the agreement in the present case is contained in the sale-deed in respect of the proprietary right itself and is said to be repeated in the contemporaneous deed of assignment in respect of arrears of rent. It is not disputed that the sanction of the Assistant Collector contemplated by sub-Rr. (2) and (3) was not obtained. It follows that the circumstances in which the invalidating part of S. 15, becomes inapplicable do not exist in the present case and the agreement to relinquish is calculated to defeat the provisions of S. 15, Tenancy Act, 3 of 1926 and the policy underlying that Act. In my opinion the considerations emphasised by their Lordships of the Privy Council in the case already referred to are applicable in spite of the change introduced by Act 3 of 1926 where the sanction provided for by sub-Ss. (2) and (3) has not been obtained. The covenant making the consideration of Rs. 700, payable only at the time of relinquishment and not before is void. That amount being admittedly the consideration of the assignment is clearly recoverable by the plaintiff. The time fixed for payment may be disregarded.

In my opinion the view taken by the trial Court is perfectly correct. Revision No. 19 of 1934, fails and is dismissed with costs. As regards the plaintiff's revision which is in respect of costs only, I do not think that any interference is called for. Costs were in the discretion of the lower Court and in the exercise of that discretion, the lower Court was undoubtedly influenced by the fact that the plaintiff did not relinquish his ex-proprietary rights as he had agreed to do and though a rule of law favours him on grounds of public policy, he is not without moral blame in the matter. Revision No. 257 of 1934 is also dismissed with costs.

K.S. *Revision dismissed.*

A. I. R. 1935 Allahabad 121

RACHHPAL SINGH, J.

Gauri Dayal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 621 of 1934, Decided on 20th October 1934, from order of Sess. Judge, Pilibhit, D/- 8th May 1934.

(a) Railways Act (1890). S. 101 — R. 187, Cl. (8), Sub-Cl. (3)—Station master who has opened lock, leaving it unlocked — Assistant Station Master who relieved him held was not guilty under S. 101.

The doctrine of constructive notice should not be pushed too far in order to help the prosecution. Hence where a Station Master opened a lock leaves it unlocked when he is relieved by the Assistant Station Master and there is nothing to make the latter know that it is left unlocked, he cannot be held guilty under S. 101. [P 123 C 1,2]

(b) Criminal Trial — Person sought to be made criminally liable for alleged omission —His case must be brought within terms of rule or section which he has disobeyed.

When a man is sought to be made criminally liable for any alleged omission on his part, then his case must be brought within the terms of the rule or section he is said to have disobeyed. [P 123 C 2]

(c) Interpretation of Statutes -- In case of doubt as to interpretation, benefit of doubt must go to accused.

Where there is a doubt as to the interpretation of a particular rule or section, then the benefit of that doubt must go to the accused person, who is alleged to have disobeyed the rule. [P 123 C 2]

Saila Nath Mukerji—for Applicant.

Assist. Gov . Advocate—for the Crown.

Order.—This is a revision application by one Pandit Gauri Dayal against the order passed by the learned Sessions Judge of Pilibhit, dismissing his

appeal against his conviction under S. 101, Railways Act. The facts of the case are these: There is a railway station called Mala on the R. & K. Railway. B. Gaya Prasad was the Station Master of that station, and Babu Gauri Dayal was the Assistant Station Master at the same place. On 6th July 1933, Babu Gaya Prasad, Station Master was on duty from 6 a. m. to 6 p. m. He was relieved by Babu Gauri Dayal.

There are three railway lines at Mala railway station. One is towards the railway station. The second is in the middle and is meant for run-through trains. The third is towards the goods shed. The points Nos. 1 and 4 are on junctions of the station line and the middle line and the points Nos. 2 and 3 are on the junctions of the second and the third lines. The third line is meant for goods wagons, and the first line is meant for those trains which are not run-through trains. On 6th July 1934, a goods wagon was loaded at the third line. According to the facts found by the learned Sessions Judge this loading work finished at 5 p. m., when Babu Gaya Prasad was still on duty. According to the railway rules, the loading should have been finished by that time. The points Nos. 2 and 3 are permanent locked points.

It has been found that Babu Gaya Prasad, Station Master opened the lock at point No. 3 in order to admit the goods wagon on line No. 3. Babu Gaya Prasad should have locked the point No. 3 before he was relieved, but it has been found that when he was relieved he left this point No. 3 unlocked. The diary showing the change of duties was not filled in by Babu Gaya Prasad. The result was that Babu Gauri Dayal, when he relieved Babu Gaya Prasad at 6 p. m., did not know that the point No. 3 had been left unlocked by Babu Gaya Prasad. One train 7 up came after Babu Gauri Dayal had relieved Babu Gaya Prasad. This train should have gone straight on line No. 2, but went on line No. 3 because permanent point No. 3 had been left unlocked by Babu Gaya Prasad with the result that there was a collision between this train and the aforesaid goods wagon, which was standing on line No. 3 as already mentioned. It has been found that seven persons were injured. Babu Gaya Prasad and some other servants of the railway including Babu Gauri Dayal were departmentally dealt with. Babu Gauri Dayal was further prosecuted under S. 101, Railways Act (9 of 1890).

The trial Court sentenced Babu Gauri Dayal to a fine of Rs. 60. He appealed against his conviction. The learned Sessions Judge reduced the fine to Rs. 20, but affirmed the conviction of Babu Gauri Dayal under S. 101. Against that order of the learned Sessions Judge, Babu Gauri Dayal has preferred this revision. S. 101 enacts:

"If a railway servant, when on duty, endangers the safety of any person . . . (a) by disobeying any general rule made, sanctioned, published and notified under this Act, or (b) by disobeying any rule or order which is not inconsistent with any such general rule, and which such servant was bound by the terms of his employment to obey, and of which he had notice, or (c) by any rash or negligent act or omission, he shall be punished with imprisonment for a term which may extent to two years, or with fine which may extend to five hundred rupees, or with both."

The prosecution case is that the accused disobeyed the R. 187, Cl. 8, sub-Cl. 3 which runs as follows:

"When it is required to change the position of a permanently locked points the Station Master must see and is personally responsible that such points are correctly re-set and re-locked in the normal position and must have the keys of the locks of each point in his possession before allowing any train to pass over them."

The first question which is to be determined in this case is whether the applicant has in any manner contravened the provisions of this rule. If the answer to this question be in the affirmation then it is perfectly clear that he is guilty under S. 101, Railways Act. On the other hand, if it be found that he had done nothing contrary to the provisions of the aforesaid rule, then he has committed no offence at all. Both the Courts below have found that it was the duty of Babu Gauri Dayal to relock the point No. 3 before allowing the 7 up train to pass through the station, and I have to see whether this finding is correct.

After a consideration of the question I have come to the conclusion that it cannot be said that the accused has acted in contravention of R. 187, Cl. 8, sub-Cl. 3. The rule ordains that it shall be the duty of the Station Master who will be personally responsible to see that when a permanently locked point has been opened then it should be correctly re-set and re-locked, and he should further have the key of the lock in his possession before he allows any train to enter the station. It appears to me that this rule pre-supposes that the Station Master is aware that

it had been necessary to change the position of a permanently locked point. If the Station Master unlocks a permanent point then it is his clear duty to re-set it before any train is allowed to enter the station. Now, if Babu Gaya Prasad had been prosecuted one would have had no hesitation in holding him to be guilty of having disobeyed this rule. He had unlocked the point No. 3 in order to permit the goods wagon to go on line No. 3. It was therefore his duty to see that the point No. 3 was re-locked. This duty he did not perform according to the findings of the Courts below. Different considerations however prevail in determining whether the man who relieved Babu Gaya Prasad can be said to have disobeyed the above mentioned rule. Now, if Babu Gaya Prasad on relief by the applicant had informed the applicant that one point had been allowed to remain unlocked, and then the applicant had not re-set the point by relocking it, then, he would have been certainly guilty of disobeying the rule. But in the present case however Babu Gaaya Prasad did not do this. A journal or diary is kept at every station in which these matters are noted. If Babu Gaya Prasad had made a note in that journal or diary, before he was relieved, that the point No. 3 had been unlocked and had not been relocked, then the applicant should have known that he was to perform that duty. I am told the keys of the permanently locked point are kept in the office of the Station Master.

If the key of lock No. 3 had not been in its place ,then it could have been said that the applicant when he relieved Gaya Prasad ought to have noticed this matter, but it appears that the key of the lock was in its proper place. So the applicant had no notice and had no means of knowing that any permanent point had been left unlocked by the man whom he relieved. So he had no reason to suppose that any permanent point had remained unlocked due to the negligence on the part of Babu Gaya Prasad. Of course, the Assistant Station Master would have discovered this matter if he had gone on a visit of inspection before taking over the charge from Babu Gaya Prasad. But the rule as it stands did not impose any such duty on the applicant. When a man is sought to be made criminally liable for any alleged omission on his part, then, his case must be brought within the terms of the rule or section he is said to have disobeyed. The doctrine of constructive notice should not be pushed too far in order to help the prosecution. If the intention of the framers of the rule mentioned above had been that it shall be the duty of the Station Master or Assistant Master in charge to personally go and inspect the station yard to see whether or no, all the permanent points are locked. then, that intention would have been expressed in the rule in clear manner. I am of opinion that there is nothing in the rule from which we might gather that it enjoins the person on duty, on taking over the charge, to go to the yard and see each and every lock point. In a big station, it would be difficult for a man taking over charge of his duties from the man whom he is relieving to go all over the station yard at night to see whether each and every permanent point is locked. It may be that such a course may be absolutely necessary for the safely of the passangers but in that case the rule should be more explicit. The words "When it is required to change the position of a permanently locked point" would indicate that the rule assumes that the man on duty is aware that a permanently locked point has been unlocked. It is only in that case that he is bound to re-lock it before any train is allowed to enter the station yard. I am very doubtful whether according to the rule as it stands, the applicant can be said to be guilty of having disobeyed it. When there is a doubt as to the interpretation of a particular rule or section, then, the benefit of that doubt must go to the accused person, who is alleged to have disobeyed the rule. In these circumstances. I am of opinion, that the accused is not guilty and must therefore be acquitted.

For the reasons given above I allow this revision application, set aside his conviction and acquit him. The fine if paid shall be refunded.

K.S. *Revision allowed.*

A. I. R. 1935 Allahabad 123

SULAIMAN, C. J. AND BAJPAI, J.

Kanta Tewari and *another* — Defendants—Appellants.

v.

Sheo Narain Lal and *others* — Plaintiffs—Respondents.

Second Appeal No. 854 of 1931, Decided on 4th October 1934.

Possession — Plaintiff licensee having possession over land — Defendant not having possession but removing plaintiff's cattle troughs and erecting building on same — Plaintiff is entitled to sue for possession even though he is licensee.

The plaintiffs were in possession of a piece of land which they were using as their Court yard over which they had cattle troughs and a platform. The defendants had unlawfully removed the cattle troughs and the platform and taken possession of the land by building upon it :

Held : that the plaintiffs had sufficient possessory title to maintain an action for possession of land and removal of buildings against the defendant, even though plaintiff was only a licensee : *Northam* v. *Bowden*, (1855) 11 *Ex* 70, *Rel on.* : 1927 *All* 633, *Heap* v. *Hartley*, 42 *Ch D* 461, *Fitzgerald* v. *Firbank*, (1897) 2 *Ch D* 96, *Dist.*

[P 125 C 1]

Gadadhar Prasad—for Appellants.

B. Malik—for Respondents.

Sulaiman, C. J. — This is a defendant's appeal arising out of a suit for possession of land, removal of certain constructions put upon it by the defendants and for damages and injuction. The first Court dismissed the plaintiffs' claim; but on appeal the lower appellate Court has decreed it. Its findings are unfortunately not so categorical as they ought to have been, but there is no doubt that what the learned Judge has found is that the land in dispute has been used by the plaintiffs as their Court yard (Sahan darwaza). They had possession over it by having cattle troughs (churnies) and a platform, (chabutra) at this spot; and that the defendants had no possession over the land at all.

Learned advocate for the defendants-appellants relied strongly on the case of 1927 All 633 (1), and contends that the plaintiffs being mere licensees have no right to maintain this action in their own name. In the case of 1927 All 633 (1), decided by a learned Judge of this Court it was assumed that the right of the plaintiff was based entirely on a bare licence and that there had been no licence coupled with the grant. It is possible that the licence was for the purpose of building upon the land. The building may have been only of a temporary character although licence might not be tantamount to a grant. On that assumption it was held that the plaintiff as a bare licensee could not maintain an action for possession against another person who also claimed to be a licensee from the same licensor. In that case possession apparently had not been taken by the plaintiff and before he could build upon the land, the defendant had stolen a march over him by putting up a construction. The case therefore is distinguishable.

The authority for the proposition that a bare licensee cannot maintain an action in his own name is (1889) 42 Ch D 461 (2). In that case a patentee of machinery had granted to the plaintiff the full and exclusive licence to use and to exercise the patented invention within a certain district and covenanted not to grant any licence to any other person; nevertheless the patentee afterwards sold two of the patented machines to the defendant firm who used them within that district. Upon an action brought by the plaintiff against the defendant, without joining the patentee, it was held that the exclusive licence was not intended to be a grant to the licensee of any right to sue and that accordingly the plaintiff could not maintain the action. It was laid down that a licence may be, and often is, coupled with a grant, and that grant conveys an interest in property, but licence pure and simple, and by itself, never conveys an interest in property; it only enables what he could not otherwise do except unlawfully and that therefore an exclusive licensee has no title whatever to sue. The case of (1897) 2 Ch D 96 (3), where the grantee of an exclusive right of fishing and taking away the fish from a stream was entitled to maintain an action against a wrongdoer, is also not in point, because it was not a mere licence to fish, but also a right to carry away the fish caught which was a profit a prendre.

We however think that the case 11 Ex 70 (4), is more in point. There the plaintiff who was a licensee of the owner of the soil to search for the tin ore, had in searching for that mineral made certain excavation in the soil and before he abandoned the soil, the defendant carted away some of the soil so thrown out by the plaintiff. In an action brought by the plaintiff it was held that he had a sufficient possessory title to the mass thrown out so as to enable him to maintain an action against the defendant, a wrongdoer. There the plaintiff was merely searching for tin ore and would have examined the soil and might have

1. Manbahal Rai v. Ram Ghulam Pandey, 1927 All 633=103 I C 338

2. Heap v. Hartley, (1889) 42 Ch D 461=58 L J Ch 790=38 W R 136=61 L T 538.

3. Fitzgerald v. Firbank, (1897) 2 Ch D 96=66 L J Ch 529=76 L T 584.

4. Northam v. Bowden, (1855) 11 Ex 70=24 L J Ex 237.

taken any bits of ore that might be discovered and would have thrown away the soil. Nevertheless it was held that inasmuch as the plaintiff by permission of the owner was at liberty to examine the soil for the purpose of separating the ore from it, he had possessory right to the entire mass as against a wrongdoer and could maintain an action for its conversion.

In the present case, even if we assume that the constructions, not being of a permanent character, the licence was not coupled with a grant, it must be conceded that the plaintiffs were in possession of this piece of land which they were using as their Court yard and over which they had cattle troughs and a platform. The defendants had unlawfully removed the cattle troughs and the platform and taken possession of the land by building upon it. We think that the plaintiffs had sufficient possessory title to maintain the action against the defendants. We accordingly dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 125

BENNET, J.

Bachan Lal—Applicant.

v.

Amar Singh and *others*— Defendants—Judgment-debtors—Opposite Parties.

Exn. Second Appeal No. 935 of 1933, Decided on 25th October 1934, from decision of Dist. Judge, Mainpuri, D/- 9th August 1933.

(a) Civil P. C. (1908), O. 21, R. 53—Representative of holder of attached decree is person entitled to make objection in execution proceedings of that decree.

A representative of the holders of the attached decree is a person entitled to make an objection in the execution proceedings of that decree.

[P 125 C 2]

(b) Civil P. C. (1908), Sch. 2, R. 1—Parties to execution application cannot file application for reference to arbitration — Execution.

An execution proceeding is not a suit and therefore Sch. 2 does not entitle the parties to an execution proceeding to file an application for a reference to arbitration. The arbitration proceedings are invalid, and the Court is not entitled to enforce these arbitration proceedings : 1925 *Cal* 812, *Rel on.* [P 125 C 2]

Baleshwari Prasad—for Appellant.

Judgment. — This is an execution second appeal on behalf of one Bachan Lal against orders in execution of the two lower Courts dismissing his application to set aside arbitration proceedings. There was a decree obtained by Chheda Lal against Amar Singh, etc. Seven persons applied to put this decree into execution as legal representatives of Chheda Lal deceased and proceedings in execution began. The judgment-debtors of that decree objected and on 29th November 1932, both parties made an agreement that the objection should be referred to arbitration. The 10th January 1933 was fixed for filing the award and the award was filed on that date, and 23rd January, was fixed for orders. Meanwhile on 3rd January 1933, Bachan Lal, the present appellant, filed a suit on the promissory note against the legal representatives of Chheda Lal deceased naming the same seven persons and one other. On 7th January 1933, Bachan Lal made an application for attachment before judgment of the decree of Chheda Lal against Amar Singh, etc., and this decree was attached on 9th January 1933, i. e., one day before the award was filed. After the filing of the award Bachan Lal made an objection including the arbitration proceedings and the award. Both the lower Courts have held that Bachan Lal had no locus standi to impeach the award as he was not a party to the case which was referred to arbitration.

Now, as regards the position of Bachan Lal it appears to me that under O. 21, R. 53 (3), Bachan Lal must be deemed to be the representative of the holders of the attached decree. As he is the representative of the holders of the attached decree in my opinion he is a person entitled to make an objection in the execution proceedings of that decree. The objection which he makes is that he impugns the arbitration proceedings and the award. Learned counsel points out that Schedule 2, Civil P. C., in R. 1 lays down that all the parties interested in a suit may agree to a reference to arbitration. An execution proceeding is not a suit and therefore Sch. 2 does not entitle the parties to an execution proceeding to file an application for a reference to arbitration. This has been held in 1925 Cal 812 (1). It appears therefore that the arbitration proceedings are invalid, and as held in that ruling the Court is not entitled to enforce these arbitration proceedings. I consider that Bachan Lal is a person who has attached the decree in question and is therefore entitled

1. T. Wang v. Sona Wangdi, 1925 Cal 812=87 I C 633=52 Cal 559.

to have the arbitration proceedings set aside. Accordingly I allow this appeal with costs in all Courts and I hold that the arbitration proceedings are invalid and that Bachan Lal is entitled to proceed with the execution of the decree of Chheda Lal deceased against Amar Singh and others.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 126

BENNET, J.

Jiwa Lal Evide— Judgment-debtor—Applicant.

v.

Kharagjit Singh Misra—Decree-holder—Opposite Party.

Exn. First Appeal No. 132 of 1933, Decided on 25th October 1934, from decision of Sub-Judge, Mainpuri, D/- 6th December 1932.

(a) Civil P. C. (1908), Ss. 47 and 144—Appeal dismissed with costs to respondents — Application for execution of entire decree for costs by one of respondents — Objection that decree was joint one dismissed — Subsequent issuing of warrant in execution and order that whole costs deposited should be paid to applicant—No appeal filed from such order but appeal from order dismissing objection allowed and execution application held should be dismissed — Application for refund by judgment-debtor of amount deposited in Court and paid to executing decree-holder—Neither S. 144 nor S. 47 applies.

The appellant as plaintiff had brought an election suit against defendant 1 and defendant 2 The High Court dismissed the appeal of the plaintiff with costs to the respondents-defendants. Defendant 1 applied for execution of the entire decree for costs. Objection was taken by the plaintiff that the decree for a costs was a joint decree and not intended for defendant 1 alone but it was dismissed. Subsequently a warrant was issued in execution and the whole costs were paid into the Court and on inquiry made by the Court from defendant 2, as to whether anything had been spent in the High Court as costs of the case, defendant 2 replied that nothing had been spent by them. On this assurance the Court passed an order that the whole amount of costs deposited should be paid to defendant 1. The plaintiff brought an appeal in the High Court against the order of dismissal of objection but he did not bring any appeal against the order which ordered the whole amount to be paid to defendant 1. The appeal was allowed and the High Court held that defendant 1 alone was not entitled to execute the decree for costs and that the execution application of defendant 1 should be dismissed. Subsequently the present application was made for the refund of the amount by the Court to defendant 1 :

Held : neither S. 144 nor S. 47 applied to the case :

Held further, that the remedy of the appellant was to appeal against the order by which the Court directed the whole amount in deposit to be paid to defendant 1. No appeal was taken against that order and by neglecting to take an appeal the appellant has lost any right to have that order varied which he might have had. [P 127 C 2]

(b) Civil P. C. (1908), S. 144 — Restitution can be allowed under S. 144 only in case of variation or reversal of decree by appellate Court.

Section 144 provides for only one case, that is, the variation or reversal of a decree by an appellate Court. [P 127 C 1]

(c) Civil P. C. (1908), Ss. 47 and 144 — Restitution is converse of idea embodied in S. 47.

Section 47 refers to three matters : the execution, discharge or satisfaction of the decree. The execution of a decree is the carrying out of a decree : the discharge or satisfaction of the decree also involves the idea of carrying out the decree. None of these three words imply restitution which is a different idea and implies the restoring of something which has been taken in execution, and to that extent the rectification or alteration of some proceeding in execution discharge or satisfaction. Restitution is in fact the converse of the ideas embodied in S. 47 : 1932 *Bom* 96, *Dist.* [P 127 C 1]

Vishwa Mitra—for Appellant.

M. L. Chaturvedi—for Respondent.

Judgment.—This is an execution first appeal by a judgment-debtor under the following circumstances:

The appellant as plaintiff had brought an election suit against defendant 1, Rai Bahadur Kharagjit Singh Misra and defendant 2, the District Board of Mainpuri. In appeal this Court dismissed the appeal of the plaintiff with costs to the respondents-defendants. Defendant 1 applied for execution of the entire decree for costs of this Court. Objection was taken by the plaintiff that the decree for costs was a joint decree and not intended for defendant 1 alone. The lower Court dismissed this objection on 1st April 1930. Subsequently a warrant was issued in execution and the whole costs were paid into the lower Court and an inquiry was made by the lower Court from the District Board, defendant 2, as to whether anything had been spent in the High Court as costs of the case and the District Board replied that nothing had been spent by them. On this assurance the lower Court passed an order on 11th July 1930, that the whole amount of costs deposited should be paid to defendant 1. The plaintiff brought an appeal in the High Court against the order of 1st April 1930 but he did not bring any appeal against the order of 11th July 1930. The appeal of the plaintiff was allowed on 22nd August 1931, and this Court held that defendant 1 alone was

not entitled to execute the decree for costs and that the execution application of defendant 1 should be dismissed. Subsequently the present application had been made for the refund of the amount paid by the Court to defendant 1, Rs. 257-4-0, with interest and costs. This application is headed "Application under S. 144, Civil P. C."

The lower Court has disallowed the application on the grounds that S. 144 does not apply. The first ground of appeal to this Court is that S. 144/47, Civil P. C., was clearly applicable. Section 144 (1) begins "where and in so far as a decree is varied or reversed." Now, the decree for costs was granted by this Court and it has not been varied or reversed. S. 144 allows restitution in the particular case where an appellate Court varies or reverses a decree of a lower Court and in that particular case only. There has been no variation or reversal by an appellate Court of a decree of a lower Court in the present case. Accordingly S. 144, Civil P. C., has no application. There may be many cases in which a party may consider himself entitled to restitution. It does not follow that the Code has provided for all these cases. In particular S. 144 provides for only one case, that is, the variation or reversal of a decree by an appellate Court. Now, as regards S. 47, this section states:

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

This sub-section refers to three matters the execution, discharge or satisfaction of the decree. The execution of a decree is the carrying out of a decree; the discharge or satisfaction of the decree also involves the idea of carrying out the decree. None of these three words imply restitution which is a different idea and implies the restoring of something which has been taken in execution, and to that extent the rectification or alteration of some proceeding in execution discharge or satisfaction. Restitution is in fact the converse of the ideas embodied in S. 47. For authority for the proposition that restitution can be made in the present case learned counsel for appellant has referred to 1932 Bom 96 (1), a ruling of a learned Single Judge. In that ruling it was held that restitution could be granted by "liberally" applying S. 144 and S. 47. The particular facts of that case were different. In that case the lower Court had valued certain bales at Rs. 143-2-6 for which plaintiff had given credit to defendant. That finding was reversed by the appellate Court which valued the bales at over Rs. 5,500. As a result of the appellate Court's order the judgment-debtor was held to have paid more in execution than was under the decree. Under these circumstances it was held that restitution could be granted. The circumstances are different from the present case.

In the present case I consider that the remedy of the appellant was to appeal against the order of 11th July 1930 by which the Court directed the whole amount in deposit to be paid to defendant 1. No appeal was taken against that order and by neglecting to take an appeal the appellant has lost any right to have that order varied which he might have had. Learned counsel argues that because this Court dismissed the application for execution and held that defendant 1 alone should not apply for execution therefore ipso facto all orders passed in execution fell to the ground. Even if that argument were correct it does not follow that the remedy of restitution which is confined by S. 144, Civil P. C., to the particular case of the variation or reversal of a decree can be applied to the present case. For these reasons I consider that the order of the lower Court is correct and I dismiss the first appeal in execution with costs. As questions of law have arisen I grant permission for a Letters Patent appeal.

K.S. *Appeal dismissed.*

1. Lakshminarayan Hiralal v. Laduram Onkar Agarwala, 1932 Bom 96=136 I C 486.

A. I. R. 1935 Allahabad 127

SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Jai Sri Singh and *others*—Defendants—Appellants.

v.

Prabhu Narain Singh, Benaras —Plaintiff—Respondent.

Second Appeal No. 562 of 1931, Decided on 14th September of 1934, from decision of Dist. Judge, Benares, D/- 6th January 1931.

(a) Agra Tenancy Act (1901), S. 47 — (1926), S. 69—Enhancement of rent by compromise embodied in decree of Revenue Court—Validity—Compromise invalid under old Act is not validated by new Act.

Section 47, Agra Tenancy Act of 1901, governed enhancement of rents of non-occupancy tenants

which had to be under an agreement by a registered instrument. There was no provision in that section that a decree of Revenue Court could take the place of a registered instrument. A compromise, dated 29th September 1925, was entered into at the time when the old Act of 1901 was in force, and filed in Court and signed by the parties. Under that it was agreed that occupancy rights should be conferred on the defendants and that they should pay an enhanced rent:

Held: that the compromise, being invalid under the old Act, could not be validated under the new Act. The new Act which came into force in 1926 did not apply to such a case. Even if the new Act had applied the case would be governed by S. 69, Agra Tenancy Act, and even under that section the rent could be enhanced either by a registered instrument or by a compromise filed in adjustment of a suit or proceeding under the Act and recorded by the Court under O. 23, R. 3, Civil P. C. Under the latter rule the Court had to pass a decree in accordance with the compromise only "so far as it relates to the suit." [P 129 C 1]

(b) Evidence Act (1872), S. 115—Equitable estoppel cannot be claimed against statute.

The plea of equitable estoppel cannot be taken against the provisions of a statute. When the Act requires that enhancement can be effected only by means of a registered agreement, the principle of estoppel cannot be allowed to override such a specific provision. [P 129 C 1]

Mansur Alam—for Appellants.

Gandadhar Prasad—for Respondent.

Judgment.—This is a defendants' appeal arising out of a suit for arrears of rent. The plaintiff, who was the late ruler of the Benares State, brought the suit in his own name on the allegation that the rent of the holding had been enhanced under a Revenue Court's decree which was based on a compromise between the parties and that the defendants were liable to pay such enhanced rent. The defendants pleaded that inasmuch as there was no registered agreement to pay enhanced rent, they were not at all liable and the decree should be for the old rent only. The Court of first instance accepted the defendants' contention but on appeal the learned District Judge came to a contrary conclusion. He held that under S. 50 (i) (b) of the new Tenancy Act the compromise, which was incorporated into the decree of the Court fulfilled the requirements of the law and was valid and binding. He further held that inasmuch as under the same compromise occupancy rights had been conferred on the defendants they were estopped from going behind the compromise and while claiming occupancy rights disowning their liability to pay the enhanced rent. On appeal a learned Judge of this Court has referred the case to a Division Bench on account of certain questions of law which arise in this case.

A preliminary objection is taken on behalf of the respondent that the appeal had abated inasmuch as no application to have the abatement set aside consequent upon the death of the late Maharaja was made within the time allowed by law. Such an application was filed by the appellants but it was filed a few days beyond time and there was an affidavit to explain the delay. This matter came up for disposal before a learned Judge of this Court who came to the conclusion that there was no question of abatement in this case as it was a case of devolution under O. 22, R. 10, Civil P. C., and that therefore it was not necessary to bring the present Maharaja on the record as the legal representative of the deceased Maharaja. The suit was brought in the name of the late Maharaja and there was no indication in the plaint that the property in dispute was a part of the raj of Benares. It seems unnecessary to decide whether the raj, as such, can be treated as if it were a juristic personality, can own private property in British territory. Prima facie, as the plaint stood the suit had been brought by the plaintiff who was the landholder against the defendants who were the tenants and it would appear that O. 22 Civil P. C., would be applicable. But the matter was within the jurisdiction of the Single Judge of this Court who came to the conclusion rightly or wrongly that there had been no abatement and that there was no necessity to have any such abatement. Had he come to any contrary conclusion he would certainly have considered the question whether on the facts alleged in the affidavit time should not be extended. In the circumstances we think we should not entertain this objection now.

The previous suit had been brought by the late Maharaja for the ejectment of the defendants treating them as mere non-occupancy tenants. The defendants pleaded that they were occupancy tenants and not non-occupancy tenants. A compromise was filed in Court signed by the parties under which it was agreed that occupancy rights should be conferred on the defendants and that they should pay an enhanced rent. The date of the compromise was 29th September 1925, and was entered into at the time when

the Tenancy Act, 2 of 1901, was in force.

It seems to us that the new Act which came into force in 1926 would not be applicable to such a case. If the compromise was invalid under the old Act it cannot be validated on account of the new Act. S. 47 of the old Act governed enhancement of rents of non-occupancy tenants which had to be under an agreement by a registered instrument. There was no provision in that section that a decree of the Revenue Court could take the place of a registered instrument. In these circumstances the broader question whether when matters extraneous to the suit are incorporated in a compromise which is embodied in the decree of a Revenue Court the decree dispenses with the necessity of registration does not arise in the present case. Under the Act the existence of a registered instrument was absolutely indispensable. We must therefore hold that the compromise, so far as the enhancement of the rent was concerned, was totally ineffective and invalid. It may be worthwhile to point out that even if the new Act had applied the case would be governed by S. 69, Agra Tenancy Act, and even under that section the rent can be enhanced either by a registered instrument or by a compromise filed in adjustment of a suit or proceeding under the Act recorded by the Court under O. 23, R. 3 Civil P. C. Under the latter rule the Court has to pass a decree in accordance with the compromise only "so far as it relates to the suit."

The next point urged on behalf of the respondent is that there is estoppel against the defendants because they acquired occupancy rights under this very compromise. It is quite obvious that the plea of equitable estoppel cannot be taken against the provisions of the Statute. When the Act required that enhancement could be effected only by means of a registered agreement, the principle of estoppel cannot cannot be allowed to override such a specific provision. We must accordingly hold that the view taken by the lower appellate Court was wrong We allow this appeal and modifying the decree of the lower appellate Court restore the decree of the first Court with costs in all Courts.

R.K. *Appeal allowed.*

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A. I. R. 1935 Allahabad 129

SULAIMAN, C. J. AND HARRIS, J.

Ghulam Murtaza—Defendant—Appellant.

v.

Mt. Fasiunnissa Bibi — Plaintiffs — Respondent.

Second Appeal No. 268 of 1933, Decided on 28th August 1934, from decision of Dist. Judge, Allahabad, D/- 22nd May 1931.

(a) Limitation Act (1908), S. 19—Written acknowledgment — Only if he made before expiry of period saves limitation.

In order that a written acknowledgment may be of avail to a plaintiff under S. 19, it is necessary that such acknowledgment must have been made before the expiration of the period prescribed for the suit. It is equally necessary that it must be a clear and unambiguous acknowment specifically admitting liability in respect of the debt sued upon and it must be signed by the party or by his authorized agent. If an admission amounts to such an acknowledgment, then if it is made before expiry of the period, it is helpful and the suit can be maintained for the recovery of the earlier debt, the time being extended by the acknowledgment. In such an event there is no question of there being a fresh cause of action or a fresh promise to pay a debt which can be sued upon. On the order hand, if the acknowledgment is made after the period of limitation has expired, then the acknowledgment is of no utility and cannot save limitation.

[P 131 C 1, 2]

(b) Limitation Act (1908), S. 19 — Receipt containing acknowledgment of previous debt may not be mere acknowledgment — It may amount to implied promise to pay—Even then it does not give fresh cause of action—But if there is fresh consideration, new cause of action arises—Contract Act (1872), S. 25.

A receipt containing an acknowledgment of a previous debt may not be a mere acknowledgment, i. e. a bare admission of existing liability, but it may contain words indicating an implied promise to pay the earlier debt. Whether it is a mere acknowledgment or it is more than an acknowledgment and contains an implied promise to pay will of course depend on the terms of the particular document. But assuming that it amounts to an implied promise to pay, it does not follow that it can be made the basis of a suit and treated as giving rise to a fresh cause of action. If the debt had not become barred by time then even an express promise to pay it is nothing more than a promise to do what a person is, under the law, bound to do. It cannot be treated as a fresh contract or a novation of the old contract and is on no higher footing than mere acknowledgment. On the other hand, if the debt had become barred by time, then an implied promise to pay it would be of no avail because under S. 25 (3), Contract Act, it cannot be treated as a promise, made in writing, to pay a time-barred debt. When there is no express promise to pay but the intention is inferred only indirectly it cannot be treated as a promise in writing to pay the time-barred debt. The plaintiff therefore would not be entitled to take advantage

of such an implied promise to pay a time-barred debt. On the other hand if there is a fresh consideration proceeding from the promisee and the parties enter into a new contract which replaces the previous contract and supersedes it, then it certainly becomes the basis of a new cause of action and a suit would lie upon it because the contract is binding on the parties, being for consideration. But where there is no fresh consideration proceeding from the promisee, the transaction cannot be treated as an agreement between two parties as it is only a one-sided promise to pay a debt which was due. Hence where the receipts do not purport to acknowledge liability for an earlier debt but merely state that money had been taken under promissory-notes of even date by the executant, they refer to the debts created by the promissory-notes themselves and not to any earlier debt. If the promissory-notes cannot be sued upon the receipts cannot amount to an acknowledgment of any earlier debts of which the plaintiff can take advantage.[P 131 C 2;P 132 C 1]

K. Verma, *Hyder Mehdi* and *Zafar Mehdi*—for Appellant.

M. A. Aziz—for Respondent.

Sulaiman, C. J.—This is a defendant's appeal arising out of a suit for recovery of a certain sum of money with interest. Originally the claim was based on two promissory notes of January 1925 and December 1927; but later the plaintiff got the plaint amended and claimed to recover an earlier debt, the time being saved by the alleged acknowledgments of 1925 and 1927. The cause of action alleged in the amended plaint was the date on which the liability of the debt was admitted by the defendant. The trial Court dismissed the suit, holding that the claim was barred by time. The lower appellate Court has come to a contrary conclusion and has decreed the claim, holding that the acknowledgment of the old debt saved time. The learned Judge had relied on the case of 1929 All 980 (1), in support of his view.

In that case Niamatullah, J., certainly was inclined to take the view that an acknowledgment, clear and unconditional, can itself be the foundation of an action I concurred in the order on the ground that the recitals in the receipt along with the circumstances indicated that there was a renewal of previous debt, so that either the previous debt had been acknowledged afresh or had been substituted by a new contract including a fresh promise to pay. It is noteworthy that in that case, although the promissory note was inadmissible in evidence as being insufficiently stamped, the receipt was admissible, and it had been executed before the expiry of the period of limitation for suing upon the earlier debt. Accordingly no question of any express acknowledgment in writing of a time-barred debt within the meaning of S. 25, Contract Act, arose in that case. The previous debt had not become barred by time and the Bench in that case came to the conclusion that there had been a novation of the contract.

A Full Bench of this Court in 1931 All 183 (2), laid down that where there is a completed cause of action for recovery of money on foot of a distinct and separate transaction, and a promissory note is given as a collateral security, the plaintiff is entitled to sue for the original consideration, even if, for some flaw in the promissory note, the promissory note itself may not be sued upon, being inadmissible in evidence; but where the making and handing over of the note and the payment of the money are "concurrent conditions" (i. e., part and parcel of the same transaction), then if the promissory note turns out to be inadmissible in evidence for any reason, it is not open to the plaintiff to recover his money by proving orally the terms of the contract. The result of this pronouncement is that where the debt is separable from the promissory note, the transaction being truly independent of it and not part of the transaction of the promissory note, the debt can be proved although the promissory note was not admissible in evidence: but where it is part and parcel of the same transaction the debt cannot be separately proved.

The Bench which had decided 1929 All 980 (1) had occasion to consider a somewhat similar point in 1932 All 199 (3), Nitmatullah, J., again expressed the opinion that a promise to pay an old debt was a new contract, the consideration for which is the old debt, and such promise constitutes a new cause of action, so that an unconditional acknowledgment implies a promise to pay and affords a new cause of action to the obligee. I expressed the view that a mere acknowledgment of liability is not always evidence of a new contract which can be the basis of a suit, but there may be recitals in the written acknowledgment or there may be other direct or circumstantial evidence which may show that the

1. Govind Singh v. Bijoy Bahadur Singh, 1929 All 980=121 I C 108=52 All 169.

2. Nazar Khan v. Ram Mohan, 1931 All 183=133 I C 307=53 All 114 (FB).

3. Abdul Rafiq v. Bhajan, 1932 All 199=137 I C 243=53 All 963.

transaction in which the acknowledgment was made amounted in reality to a novation of the contract for a valid consideration. I also pointed out that in order that a promise to pay a time-barred debt should fall within the purview of S. 25 (3), Contract Act, it was necessary that the promise to pay should be express; and that an implied promise to pay a time-barred debt would not fulfil the requirements of S. 25. I further pointed out that in order to amount to a new contract it was necessary that there should be a fresh consideration proceeding from the promisee and that a mere oral promise to pay a previous debt would not be tantamount to a new valid agreement.

In 1934 All 76 (4), another Bench of this Court has laid down that a mere acknowledgment of an older debt cannot be made the basis of a suit and that an acknowledgment of a debt does not necessarily amount to a suppression of the debt acknowledged, but only confirms the older debt, and therefore if anything has to be recovered, it is on the debt which is being acknowledegd by the document called acknowledgment. The learned Judges pointed out that the case before them was different from a case where an acknowledgment amounted to a new contract including a fresh promise to pay.

It seems to me that there is no inconsistency in any of these decisions except that the view that an unconditional acknowledgment cannot itself be the basis of a suit and furnish a new cause of action has been too broadly stated and has not been accepted by several Judges of this Court.

In order that a written acknowledgment may be of avail to a plaintiff under S. 19, Limitation Act, it is necessary that such acknowledgment must have been made before the expiration of the period prescribed for the suit. It is equally necessary that it must be a clear and unambiguous acknowledgment specifically admitting liability in respect of the debt sued upon and it must be signed by the party or by his authorised agent. If an admission amounts to such an acknowledgment, then if it is made before the expiry of the period, it is helpful and the suit can be maintained for the recovery of the earlier debt, the time being extended by the acknowledgment. In such an event there is no question of there being a fresh cause of action or a fresh promise to pay a debt which can be sued upon. On the other hand, if the acknowledgment is made after the period of limitation has expired, then the acknowment is of no utility and cannot save limitation.

But there is no doubt that a receipt containing an acknowledgment of a previous debt may not be a mere acknowledgment, i. e., a bare admission of the existing liability, but it may contain words indicating an implied promise to pay the earlier debt. Whether it is a mere acknowledgment or it is more than an acknowledgment and contains an implied promise to pay will of course depend on the terms of the particular document. But assuming that it amounts to an implied promise to pay, it does not follow that they can be made the basis of a suit and treated as giving rise to a fresh cause of action. If the debt had not become barred by time then even an express promise to pay it is nothing more than a promise to do what a person is, under the law, bound to do. It cannot be treated as a fresh contract or a novation of the old contract and is on no higher footing than mere acknowledgment. On the other hand, if the debt had become barred by time, then an implied promise to pay it would be of no avail because under S. 25 (3), Contract Act, it cannot be treated as a promise, made in writing, to pay a time-barred debt. When there is no express promise to pay but the intention is inferred only indirectly it cannot be treated as a promise in writing to pay the time-barred debt. The plaintiff therefore would not be entitled to take advantage of such an implied promise to pay a time-barred debt.

On the other hand, if there is a fresh consideration proceeding from the promisee and the parties enter into a new contract which replaces the previous contract and supersedes it, then it certainly becomes the basis of a new cause of action and a suit would lie upon it because the contract is binding on the parties, being for consideration. But where there is no fresh consideration proceeding from the promisee, the transaction cannot be treated as an agreement between two parties as it is only a one-sided promise to pay a debt which was due.

In the present case it was never the plaintiff's case that in 1925 or 1927 the parties entered into a fresh

4. Bal Krishna v. Debi Singh, 1934 All 76=149 I C 571=56 All 281.

contract for consideration under which the previous transaction was wiped out and a new agreement accepted, Even in the amended plaint, the plaintiff merely emphasized that the receipts of 1925 and 1927 "extended the period of limitation" and the cause of action was the date on which "the liability of the debt was admitted." There was no issue framed and the question has never been considered by either of the Courts below as to whether there was any fresh contract. Indeed, it could not be, as the plaintiff never put forward such a case. I am therefore unable to allow the plaintiff to change the character of the suit by amending the plaint and have this new question of fact tried afresh on production of fresh evidence by both the parties. It must be assumed that the plaintiff came to Court on the allegation that he was entitled to recover the earlier debt on the strength of the two acknowledgments which were made by the defendants in 1925 and 1927. Now, if the receipts of 1925 and 1927 could amount to an acknowledgment of the old debt, then there would be no difficulty in the way of the plaintiff at all for time would be kept alive. But these receipts merely refer to the promissory notes which were executed on the same dates and which are inadmissible in evidence on the ground of insufficiency of the stamps. The receipts do not purport to acknowledge liability for an earlier debt but merely state that money had been taken under promissory notes of even dates by the executant. They therefore refer to the debts created by the promissory notes themselves and not to pay earlier debt. If the promissory notes cannot be sued upon the receipts cannot amount to an acknowledgment of any earlier debts of which the plaintiff can take advantage. I am therefore of opinion that the lower appellate Court is wrong in treating them as if they were acknowledgments of earlier debts.

I would therefore allow this appeal and setting aside the decree of the lower appellate Court, restore that of the Court of first instance.

Harris, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 132

KENDALL, J.

Abdul Salam and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 480 of 1934, Decided on 12th October 1934, from order of Sess. Judge, Jhansi, D/- 21st May 1934.

(a) Penal Code (1860), S. 397—S. 397 does not provide for joint liability as S. 149 does.

Section 397 does not provide that if a gun is used at a dacoity by a person or persons unknown, all of the dacoits must be punished with at least seven years' imprisonment. The section does not provide for joint liability as S. 149 does. [P 133 C 1]

(b) Criminal Trial—Approver's statement requires corroboration which implicates person accused in the crime — Corroboration need not be direct—Evidence Act, S. 114, Illus. (b).

The statement of an approver is always to be suspected and it needs corroboration, not only of a general kind, but of a kind that will implicate the person accused in the crime. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime: *King* v. *Baskerville*, (1916) 2 *K B* 658, *Rel on.* [P 133 C 2 ; P 134 C 1]

S. M. Husain—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—These are appeals by Mauji and five others from an order of the learned Sessions Judge of Jhansi sitting at Jalaun, convicting the six appellants of offences under Ss. 397 and 397/75, Penal Code, and sentencing Abdul Salam and Janki as ring leaders to eight years' rigorous imprisonment, Mauji was a previous convict to the same term and Nabi Bux, Nanhain and Chhotey Singh to seven years' rigorous imprisonment each. Abdul Salam and Nabi Bux were represented in this Court by Mr. Mohammad Husain and the others have appealed from jail. It should be mentioned at the outset that the convictions purporting to be under S. 397 are wrong for two reasons. In the first place S. 397 does not contain the definition of a substantive offence and no person can be charged or convicted under that section separately. Of course the section may be read with S. 395. In the second place S. 397 provides that:

"If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

But it does not provide that if a gun is used at a dacoity by a person

or persons unknown all of the dacoits must be punished with at least seven years' imprisonment. In short, the section does not provide for joint liability as S. 149 does. These however are technical points, and do not affect the merits of the case.

The dacoity was committed on the night of 16th or 17th November 1933, at the house of Paras Ram Bania. Several persons were sleeping in it when there was a knock at the door and a call for Bandi Din, who was as a matter of fact one of the persons in the house. Bandi Din opened the door, the dacoits ran in, beat the inhabitants, dug up the floor, and stole a thousand rupees which they found in an earthenware pot. A number of villagers began to collect, and the dacoits after firing two or three shots left the village, and according to the statement of the approver distributed their booty the same night at the spot near the canal. In addition to cash they had stolen gold and silver ornaments from the persons of two women. About a fortnight later, as a result of information received, Mohan Lal Chamar was arrested in connection with the dacoity. He made a confession in which he named several others who were accordingly taken into custody, and Mohan Lal Chamar was made an approver. His statement forms one of the principal parts of the evidence for the prosecution. It is not disputed at this stage that a dacoity took place, and although a great deal seems to have been made in the trial Court of theory, that the dacoits were not really criminals, but that they attacked the house on account of some quarrel between Bandi Din and Paras Ram or rather the wife of Paras Ram, this was not established, and is not now of any importance, if it ever was. The only question that has been argued before me is whether the offence has been brought home to all or any of the present appellants.

The approver Mohan Lal made a statement in which he described the dacoity in detail and named all of the appellants. One of these appellants, Chhotey Singh, made a confession which he afterwards retracted, saying that he had been tortured by the police. The learned Sessions Judge does not appear to have made much use of this confession of Chhotey Singh, but he has relied on the statement of the approver, and so it appears did the assessors to a large extent. Evidence was brought to corroborate the statement of the approver, and it was also proved that he had taken the Sub-Inspector together with several respectable gentlemen to the bed of a dry stream near Jalaun from which he recovered a muzzle loading gun, a few caps and some gun-power, and a pair of anklets. He also took the same people to a sopt near the scene of the dacoity where he said the loot had been divided, and there were found certain small articles, including the pot in which a thousand rupees is said to have been put away. None of the evidence relating to the recovery of these articles was questioned, and there can be no doubt that it was useful to corroborate the general story told by the approver. Mr. Mohammad Husain has pointed out that according to the confession of Chhotey Singh each of the dacoits got Rs. 65 when the money was distributed, while Mohan Lal says that he got only Rs. 20; but the suggested explanation is that the approver is a Chamar, and that he may have been given less than others for this reason. The approver mentioned that others got Rs. 25 Rs. 50 or Rs. 60 and ,indeed, it is more than likely that the amount awarded was according to the status of each dacoit or the share he had taken in the dacoity. But, at any rate, the fact is one which does not justify me in discarding the statement of the approver after it has been accepted by the Judge and the assessors.

It has been pointed out that the statement of an approver is always to be suspected and that it needs corroboration, not only of a general kind, but of a kind that will implicate the person accused in the crime. The law on the subject has been clearly stated, and the proposition put forward by counsel has now been accepted, I think, by all the High Courts in India, although there is no statutory provision that a person is not to be convicted on the uncorroborated testimony of the approver. In the case of (1916) 2 K B 658 (1) Lord Reading remarked:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law, but it has long been a rule of practice at Common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices,"

and further:

1. King v. Baskerville, (1916) 2 K B 658=86 L J K B 28=60 S J 696=25 Cox C C 524=80 J P 446=115 L T 453.

'evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime."

His Lordship further remarked (p. 667):

"In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

and later.

"the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

I need not, however dilate further on this point because the prosecution evidence in this case to corroborate the approver was not only evidence to confirm his statement that the crime had been committed, but also to show that each of the present appellants had committed it. The argument advanced however is that the evidence produced for corroboration is in itself not to be believed. That evidence consists of the statements of witnesses who claim to have identified the appellants, and I shall have to take each case separately. (After examining the evidence, his Lordship proceeded). In view of the fact that the approver's evidence has been believed and that it has been corroborated by other evidence which cannot be discarded, involving Abdul Salam and Nabi Bux, I see no reason to interfere with the decision of the trial Court in the case of these two accused.

The other four appellants who are not represented were not so favourably regarded by the assessors, but I can dispose of their cases more summarily. Nanhain was identified by no less than four witnesses who were believed by the Judge, Chhotey Singh by two, Janki by two and Mauji by one. The only witness against Mauji was however Nathu Kurmi who did not actually see him at the dacoity. He says that he saw him at the same time as he saw Abdul Salam and three others that is to say when they were sitting at the well near the scene of the dacoity at about 9 p. m. In my opinion, this evidence is admissible on the principle laid down by Lord Reading. It is circumstantial evidence though not direct evidence that Mauji took part in the dacoity. It is therefore evidence that may be accepted, and it has been believed. The conviction of Mauji was therefore fully justified, unless it is to be held that, because he is a previous convict, the police must be presumed to have implicated him falsely. This is a proposition which I cannot accept. It follows that the conviction of all the appellants ought to be upheld.

As regards the sentences I think that they call for a slight reduction. It was not a very serious dacoity, no great violence was used and it appears to me that the Sessions Judge may have been misled by the diea that S. 397, Penal Code, applied to the case, which it does not. While maintaining all the convictions on the facts therefore I allow the appeals to this extent that I modify the orders passed and direct that Mauji be convicted under S. 395 read with S. 75, Penal Code, and sentenced to six years' rigorous imprisonment; and that the other appellants be convicted under S. 395, Penal Code, and sentenced to five years' rigorous imprisonment each.

K.S. *Orders modified.*

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* A. I. R. 1935 Allahabad 134

NIAMATULLAH AND COLLISTER, JJ.

(*Mirza*) *Husain Yar Beg*—Applicant.

v.

(*Sahu*) *Radha Kishan* and *others*—Opposite Parties.

First Appeal No. 421 of 1932, Decided on 27th September 1934.

*** Civil P. C. (1908), O. 41, R. 22—Cross-objection may be taken against co-respondent also if there is community of interest between him and appellant.**

The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant; but it may be taken against a co-respondent also if there is a community of interest between the latter and the appellant. Where the cross-objection is directed solely against a co-respondent, whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable: *Case law reviewed.* [P 136 C 2]

Mushtaq Ahmad—for Applicant.

A. M. Khwaja, G. S. Pathak and *Krishna Murari Lal*—for Opposite Parties.

S. N. Seth—for Objection.

Niamatullah, J.—This is a cross-objection filed by one of the defendants-respondents in an appeal which has been compromised between the appellant and the plaintiff-respondents. A preliminary objection has been taken by the plaintiffs-respondents that the cross-objections which are directed solely against them are not maintainable under O. 41, R. 22, Civil P. C. To appreciate the arguments addressed to us it is neces-

sary to bear in mind the following facts. The property in dispute is village Tewar Khas. It belonged to one Mohammad Husain who had a son Ahmad Husain and three daughters, only two of whom need be mentioned, namely, Bashiruzzaman Bibi and Shaukatuzzaman Bibi. Mohammad Husain executed a deed of gift in favour of his son Ahmad Husain sometime in 1883. Not long afterwards he instituted a suit for the cancellation of that deed. The principal defendant was his son Ahmad Husain, the donee. The controversy was referred to an arbitration by a common friend whose award dated 13th September 1884 was made a rule of the Court by decree dated 13th November 1884. The award provided that Mohammad Husain would remain in possession of village Tiwar Khas, that after his death Ahmad Husain would become the owner thereof but would have no power of transfer and would be bound to allow the property to descend upon his own heirs unfettered by any encumbrances created by himself. Ahmad Husain was made liable to pay Rs. 30 a month to each of his two sisters Shaukatuzzaman Bibi and Bashiruzzaman Bibi. Mohammad Husain died in 1886. Ahmad Husain who entered into possession made default in payment of the monthly allowance which he was bound to pay under the award and the decree of 1884.

His sisters instituted suit for arrears of their allowance in 1892. The dispute between the brother and sisters was referred to arbitration. The award which was again made a rule of the Court directed that the village Tewar Khas be made over to one of the two sisters, namely, Bashiruzzaman Bibi who should pay herself the monthly allowance and thereafter the monthly allowance of her sister Shaukatuzzaman Bibi. If any surplus was left, the same was to be paid to Ahmad Husain. The award was given effect to and Bashiruzzaman Bibi was placed in possession of village Tewar Khas. In 1910 Shaukatuzzaman Bibi made a simple mortgage of her interest in village Tewar Khas to Asfandayar Beg who has since died and is now represented by his son Husain Yar Beg. In 1912 Asfandayar Beg enforced his mortgage and had the rights of Shaukatuzzaman Bibi sold. He himself became the auction purchaser. The result of this was that he became entitled to Rs. 30 a month which his mortgagor Shaukatuzzaman Bibi was entitled to receive in terms of the award of 1884. An arrangement was arrived at between the auction purchaser Asfandayar Beg and Bashiruzzaman Bibi who was in possession of the village Tewar Khas, under which part of that village was made over to Asfandayar Beg who was to recover Rs. 30 a month from its rents and profits. This arrangement appears to have been given effect to. In 1922 Bashiruzzaman Bibi executed a deed of wakf the particulars of which need not be stated in detail. In 1924 she executed another deed of wakf. One related to her right in that portion of the village Tewar Khas which was in possession of Asfendayar Beg. The other related to the rest of her rights in that village. By one or both of these deeds she made her daughter's daughter Mt. Sabiri Begam the present cross-objector a beneficiary entitled to receive Rs. 10 per month. Nazir Ahmad the son of Shaukatuzzaman Bibi who had died in the meantime was made the mutwalli entitled to manage the wakf properties. Accordingly Nasir Ahmad obtained possession of that part of Tewar Khas which was not in possession of Asfandayar Beg. The plaintiffs Radha Kishan and his three brothers claim to be the auction purchasers of the right and title and interest of Ahmad Husain. They instituted a suit against Nazir Ahmad the mutwalli, Hussain Yar Beg the son of Asfandayar Beg who has since died, Mt. Sabiri Begam one of the beneficiaries under the wakf and two others. They claimed the relief of possession and mesne profits on the ground that Shaukatuzzaman Bibi and Bashiruzzaman Bibi were entitled to receive Rs. 30 a month only for life and both having died, their legal representatives by inheritance or by transfer are no longer entitled to that allowance and that the plaintiffs being the representatives in interest of Ahmad Husain the paramount owner are entitled to actual possession of the entire village Tewar Khas. It will appear that the plaintiffs repudiate the title of Husain Yar Beg and Sabiri Begam precisely on the same ground. Husain Yar Beg claims to derive his right partly from Shaukatuzzaman Bibi and partly from Bashiruzzaman, Bibi. Sabiri Begam claims to derive title from Bashiruzzaman Bibi. The nature of the rights of Bashiruzzaman Bibi and Shaukatuzzaman Bibi is precisely identical. The suit was contested by

Husain Yar Beg and Sabiri Begam on identical grounds. They pleaded that the plaintiffs acquired no interest by auction purchase because Ahmad Husain whose interest they purchased had no transferable rights. Sabiri Begam took the additional plea that she is entitled to Rs. 10 a month under the deeds of wakf of 1922 and 1924, but this plea is of no consequence as against the plaintiffs, as, if the plaintiffs' rights prevail—and they can prevail only of Shaukatuzzaman Bibi and Bashiruzzaman Bibi had only life interest—the deeds of wakf lapsed on their deaths and Sabiri Begam ceased to be entitled to anything thereunder. If on the other hand the plaintiffs' rights do not prevail for the alleged reason that their predecessor in title Ahmad Husain had no transferable right, their suit should be dismissed and it would not be necessary to adjudicate on Mt. Sabiri Begam's additional plea. The Subordinate Judge decreed the plaintiffs' suit in its entirety. The mutwalli Nazir Ahmad did not appeal nor did Mt. Sabiri. Husain Yar Beg preferred appeal which was numbered as F. A. 421 of 1932. On receipt of summons Mt. Sabiri Begam filed cross-objections which it is not disputed were filed after the expiry of the period of limitation for an appeal by her against the decree. Husain Yar Beg and the plaintiffs entered into a compromise the effect of which was that the former's appeal was dismissed. There only remain the cross-objections of Mt. Sabiri Begam, which, if otherwise maintainable, remain unaffected by the fact that the appeal has been dismissed.

The plaintiffs-respondents have taken the preliminary objection that, in the circumstance of the case, Mt. Sabiri's cross-objections which are directed against them alone, are not maintainable and should be dismissed without a hearing thereof on the merits. From the narrative of the facts given above, it is clear that Mt. Sabiri Begam's cross-objections proceeded on the same grounds as Husain Yar Beg's appeal which has been dismissed. They are not to any extent directed against the appellant Husain Yar Beg. The position of Sabiri Begam in the litigation was such that she could very well have joined Husain Yar Beg in the appeal filed by him. They both attack the plaintiffs-respondents on the same grounds. On the one hand, it is contended on behalf of the plaintiffs-respondents that cross-objections can be directed only against the appellant and that it is not open to one of the respondents who has preferred an appeal to file cross-objections under O. 41, R. 22, Civil P. C., against his co-respondents. On the other hand, it is argued on behalf of Mt. Sabiri Begam that the language of O. 41, R. 22, is general enough to allow cross-objections by a respondent, who could have appealed from a part of the decree but had not done so. It seems to us that the correct view lies midway between the extreme contentions which have been put forward before us on behalf of the plaintiffs-respondents and Mt. Sabiri Begam. The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant, but it may be taken against a co-respondent also if there is a community of interest between the latter and the appellant. It is clear to us that where the cross-objection is directed solely against a co-respondent, whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable. The case law on the point does not militate against this view. In 1932 Cal 524 (1) it was held that:

"A cross-objection which seeks to raise a question as between two respondents inter se and is a purely lateral attack, in which the appellant is not concerned or interested, cannot be entertained in view of the settled practice of the Calcutta High Court, both under the old and under the present Code."

The facts of this case were different, but the view taken is that a cross-objection, unless it is directed against the appellant also is not maintainable. In 37 Bom 511 (2) it was held that:

"The ordinary rule is that the cross-objections provided for by O. 41, R. 22, Civil P. C., are cross-objections which are aimed against an appellant from a decree of a lower Court and are not cross-objections against a co-respondent. In any case such cross-objections will not be allowed as against a co-respondent where the respondent could have preferred them by way of appeal."

In the case before us Mt. Sabiri Begam could have have not only preferred an appeal of her own, but as already stated, could have joined with Husain Yar Beg as appellant in the appeal which the latter filed. In 1920

1. Co-operative Hindustan Bank v. Surendra Nath De, 1932 Cal 524=138 I C 852=59 Cal 667.
2. Nursey Virji v. Alfred H. Harrison, (1913) 37 Bom 511=21 I C 7.

Pat 77 (3) the point has been considered at great length. It was held that:

"Order 41, R. 22 (1) in so far as it relates to a cross-objection, was provided to meet the case where a respondent, although the decree is not entirely in his favour, is content to let matters rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportuuity of appealing against the findings which are adverse to him. The rule should ordinarily be confined to cases of cross-objections urged against the appellant, but O. 41, R. 33, gives the Court a wide discretion, where justice requires it, that cross-objections against a correspondent should be heard. The rule should not be invoked to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court-fees Act."

In 28 All 95 (4), which was decided under the Code of 1882, it was held that:

"Where it is necessary for the proper decision of an appeal before it, it is competent to an appellate Court to take into consideration objections filed under S. 56 (1), Civil P. C., by one of the respondents, not only as against the appellant, but, it may be, as against the co-respondents with the objector also, and to modify the decree as against them accordingly."

In that case the appeal was filed by one of the defendants who impleaded the plaintiff and a defendant who had a common interest with the appellant. The plaintiff filed cross-objection which was directed against the defendant-appellant and the defendant-respondent. The question was whether the plaintiff should be allowed to impugn the decree by his cross-objections so far as it affected his co-respondent. It was observed as follows:

"The Court of first instance had decided the suit upon a ground common to all the defendants. Consequently, under S. 544, Civil P. C., on the appeal of only one of the defendants, the appellate Court could modify or set aside in favour of all the defendants the decree of the lower Court. The whole case was thus opened out in appeal, not only as between the plaintiff and the defendant who had appealed, but also as between the plaintiff and other defendants, who had been made respondents apparently because they had not joined in the appeal. Having regard to the nature of the suit, and of the decree passed by the Court of first instance, those defendants were necessary parties to the appeal and complete justice could not be done without having them before the Court. Under the circumstances of the case they were to all intents and purposes appellants in the lower appellate Court. The objections under S. 56 (1) were preferred not only against these other defendants, the co-respondents of the plaintiff, but also against the appellant. . . . . As the Court on the appeal of one of the defendants could have varied or set aside the decree in favour of all the defendants, it seems to us to be just and equitable that it should also have the power upon objections taken by the plaintiff to vary the decree against all the defendants."

It will be seen that in this case the cross-objections were directed against the defendant-appellant to the same extent as against the defendant-respondent, the cross-objector being the plaintiff who had partly succeeded in the Court of first instance. None of these cases countenances the view that cross-objection can be permitted by one respondent against another where the effect of the cross-objection, if successful, cannot be adverse to the appellant to any extent. We hold that in the circumstances of the present case the cross-objections filed by Mt. Sabiri Begam which are directed solely against the plaintiffs-respondents are not maintainable under O. 41, R. 22, Civil P. C. Accordingly we dismiss them with costs.

K.S. *Cross-objection dismissed.*

3. Official Trustee of Bengal v. Charles Joseph Smith, 1920 Pat 77=56 I C 262=5 Pat L J 328.

4. Abdul Ghani v. Muhammad Fasih, (1906) 28 All 95=2 A L J 667=1905 A W N 200.

A. I. R. 1935 Allahabad 137

NIAMATULLAH AND COLLISTER, JJ.

Mirza Husain Yar Beg—Applicant — Appellant.

v.

Radha Kishan and *others* — Plaintiffs —Respondents.

First Appeal No. 421 of 1932, Decided on 27th August 1934.

(a) Civil P. C. (1908), O. 23, R. 3—Rule 3 is mandatory.

Rule 3 is mandatory in its terms and provides that, if it is proved to the satisfaction of the Court that a suit (or appeal) has been adjusted by a lawful compromise, the Court has no option but to order such compromise to be recorded and to pass a decree in accordance thereof. The compromise, if given effect to, adjusts the case as between the parties to the compromise.

[P 138 C 2]

(b) Civil P. C. (1908), O. 23, R. 3 — "Lawful" includes agreements which are voidable —Party executing compromise cannot avoid it under O. 23, R. 3 on ground of fraud.

The word "lawful" in O. 23, R. 3 refers to agreements which in their very terms or nature are not unlawful and may therefore include agreements which are voidable at the option of one of the parties thereto because they have been brought about by undue influence, coercion or fraud. Hence a party alleging fraud cannot be allowed to avoid the compromise admittedly executed by it in proceedings started by an application under O. 23, R. 3. [P 138 C 2]

(c) Civil P. C. (1908), O. 23, R. 3 — O. 23, R. 3 does not provide for inquiry into dis-

puted facts collateral to terms of compromise.

Order 23, R. 3 does not provide for an inquiry into disputed facts collateral to the terms of the compromise. [P 139 C 1]

Mushtaq Ahmad—for Applicant.

A. M. Khwaja, S. N. Seth, G. S. Pathak and *Krishna Murari Lal* — for Opposite Parties.

Niamatullah, J.—This is an application by the appellant (defendant 2 in the original suit) praying that a decree be passed in terms of a registered compromise arrived at between the appellant and the plaintiffs-respondents on 1st February 1933. The original document was in possession of the plaintiffs-respondents. The appellant filed a certified copy thereof with his application in this Court. He also prayed that the plaintiffs-respondents be called upon to produce the original deed of compromise. An order was passed by this Court sending down the certified copy of the compromise to the lower Court for "verification and report." The lower appellate Court issued a notice to the plaintiffs-respondents directing them to file the original deed of compromise and to verify the same. The plaintiffs-respondents appeared before the lower Court and filed the original with an application in which they admitted having executed the registered compromise relied on by the appellant but alleged that the appellant's conduct in inducing the plaintiffs-respondents to enter into the compromise was fraudulent. According to them, the appellant had given an assurance that no other defendant would file any cross-objection, but in contravention of that assurance, a cross-objection had been filed by another defendant, namely, Mt. Sabra Begam, just a day before the compromise was registered, a fact of which the plaintiffs-respondents were not aware and which the appellant concealed from them. The compromise does not contain any such stipulation.

The lower Court did not enter into the truth or otherwise of the respondents' allegation and made a report to the effect that the compromise had not been "verified." We do do not think that the plaintiffs-respondents can be considered to have refused to "verify" the compromise except in the sense that they declined to give effect to it. They admit its execution and registration. They do not plead that any of the stipulation contained in the document was not known to them or that they were not free agents in entering into it. Apart from the allegation of fraud, to which reference has already been made, the compromise is a perfectly valid and binding document. The question is whether the plaintiffs-respondents' averment of fraud should be enquired into before the compromise is given effect to under O. 23, R. 3, Civil P. C. R. 3 is mandatory in its terms and provides that if it is proved to the satisfaction of the Court that a suit (or appeal) has been adjusted by a lawful compromise, the Court has no option but to order such compromise to be recorded and to pass a decree in accordance thereof. The compromise if given effect to adjusts the appeal as between the parties to the compromise. It is not disputed that they consented to its terms. Therefore a decree must be passed unless it is shown that O. 23, R. 3 does not apply for any reason.

The learned advocate for the plaintiffs-respondents contends that O. 23, R. 3 does not apply inasmuch as the compromise in question in the present case is not "lawful" as the same had been obtained by fraud. He offers to show by evidence, if an opportunity is given to him that the fraud alleged by his clients in their application already referred to was in fact perpetrated by the defendant-appellant. Assuming, in favour of the plaintiffs-respondents, that the appellant had given an assurance to them that no other defendant would file any cross-objection and that he was privy to a cross-objection being filed by another respondent. We do not think that the compromise can, for that reason, be considered to be otherwise than lawful within the meaning of O. 23, R. 3, Civil P. C. The point is covered by 1928 All 494 (1) in which a Division Bench of this Court held that:

"The word 'lawful' in O. 23, R. 3 does not merely mean binding or enforceable. A contract which is brought about either by undue influence, misrepresentation or fraud is, under Ss. 19 and 19-A, Contract Act, merely voidable and not absolutely illegal or unlawful. These are cases where t . . . . . involves or implies injury to any person or property, or where the Court regards it as immoral or opposed to public policy. We think that the word 'lawful' in O. 23, R. 3, refers to agreements which in their very terms or nature are not 'unlawful', and may therefore include agreements which are voidable at the option of one of the parties thereto because they

1. Qadri Jahan Begam v. Fazal Ahmad, 1928 All 494=110 I C 573=50 All 748.

have been brought about by undue influence coercion or fraud."

We are in entire agreement with the views expressed in the passages quoted above. A contract which has been induced by fraudulent conduct is between the parties, not void but only voidable at the option of the party defrauded. Such contract is valid until it is set aside at the instance of the party at whose option it is voidable. A contract vitiated by fraud can be set aside by a decree obtained in a regular suit instituted for that purpose. A mere repudiation by one of the parties, not acquiesced in by the other is not avoidance of such contract. A judicial determination of facts on which the right to avoid rests is a necessary preliminary to the contract being set aside. O. 23, R. 3 does not provide for an inquiry into disputed facts collateral to the terms of the compromise. It is highly inexpedient that questions of the character raised in the present case should be enquired into in a miscellaneous proceeding started by an application under O. 23, R. 3, Civil P. C. If such enquiry is allowed, all the various stages of a regular suit will have to be gone through in disposing of that application. For these reasons, we do not think that a proceeding of the nature above referred to is within the purview of O. 23, R. 3 and that a party alleging fraud cannot be allowed to avoid the compromise admittedly executed by it in proceedings started by an application under O. 23, R. 3, Civil P. C. The Court is bound to give effect to it forthwith if it is lawful having regard to its own terms.

The learned advocate for the plaintiffs-respondents invoked our jurisdiction under S. 151, Civil P. C. We do not think this is a fit case in which we should act in the exercise of our inherent power and enquire into the truth or otherwise of the plaintiffs' allegations, assuming we have such power under that section. It is open to the plaintiffs-respondents to institute a regular suit for setting aside the compromise. If such a suit is successful, the compromise shall be set aside and the decree passed thereon shall be vacated with the result that the appeal which has been compromised shall have to be reopened.

Having regard to the circumstances which exist at present, the compromise which was admittedly executed by the plaintiffs-respondents cannot be considered to be otherwise than lawful. Accordingly we order the compromise to be recorded and pass a decree in accordance therewith.

K.S. *Order accordingly.*

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NIAMATULLAH AND COLLISTER, JJ.

Sheo Shanker—Plaintiff—Appellant.

v.

Kashi Shanker and *others* — Defendants—Respondents.

First Appeal No. 241 of 1928, Decided on 14th August 1934, from decision of Addl. Sub-Judge, Benares, D/- 26th March 1928.

Trusts—Private or public — Test is to see whether it is for benefit of individuals or of public.

The criterion for deciding whether a particular trust is or is not of a private nature is whether the said trust is or is not for the benefit of individuals.

Where in a will the testator recited that so long as he remained alive he should be the owner of his property, that after his death his heirs should take the property in equal shares with the exception of shevala and thakurdwara which he had built and dedicated for the benefit of his soul (or, more correctly, for the sake of spiritual merits) in the next world, that the heirs should defray the expenses of worship at the shevala and thakurdwara from the income of the house and shops appertaining thereto; and out of the balance of the income they should do all necessary repairs of the thakurdwara and shevala and also of the house and shops, and if any balance should remain thereafter, they were to devote it to charitable purposes and not to their own private expenses:

Held: the trust was of a public nature and not for the benefit of the individual members of the family. [P 140 C 1,2]

P. L. Banerji and *H. P. Sen*—for Appellant.

Gadadhar Prasad—for Respondents.

Collister, J. — The plaintiff sued for a declaration that a certain trust was of a private nature and that he and defendants 1 to 4, being descendants of Gauri Shankar, who was the founder of the trust, had a right to manage the said trust and to perform worship in a temple forming part of the trust property. The plaintiff's case was that Gauri Shankar built a thakurdwara and a shevala and installed the family idols therein and he then built a few houses and some shops appertaining to the temple. On 20th November 1873 he executed a will under which he laid down certain rules of management. The plaintiff alleged that during his absence from Benares in which town the property in suit is situate—certain individuals filed a suit before the District Judge and wrongly

obtained declaration that the trust was of a public nature, and defendants 5 and 6 were thereupon appointed trustees by the District Judge. The plaintiff accordingly sued for a declaration that defendants 5 and 6 aforesaid had no right to interfere with the trust property. Defendants 5 and 6 alone contested the suit and they pleaded inter alia that the trust was of a public nature and that the suit was barred by S. 42, Specific Relief Act. The Court below finds that the trust is of a public character and that the plaintiff is not in possession and it has therefore dismissed the suit.

The criterion for deciding whether a particular trust is or is not of a private nature is whether the said trust is or is not for the benefit of individuals. In the present suit the question whether the trust is of a private or of a public nature rests upon the construction of Gauri Shanker's will dated 20th November 1873. In para. 1 of that will the testator recites that so long as he remains alive he shall be the owner of his property. In para. 2 he provides that after his death his heirs shall take the property in equal shares with the exception of shevala and thakurdwara:

"which I have built and dedicated for the benefit of my soul (or, more correctly, for the sake of spiritual merits) in the next world."

In para. 5 the testator lays down that the heirs shall defray the expenses of worship at the shevala and thakurdwara from the income of the houses and shops appertaining thereto; and out of the balance of the income they should do all necessary repairs of the thakurdwara and shevala and also of the houses and shops, and if any balance should remain thereafter, they were to devote it to charitable purposes and not to their own private expenses. There is nothing whatsoever in this document to indicate that the trust was of a private nature; on the contrary its recitals show that the intention of the testator was that the property be dedicated for the benefit of the idols, which in its wider sense means, for the benefit of the public. There is the evidence of a witness for the defendants, a Khatri merchant of the name of Arjun Mal, who swears that the public are in the habit of worshipping in the temple and that no one is ever prohibited from doing so. There is no evidence in rebuttal of this statement. In our opinion the recitals in the will of the founder of the trust—corroborated as it is by the evidence of Arjun Mal—leaves no room for doubt that the trust is of a public nature and is not for the benefit of the individual members of the family.

As regards the plea of the defendants that the suit is barred by S. 42, Specific Relief Act, the Court below has found that Kashi Shanker, defendant, is in possession and that he obtained possession by virtue of the fact that he along with defendants 5 and 6 was appointed a trustee by the District Judge of Benares and thus his possession must be deemed to be in the capacity of a trustee and not on behalf of the plaintiff. We have not been referred to any evidence on the record to shake this finding of the Court below that Kashi Shanker trustee is in possession and that the plaintiff is out of possession. This being so, the suit fails on this ground also. The result of our findings is that this appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 140

NIAMATULLAH AND COLLISTER, JJ.

Kunwar Indra Bikram Singh—Appellant.

v.

Gaya Prasad and *another* — Respondents.

First Appeal No. 84 of 1934, Decided on 14th September 1934, from order of Dist. Judge, Shahjahanpur, D/- 9th December 1933.

Civil P. C. (1908), O. 41, R. 25—Appeal.

An order merely remitting issue to the trial Court is not appealable. [P 140 C 2]

Harnandan Prasad—for Appellant.

Collister, J.—This is an appeal from an order of the District Judge of Shahjahanpur, remitting a certain issue to the trial Court under O. 41, R. 25, Civil P. C. The question arises whether an appeal lies from such an order. Under O. 43, R. 1 (u), Civil P. C., an appeal lies from an order remanding a case, but the order before us is not an order of remand at all, but merely an order remitting an issue to the trial Court and the lower appellate Court has retained seisin of the case. Nor can it be said that it is an appealable order passed under S. 47 for it is not a question "relating to the execution, discharge or satisfaction of the decree." In our opinion no ap-

peal lies, and the appeal is accordingly dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 141 (1)

BAJPAI, J.

Bharat Lal—Defendant—Applicant.

v.

Jiwan Singh — Plaintiff — Opposite Party.

Civil Revn. No. 166 of 1934, Decided on 31st October 1934, against order of Addl. Sess. and Sub-Judge, Benares, D/- 17th November 1933.

Civil P. C. (1908), S. 24 (4)—Case pending in Small Cause Court transferred to Honorary Munsif's Court by District Judge — S. 24 (4) does not apply, and appeal to Subordinate Judge lies from decision of Honorary Munsif—U. P. Honorary Munsif's Act (2 of 1890), S. 8.

In the case of a transfer by the District Judge of a case pending in the Court of Small Causes to the Court of Honorary Munsif, Cl. (4), S. 24 will not apply, and appeal lies to the Subordinate Judge against the decision of the Honorary Munsif: 1917 *Oudh* 104 and 1924 *All* 761, *Rel. on.*

[P 141 C 2]

B. Malik and *Gadadhar Prasad* — for Applicant.

K. N. Malaviya—for Opposite Party.

Order.—This is an application by the defendant under S. 115, Civil P. C. The facts are that the plaintiff brought a suit upon the basis of a promissory note for the recovery of a sum of Rs. 82-8-0. The suit was filed in the Court of the Small Cause Judge, Benares, on 2nd January 1932. A note was made on the order sheet as follows:

"Transferred to the Honorary Munsif's Court under the order of the District Judge of Benares dated 24th June 1931."

The Honorary Munsif's Court dismissed the plaintiff's suit. The plaintiff went in appeal and the Additional Sessions and Subordinate Judge of Benares decreed the plaintiff's suit. In revision it is argued before me that no appeal lay to the learned Subordinate Judge. The argument is that the case must be deemed to be transferred from the Court of the Small Cause Court Judge to the Court of the Honorary Munsif under S. 24, Civil P. C., and under Cl. (4) the Honorary Munsif, trying the suit so transferred, should, for the purposes of the suit, be deemed to be a Court of Small Causes. It is however contended by learned counsel for the opposite party that Cl. (4), S. 24, Civil P. C., does not apply where the District Judge transfers the suit pending in a Court of Small Causes to the Court of Honorary Munsifs as is clear from the Honorary Munsifs Act (Local Act 2 of 1896). It is specifically provided therein that the last paragraph of S. 25 of the old Civil Procedure Code, (corresponding to S. 24 of the present Code), shall not be applicable to cases so transferred from Courts of Small Causes. It is clear that the case was transferred from the Court of Small Causes under some general order passed by the District Judge on 24th June 1931 long before the institution of the present suit and the transfer must be deemed, therefore to be a transfer S. 8, Honorary Munsifs Act. In the case of a transfer by the District Judge of a case pending in the Court of Small Causes to the Court of Honorary Munsifs, there is a clear provision that Cl. (4), S. 24 will not apply. This is the view taken by the learned Judicial Commissioner of Oudh, Mr. Lindsay, in 1917, Oudh 104 (1). Boys, J., also took the same view in 1924 All 761 (2).

I am therefore of the opinion that an appeal lay to the Subordinate Judge against the decision of the Honorary Munsif and there is no force in the first contention advanced by learned counsel for the applicant. The other pleas taken in revision cannot be entertained because they deal with pure questions of fact. I dismiss this application with costs.

K.S. *Application dismissed.*

1. Mt. Nazir Bibi v. Daya Shankar, 1917 Oudh 104=39 I C 340.
2. Megi Mal v. Hira Lal, 1924 All 761=82 I C 292.

A. I. R. 1935 Allahabad 141 (2)

BENNET, J.

Ganga Prasad—Defendant — Applicant.

v.

Prabhu Dayal — Plaintiff — Opposite Party.

Civil Revn. No. 64 of 1934, Decided on 22nd October 1934, from decree of Small Cause Court Judge, Aligarh.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 35 (i) (ii) — Suit for return of gold and silver given for making ornaments —No allegation of dishonest misappropriation or conversion or use—Suit is not barred from Small Cause Court jurisdiction.

Where plaintiff sued for return of gold and silver given to defendant for making ornaments and merely alleged that defendant did not return them in bad faith:

Held: that as there was no allegations of dishonest misappropriation or conversion or dishonest use or disposal of property, the suit was not barred from Small Cause Court jurisdiction.
[P 142 C 1]

M. L. Chaturvedi—for Applicant.

Kamta Prasad—for Opposite Party.

Order.—This is an application in civil revision by a defendant against a decree of the Small Cause Court. The plaint alleged that the plaintiff had given gold and silver to the defendant, a sonar, to make into ornaments. In para. 3 of the plaint it was stated that after a week the plaintiff had asked the ornaments to be returned but that the defendant "bad niati se" had not returned the gold and silver. The lower Court held this allegation proved and granted a decree to the plaintiff. The point taken in revision is that the allegations in the plaint amount to an offence under Ch. 17, Penal Code, and therefore the suit should have been tried as a regular suit as it is barred from Small Cause Court jurisdiction by the provision in the Provincial Small Cause Courts Act, Sch. 2, Art. 35 (1) (2). Learned counsel referred to the definition of "criminal appropriation" in S. 403, and also "criminal breach of trust" in S. 405, Penal Code. These definitions involve dishonest misappropriation or conversion or dishonest use or disposal of the property. It is not alleged in the plaint that the defendant did any of these things. It is merely alleged that in bad faith he did not return the gold and silver. I consider therefore that on the allegations in the plaint the suit is not barred from Small Cause Court jurisdiction. Accordingly I dismiss this application in revision with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 142

BAJPAI, J.

Bhoore Singh and *others* — Defendants —Applicants.

v.

Karan Singh — Plaintiff — Opposite Party.

Civil Revn. No. 145 of 1934, Decided on 30th October 1934, from order of Small Cause Court Judge, Agra, D/- 22nd November 1933.

Evidence Act (1872), S. 45 — Expert opinion — Report of expert by itself is not evidence— Expert should be produced in Court and his evidence tested by cross-examination.

If a Court wishes to rely upon the report of an expert, then he should be produced and his evidence tested by examination and cross-examination in open Court, and unless it is done the report does not by itself become evidence in the case.
[P 143 C 1]

B. S. Darbari—for Applicants.

J. Swarup—for Opposite Party

Order.—The plaintiff brought a suit for the recovery of a sum of money on the basis of a pronote, said to have been executed by Bhurey Singh and Rup Ram. Rup Ram is dead and his two sons, Beni Ram and Charan Singh, were arrayed as defendants legal representatives of Rup Ram, the deceased-executant. Bhurey Singh is also one of the sons of Rup Ram. The pronote purported to bear the thumb impressions of Bhurey Singh and Rup Ram. Bhurey Singh denied the thumb impressions on the promissory note to be his or of his father, Ram Ram. The other two sons of Rup Ram also denied the thumb impression of Rup Ram and said that no money had been taken by Rup Ram. The promissory note along with certain other documents, containing the admitted signatures of Bhurey Ram and Rup Ram were sent to the thumb impressions expert in the office of the Deputy-Inspector-General of Police, C. I. D., U. P., and his report was that the promissory note did bear the thumb impression of Bhurey Singh, defendant.

The case was then taken up on 22nd November 1933 and the plaintiff was examined. An attempt was made to prove the report of the thumb impression expert by the evidence of the plaintiff. The plaintiff by his own evidence proved the promissory note and said that Rup Ram also had put his thumb-mark on the document. Beni Ram, defendant 2, one of the sons of Rup Ram, also entered the witness-box and he said that neither his father nor his brother had taken any loan from the plaintiff. The learned Judge by his judgment dated 22nd November 1933 decreed the suit against Bhurey Singh and against the assets of Rup Ram in the hands of defendants 2 and 3. In his judgment he refers to the report of the thumb-impression expert; he says that one of the thumb-marks has been proved to be of defendant 1 but the thumb-mark of Rup Ram could not be deciphered as it was too much blurred. In an earlier part of his judgment, the learned Judge observes: "The plaintiff says the pronote was executed by Bhurey Singh and Rup Ram" and towards the end the learned Judge says:

"I believe the plaintiff and hold that Rup Ram and his own son, Bhurey Singh, executed the pronote."

It is argued by learned counsel for the defendants-applicants that the report of the thumb impression expert was inadmissible in evidence and the learned Judge should not have relied upon the report. It is argued by learned counsel for the plaintiff-opposite-party that the learned Judge relies upon the evidence of the plaintiff and even if the report of the expert be ignored, there was the evidence of the plaintiff, proving the promissory note and the Court below has said that he believes this evidence. There cannot however be the slighest doubt that the judgment of the Court below is influenced to a great extent by the report of the expert and which report, it is conceded, is inadmissible in evidence. It is not possible for me in revision to say to what extent the mind of the learned Judge was influenced by inadmissible evidence but that it was so influenced, there cannot be any question. If a Court wishes to rely upon the report of an expert, then he should be produced and his evidence tested by examination and cross-examination in open Court and unless it is done, the report does not by itself become evidence in the case.

I therefore allow this application, set aside the decree of the Court below and send back the record to that Court with directions to try the suit afresh, paying due regard to the observations contained in this judgment. If the Court wishes to admit in evidence the report of the expert, then the Court should insist that the plaintiff should call the expert as a witness in the case in order that his examination and cross-examination be conducted in open Court. If however the plaintiff is not able to deposit the expenses for the summoning of the expert, then the Court below should scrupulously leave out of consideration the report of the expert. It will, of course, be still open to the Court below to believe the plaintiff implicitly. Costs here and heretofore will abide the event.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 143

NIAMATULLAH, J.

Saira Khatun—Appellant.

v.

Qutubuddin and *others*—Respondents.

Second Appeal No. 550 of 1932, Decided on 24th September 1934, from decision of Addl. Sub-Judge, Bulandshar, D/- 18th March 1932.

(a) Advancement—Purchase by husband in name of wife — There is no presumption of advancement in India.

Where property is purchased by a husband in the name of his wife, there is no presumption of advancement in India and any one alleging that the husband made the purchase for the wife should establish it by evidence other than that afforded by the fact that the title deed stood in the name of the wife. [P 144 C 2]

(b) Civil P. C. (1908), S. 66— S. 66 applies even where property is claimed against auction-purchaser's representative in interest.

Section 66 applies not only to cases in which the property is claimed against an auction purchaser himself but also where it is claimed against his representative in interest. [P 146 C 1]

(c) Civil P. C. (1908), S. 66— Auction-purchaser no party to suit and indifferent as to which party is entitled to property purchased by him—S. 66 does not apply - But if one of parties is transferee from auction-purchaser, S. 66 applies.

Where the auction-purchaser is no party and is indifferent as to which of the two contending parties is held to be entitled to the property purchased by him he being admittedly a mere stakeholder, S. 66 does not apply. This does not apply to a case where the defendant is a transferee under a valid title-deed from the auction-purchaser : 1925 *All* 47 ; 1923 *Cal* 302 and 1928 *Cal* 448, *Ref.* [P 146 C 2]

(d) Civil P. C. (1908), S. 100— High Court can ignore even a point of law raised before it for first time— But where equities of case require that it should give effect to such a point even though not raised before, there is no bar to its taking cognizance of such point.

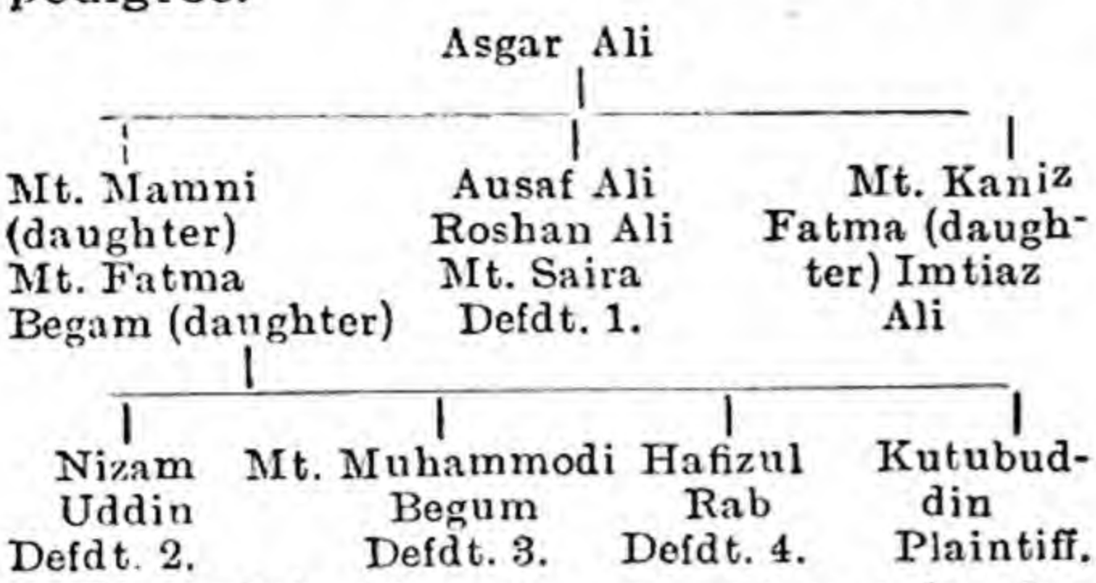
It is certainly open to the High Court to ignore a point even of law if it is raised for the first time in the High Court. At the same time the power of a Court of second appeal to give effect to a plain provision of law even though not raised in the Courts below cannot be questioned. Where the equities of a case require such a course to be adopted, there is no legal bar to the point being taken cognizance of by the Court itself. [P 146 C 2]

M. A. Aziz—for Appellant.

K. C. Mital—for Respondents.

Judgment.—This is an appeal by defendant 1, and arises from a suit brought by the plaintiff-respondent for recovery of a share in four properties mentioned at the foot of the plaint. The trial Court dismissed the plaintiffs suit, but the lower appellate Court

has decreed it. The position of the parties will appear from the following pedigree.



The plaintiff's case as set out in the plaint is that the properties detailed at the foot of the plaint belonged to Roshan Ali though properties Nos. 2 and 3 were purchased benami in the name of defendant 1 and property No. 4 was purchased at auction by one Abdul Rahman for Roshan Ali and he (Abdur Rahman) transferred it to defendant 1 with whom he was in collusion. As regards property No. 1 which stood in the name of Roshan Ali himself there is no dispute in appeal, the plaintiff being one of the heirs of Roshan Ali is entitled to a frantional share therein. The suit was contested by defendant 1, the appellant, who pleaded that the money with which properties Nos. 2 and 3 were taken belonged to her, but in her evidence she admitted that the money had been given to her by her husband. As regards property No. 4, her case was that it had been purchased at an auction by Abdul Rahman as her agent. It is common ground that Abdul Rahman purchased it at an auction and a certificate was granted to him and that after the death of Roshan Ali Abdul Rahman executed a deed of sale in respect of that property in favour of defendant 1. Abdul Rahman was examined as a witness and stated that he had in fact received no consideration from defendant 1 in respect of the sale-deed. He also stated that Roshan Ali had supplied him with funds for the purchase at auction sale and directed him to transfer it to his wife defendant 1. In accordance with Roshan Ali's direction which Abdul Rahman characterises as will he executed a sale-deed in favour of defendant 1 for an ostensible consideration of Rs. 400. The sale-deed was admittedly executed after the death of Roshan Ali.

One other defence was taken by defendant 1. She alleged that Roshan Ali was not the son of Ausaf Ali and that he was a foundling and was brought up by Imtiaz Ali, the husband of the sister of Ausaf Ali. It has however been found by the lower appellate Court that Roshan Ali was the son of Ausaf Ali. The finding is one of fact and cannot be questioned in second appeal. If it had been found otherwise the plaintiff would not have been entitled to inherit any part of Roshan Ali's property. The plaintiff's right to a share in the properties in dispute cannot therefore be disputed, if they belonged to Roshan Ali. The only question is whether the same belonged to Roshan Ali. As already stated, there is no controversy as regards property No. 1. The arguments before me related to the other three properties. The trial Court was of opinion that in the absence of evidence to the contrary it should be presumed that Roshan Ali purchased the properties in question for the benefit of his wife and that the plaintiff not having rebutted that presumption his suit is liable to be dismissed. Accordingly that Court dismissed the plaintiff's suit. The lower appellate Court referred to certain cases and held that where property is purchased by a husband in the name of his wife there is no presumption of advancement in India and that any one alleging that the husband made the purchase for the wife should establish it by evidence other than that afforded by the fact that the title-deed stood in the name of the wife. In my opinion the lower appellate Court has taken a correct view of the law on the subject.

The evidence in the case leaves no doubt that properties Nos. 2 and 3 were purchased by Roshan Ali through Abdul Rahman who directed to obtain title-deeds in the name of the appellant. There is in these circumstances no presumption that Roshan Ali had the title-deeds obtained in the name of his wife as he desired her to become the owner of the property. It is true that one of the modes by which a man desires to make his wife the owner of property which he purchases from a third person is to take a deed in her favour, in which case the transaction properly analysed amounts to a gift by the husband to the wife of the fund with which the property is purchased and whatever part he takes in the transaction itself is on her behalf as her agent. It is however a matter of evidence as to whether he intended that the wife should become the owner of the property which is purchased at his instance or that he made a gift of the money with which it was purchased.

Though the learned Subordinate Judge enunciated the law correctly he observed in the course of his judgment that:

"there appears however no evidence or circum stances in this case which can favour the defendant's contention exclusively or be incompatible with her ostensible ownership."

At another place he said that:

"Abdul Rahman who was admittedly the right hand man of Roshan Ali and through whom Roshan Ali had purchased all this property swears that Roshan Ali was their owner and that the name of defendant 1 in the sale-deeds was merely benami."

I have referred to the evidence of Abdul Rahman and have not been able to find any statement to the effect mentioned by the learned Subordinate Judge. All that he says is that properties Nos. 2 and 3 were taken by him with funds belonging to Roshan Ali and that as desired by Roshan Ali the title-deeds were taken in the name of defendant 1. In answer to questions put by the Court he stated that he could not say whether Roshan Ali had taken the properties in the name of his wife because he desired to make her the owner thereof, or because he was in service and did not like to make it appear that he had purchased properties. Roshan Lal was in service in Gwalior State. Defendant 1 was living with him there. The properties were purchased in the district of Bulandshahr where Abdul Rahman was employed as Ahalmad. It may be that the learned Subordinaate Judge inferred from Abdul Rahman's evidence that Roshan Ali was the owner and defendant 1 was benamidar. But the learned Subordinate Judge was not right if his observation implies that there is no evidence or circumstances in this case which may be indicative of the fact that Roshan Ali desired to make his wife the owner of the properties purchased by him through Abdul Rahman. To my mind the fact that Roshan Ali had no children and that the plaintiff and his sisters who were his prospective heirs besides defendant 1 were not near relatives are circumstances which have evidential value on this question. If this were a first appeal I would have considered the question whether in all the circumstances of the case an inference of Roshan Ali's intention to make defendant 1 the owner of the property should be drawn from them. I might have arrived at my own finding even in second appeal on this question of fact if I were satisfied that the learned Subordinate Judge overlooked these circumstances. But other parts of his judgment show that these facts were present in his mind. In saying that there is no evidence or circumstance to rebut the prima facie ownership of Roshan Ali the learned Judge probably meant that the facts mentioned above are not of any weight. In this view I accept the finding of fact though with a certain amount of reluctance.

The case as regards property No. 4 stands on a somewhat different footing. As already stated the property was purchased at an auction sale by Abdul Rahman with funds belonging to Roshan Ali. The former transferred it to defendant 1 after Roshan Ali's death under a sale-deed which is couched in the usual terms and declares that he had purchased the property to which it relates at an auction and was transferring it to defendant 1 in consideration of Rs. 400. It is of importance to notice that Abdul Rahman asserts in the sale-deed to be the owner by virtue of the auction sale and professes to transfer his rights whatever they were to defendant 1. In the Courts below no distinction was made between property No. 4 and properties Nos. 2 and 3 all of which were dealt with on the footing of benami transactions. The memorandum of appeal in this case also did not raise any other question. In the course of arguments my attention was arrested by para. 8 of the plaint which runs as follows:

"Munshi Abdul Rahman, Karkun of Roshan Ali, purchased at an auction-sale a house, mentioned against No. 4 at the foot of the plaint, for Roshan Ali with the latter's money, and it is adjacent to the residential house, mentioned against No. 1 at the foot of the plaint. After Roshan Ali's death defendant 1, in collusion with Munshi Abdul Rahman, the Karkun, contrary to the rights of the heirs, obtained a sale-deed in her favour alone."

It appears to me that the plaintiff stands non-suited by his own allegation having regard to the provisions of section 66, Civil P. C. He clearly claims property No. 4 on the allegation that Abdul Rahman the auction-purchaser, was a benamidar for Roshan Ali and that in collusion with defendant 1 Abdul Rahman transferred his rights to her instead of two other heirs including the plaintiff. In my opinion S. 66, Civil P. C., is in terms applicable. It provides that:

"no suit shall be maintained against any person claiming title under a purchase certified by the defendant in such a manner as may be prescribed on the ground that the purchases was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The plaintiff claims through Roshan Ali. His case is that Abdul Rahman

had purchased on behalf of Roshan Ali. The suit which has given rise to this appeal was instituted against defendant 1 who holds a deed of transfer from Abdul Rahman and is to that extent his representative in interest. S. 66 in my opinion applies not only to cases in which the property is claimed against an auction purchaser himself, but also where it is claimed against his representative in interest.

The learned advocate for the respondents has argued that defendant 1 claimed the property on the same allegation as the plaintiff, treating Abdul Rahman as a benamidar for her. This is not correct. Her case is that Abdul Rahman purchased the property for her as her agent. Though the sale-deed is not specifically referred to in her written statement she produced it in support of her case. In my opinion taking the written statement with the sale-deed produced by defendant 1 it is clear that she is claiming title under a purchase certified by the Court within the meaning of S. 66, Civil P. C. The learned advocate for the respondents relies on 1917 Mad 365 (1). In that case there was no transfer or assignment by the auction-purchaser in favour of the defendant. The auction-purchaser was no party and the case of both parties was that he was a benamidar. The auction-purchaser had executed a deed of release in favour of the defendants. The learned Judges took care to point out (p. 1001 of 33 I C), that the deed executed by the auction-purchaser was only a deed of release pure and simple whereby the executant renounced a claim, but conveyed no title. They proceeded to observe that "defendant 1 cannot therefore pose as an assignee of the rights of" the auction-purchaser. In the case before me the position is different as I have already indicated. Defendant 1 is a transferee in the real sense of the term. The fact that Abdul Rahman received no consideration from her can make no difference. Abdul Rahman intended to transfer the property to her and did transfer it. A third person such as the plaintiff cannot assail the validity of the deed on the ground that as between the parties to it there was no consideration.

Another case relied on is 1925 All 47 (2), which followed 1923 Cal 302 (3). In none of these cases the defendant was either the auction-purchaser or a transferee of the auction purchaser. He could not be considered to be claiming title under the sale certificate. Same was the case in 1928 Cal 448 (4). These cases may be authorities for the proposition that where the auction-purchaser is no party and is indifferent as to which of the two contending parties is held to be entitled to the property purchased by him he being admittedly a mere stake holder S. 66 does not apply. They do not apply to a case where the defendant is a transferee under a valid title-deed from the auction-purchaser.

The learned advocate for the respondents protested against this part of the case being disposed of with preference to S. 66, Civil P. C., which was not relied on in any of the Courts below. It is certainly open to me to ignore a point even of law if it is raised for the first time in this Court. At the same time the power of a Court of second appeal to give effect to a plain provision of law even though not raised in the Courts below cannot be questioned. Where the equities of a case require such a course to be adopted there is no legal bar to the point being taken cognizance of by the Court itself. In taking this point I was influenced by the consideration that defendant 1 is the widow of Roshan Ali; he had expressly asked Abdul Rahman to convey this property to her whom he would naturally prefer to the plaintiff and the other heirs who are otherwise not very near relations. It is more equitable to give effect to his wishes if it is possible to do so as I think it is by invoking the aid of S. 66, Civil P. C. The result is that I allow this appeal in part and modify the decree of the lower appellate Court by dismissing the plaintiff's suit as regards property No. 4. In other respects its decree shall stand. The plaintiff-respondent shall have 3/4ths of his costs from defendant 1 who shall have 1/4th of her costs from the plaintiff.

N. B.—Leave to appeal under the Letters Patent is granted to the plaintiff, but not to the defendant.

K.S. *Appeal allowed.*

1. Ramaswami Aiyar v. Venkappaier, 1917 Mad 365=33 I C 1000.
2. Jambu Dass v. Jai Prakash, 1925 All 47=82 I C 344.
3. Saradindu v. Gosta Behari, 1923 Cal 202=75 I C 196.
4. Abinas Chandra v. Pratul Chandra, 1928 Cal 448=108 I C 585=55 Cal 1070.

A. I. R. 1935 Allahabad 147

SULAIMAN, C. J. AND GANGA NATH, J.

Ahmad Ullah Khan and *another*—Objectors—Appellants.

v.

Ahsan Ali Khan—Respondent.

First Appeal No. 182 of 1933, treated as Civil Revn. No. 665 of 1934, Decided on 31st October 1934, from order of Addl. Dist. Judge, Cawnpore, D/- 15th July 1933.

(a) Charitable and Religious Trust Act (14 of 1920), S. 7 – Application under — Judge should not dispose of matter without allowing parties to produce evidence—When he so does, there is irregular exercise of jurisdiction.

Where an application is filed under S. 7, the District Judge should not dispose of the matter without allowing the parties to produce any evidence and without going into the points which are in controversy; where he so disposes of it, then it is a material irregularity in exercise of jurisdiction. [P 147 C 2]

(b) Charitable and Religious Trust Act (14 of 1920), S. 7 — Order on application under S. 7 is neither decree nor appealable order.

The order of the District Judge on an application under S. 7 cannot be treated as a decree and under no provision of the law can it be regarded as an appealable order. [P 148 C 1]

Akhtar Husain Khan—for Applicants

K. Masud Hasan—for Opposite Party

Judgment.—This is an appeal by certain objectors to an application originally filed under S. 7 of Act 14 of 1920. The applicant alleged that Mt. Haji Begam had dedicated certain property and prescribed a certain line of mutwallis and the applicant was the mutwalli of the trust property. He asked for numerous directions to be given to him by the Court in his administration of the trust property. His main point was that the income of the trust property had been reduced considerably and that there should be proportionate reduction under all heads. He also wanted a declaration in favour of his sons that they were equally entitled to certain allowances.

The application was opposed by certain beneficiaries under the deed of trust who denied the pedigree set up by the applicant, denied the fact that the applicant was a trustee, denied that the income had been in any way reduced, denied that the applicant's sons were entitled to any allowances and also denied the jurisdiction of the District Judge to entertain the application on the ground inter alia, that the trust was not a public trust at all.

The learned Judge has disposed of the matter without allowing the parties to produce any evidence and without going into the points which were in controversy. He has not held that the applicant is entitled under the deed of trust to be the mutwalli, but inasmuch as he is in possession of the trust property he has assumed that he is a mutwalli. He has not gone into the question whether the pedigree set up by the applicant or that set up by the objectors was correct, nor has he considered the question whether the income has in point of fact been at all reduced. He has found in favour of the objectors that the wakf was not a public trust, but was a private trust, although part of the income, at any rate, was fixed for religious and charitable purposes. He has not considered whether on that ground the wakf should be considered as partly public and partly private. He has treated the application as if it were not made under Act 14 of 1920, but were a mere petition to him in his capacity as the Judge of the principal civil Court of original jurisdiction, who has taken the place of the Qazi under the Mahomedan law, for directions and has considered that he has jurisdiction to give such directions to a trustee. Perhaps this part of the view taken by him cannot be seriously challenged.

Without trying the case and without giving any opportunity to the parties to substantiate their respective cases, the learned Judge has merely expressed an opinion on a pure question of law in the following words:

"In case of decrease of income, all the expenses provided for by the waqf should be proportionately reduced."

In support of this view he has relied on a passage in Mr. Amir Ali's Mahomedan Law, p. 381, based on the authority of Ruddul Muhtar Vol. 3, p. 670, viz., that in case of decrease of income from the wakf property all the expenses fixed by the wakf should be proportionately reduced. This opinion has been expressed without reference to the terms of the particular deed of trust in question.

It seems to us that there has been a material irregularity in exercising jurisdiction in this case. The learned Judge should not have expressed an without allowing the parties to produce evidence. Even if it be assumed that the applicant as a de facto trustee had a locus standi to approach the District Judge, the learned Judge should not have expressed his opinion in a general way, but should have based it on the terms of the particular deed. We do not think that the learned Judge meant to lay down that

all the items of expenditure and all allowances and maintenances mentioned in the deed stand on the same footing and they must all be reduced proportionately. Of course, where in the deed itself there is priority given to some items and they have to be met in the first instance and the others have to be met out of the balance in hand, it will be impossible to say that the items in all such groups stand on the same footing. The learned Judge has not examined the terms of the document and it seems prima facie that the general proposition of law as stated by him would not be applicable to the terms of this particular document where the items of expenditure have been classified into groups with priorities.

On the whole we are of opinion that the best course is to set aside the order of the District Judge and send the case back to him for disposal according to law. The order of the Court below cannot be treated as a decree and under no provision of the law can it be regarded as an appealable order. Accordingly no appeal lies to us. But as there has been a material irregularity in the exercise of jurisdiction and a case has certainly been decided, we have jurisdiction to interfere on the revisional side. The applicants may have the costs of this revision from the respondent who will recoup himself out of the income of the trust property, treating the same as part of the legitimate expenses of management.

K.S. *Case remanded.*

A. I. R. 1935 Allahabad 148

BAJPAI, J.

Noola—Applicant.

v.

L. Chimman Lal—Opposite Party.

Civil Revn. No. 139 of 1934, Decided on 30th October 1934, from decision of Small Cause Court Judge, Agra, D/- 3rd October 1933.

(a) Provincial Small Cause Courts Act (1887), S. 23—Small Cause Court Judge is competent to decide question of title — But where intricate question of title is involved, it should not be decided summarily but Judge should return plaint for presentation to competent Court.

Section 23 shows that a Small Cause Court is competent to decide a question of title but when he should finally determine the same and not in a cursory manner, it is not always convenient for a Small Cause Court Judge to decide an intricate question of title and the object of S. 23 is to meet cases in which the Judge is satisfied that the question of title is so intricate that it should not be decided summarily and then it should return the plaint for presentation to a proper Court: 14 *I C* 2, *Ref.* [P 149 C 1]

(b) Provincial Small Cause Courts Act (1887), S. 23—Under S. 23 it is not necessary that plaintiff and defendant should be rival claimants to property.

Under S. 23 it is not necessary that there must be a dispute of title to immovable property between the plaintiff and the defendant, each setting up title in himself before the question of returning the plaint for presentation to the proper Court arises. Under it the inquiry is limited to the right of the plaintiff and to the relief claimed by him and it is the right of the plaintiff and the relief claimed by him which has got to be considered. There are no words which would justify the inference that the plaintiff and the defendant should be rival claimants to the immovable property: 1925 *Oudh* 687, *Diss. from.*; 1921 *Lah* 91; 1926 *All* 344 and 1926 *Nag* 276, *Ref.* [P 150 C 1]

M. L. Chaturvedi—for Applicant.

J. Swarup—for Opposite Party.

Order.—This is a defendant's application in revision against a decree passed against him by a Judge of the Small Cause Court at Agra. The plaintiff brought a suit for the recovery of a sum of Rs. 45 against the defendant on the allegation that the said sum was due for arrears of rent for seven months; the rent was claimed at the rate of Rs. 10 a month for two months and Rs. 5 a month for five months. It was said that the plaintiff was the owner of two shops which the defendant had taken on rent, but about the end of March 1933 one of the shops was sold at an auction and purchased by a third party and thus the defendant was liable to pay the rent of only one of the shops after the auction-sale. The defence was that only one month's rent was due and the defendant thus admitted the liability to the extent of Rs. 10. He went on to say that for the last six months the shops were in the ownership of a third person who had purchased them at an auction-sale and the rent had been regularly paid to this third person. It was then said that as the title of the plaintiff to the shops was denied, the plaint should have been returned for presentation to a Court, having jurisdiction to determine the title.

The Court below has held that the plaintiff was entitled to the rent of both the shops for one month and one of the shops for five months and on this calculation it has given a decree to the plaintiff for Rs. 35. It is contended in revision by the defendant that a question of title was raised in

the suit and if the Small Cause Court Judge intended to decide that question he should have decided it not in a summary manner, but after having asked the parties to produce all relevant evidence on the question and to have considered them thoroughly The learned Judge in the present case observes: "I, as a Small Cause Court, need not go deep into the question." This shows that the learned Judge decided the question of title in a summary manner. Under S. 23, Provincial Small Cause Courts Act, when the right of a plaintiff and the relief claimed by him depends upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may, at any stage of the proceedings, return the plaint to be presented to a Court having jurisdiction to determine the title. This shows that a Small Cause Court is competent to decide a question of title, but then he should finally determine the same and not in a cursory manner as it has done in the present case. It is not always convenient for a Small Cause Court Judge to decide an intricate question of title and the object of the above provision is to meet cases in which the Judge is satisfied that the question of title is so intricate that it should not be decided summarily and then it should return the plaint for presentation to a proper Court. In 14 I C 2 (1), the Additional Judicial Commissioner of Oudh held that:

"where in a suit brought in a Small Cause Court, the defendant raises a question of title, it is expedient or the Court to return the plaint for presentation to a Court competent to decide such a question."

In the present case the question of title depended upon a consideration of a number of documents. The plea of the defendant was that the two shops had been mortgaged to a stranger who in execution of his mortgage decree had purchased the shops at an auction-sale. It was necessary to consider the boundaries contained in the mortgage-deed, the decree, the sale certificate and the dakhalnama. Admittedly in the present case the learned Judge says that he need not go deep into the question and he has considered only the sale certificate in favour of the stranger and in a summary manner held that as the dakhalnama clashes with the sale certificate, the former document is not worth any reliance. This was therefore a case in which the question of title ought to have been decided by a competent Court other than the Small Cause Court.

It was contended by learned counsel for the opposite party that the learned Judge of the Court below was competent to decide the question of title and as a matter of fact decided the same after considering the evidence on the record. I do not agree with this contention in view specially of the statement made by the learned Judge himself that he does not propose to go deep into the question. It was brought to my notice that several important documents like the mortgage-deed, the decree in the mortgage suit, the dakhalnama and the Sarkhat in favour of the stranger have not been considered and discussed by the Court below.

It was then contended by the opposite party that there must be a dispute of title to immovable property between the plaintiff and the defendant, each setting up title in himself before the question of returning the plaint for presentation to the proper Court arises. In this connexion reliance was placed on 1925 Oudh 687 (2), 1921 Lah 91 (3), 1926 Nag 276 (4) and 1926 All 344 (5). The definite basis of all these decisions mentioned above, except the Oudh case was that the defendant was estopped from pleading the right of a third party by reason of S. 116, Evidence Act, which says that during the continuance of a tenancy a tenant of immovable property shall not be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property. In all these cases the tenant wanted to deny the title of the plaintiff at the time when the tenancy was created and it was obvious that under S. 116, Evidence Act, he could not be permitted to do so. This was also the basis of the decision in the Oudh case, but Dalal, J. C., went on to observe that:

"the question at issue was one of tenancy and not of title and that the defendant did not say that he was the owner of the premises. He claimed ownership for a third person and that was no question of title between the parties."

With great respect I am unable to agree with this interpretation of S. 23,

1. Hira Lal v. Mohammad Sharafat Ullah, (1912) 14 I C 2.
2. Dhani Ram v. Maikoo Lal, 1925 Oudh 687=87 I C 286.
3. Labhu Ram v. Mool Chand, 1921 Lah 91=60 I C 319.
4. Chandrabhaga Bai v. Bakaram, 1926 Nag 276=92 I C 735.
5. Mohammad Ilyas v. Hari Ram, 1926 All 344=93 I C 826.

Provincial Small Cause Courts Act. The words used therein are:

"When the right of a plaintiff and the relief claimed by him in a Court of Small Causes depended upon the proof or disproof of a title to immovable property."

The inquiry therefore is limited to the right of the plaintiff and to the relief claimed by him and it is the right of the plaintiff and the relief claimed by him which has got to be considered. There are no words which would justify the inference that the plaintiff and the defendant should be rival claimants to the immovable property. It was finally contended by the opposite party that the claim of the plaintiff to the extent of Rs. 10 was practically admitted by the defendant and so far there was no controversy and no question of title was to be investigated. But it is not possible to split the relief claimed by the plaintiff which was for the recovery of a larger sum of money and in that larger connexion the question of title intervened.

The result is that I allow this application, set aside the decree of the Court below and order that the record be returned to the Small Cause Court Judge with a direction to him to return the plaint to be presented to a Court having jurisdiction to determine the title. The applicant is entitled to his costs in this Court. The costs of the Court of first instance will be borne by the parties.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 150

BAJPAI, J.

Mahadeo and *others*—Plaintiffs — Applicants.

v.

Rameshsar Dayal—Defendant—Opposite Party.

Civil Revn. No. 87 of 1934, Decided on 30th October 1934, against order of Small Cause Court Judge, Allahabad, D/- 1st November 1933.

Mortgage—Promissory note—Contemporaneous lease of land to promisee by promissor and promisee to set off rent for interest due by promissor—Held it was not usufructuary mortgage and promisee was entitled to sue for recovery of money on promissory note.

The defendant had executed a promissory note in plaintiff's favour. There was a contemporaneous transaction between the parties viz., a lease by the defendant to plaintiff. The defendant covenanted that the plaintiffs would remain in possession of the land and would not be bound to pay any rent to the defendant but would be entitled to set if off towards the amount of interest that was payable by the defendant to the plaintiffs:

Held: that unless there was a transfer of an interest in the specific immovable property for the purpose of securing payment of money advanced, there can be no usufructuary mortgage and that the lease was not for the purpose of securing the payment of principal money advanced but was only an arrangement for the payment of interest. Hence the two transactions did not amount to a usufructuary mortgage and plaintiff was entitled to institute suit for recovery of sum on promissory note: 1930 *All* 375, *Rel. on.* [P 151 C 1]

S. B. Johari—for Applicants.

Ambika Prasad Dube — for Opposite Party.

Order.—Plaintiffs' suit for the recovery of a sum of Rs. 200, due on a promissory note executed on 26th April 1929 has been dismissed by the Small Cause Court Judge of Allahabad. The plaintiffs' allegation was that the defendant had executed a promissory note in their favour for Rs. 300, that the interest on the promissory note had been regularly paid by reason of a contemporaneous transaction having been carried into effect and that Rs. 100 towards principal had been paid and therefore the sum due to the plaintiffs was Rs. 300. It is necessary to mention this contemporaneous transaction. It was a lease by the defendant of certain muafi plots of three bighas for a period of three years. The rent reserved was Rs. 24 per bigha per year or Rs. 72 for the entire land leased. The interest on the bond was at the rate of Rs. 2 per cent per mensem and thus the interest also comes to Rs. 72 a year. The defendant covenanted that the plaintiffs would remain in possession of the three bighas and would not be bound to pay any rent to the defendant, but would be entitled to set it off towards the amount of interest that was payable by the defendant to the plaintiffs. The lease was for a period of three years. It appears that Rs. 100 was paid by the defendant to the plaintiffs and the latter gave up possession over one bigha.

The contention of the defendant was that the two transactions, namely, the promissory note and the lease have got to be considered together and that considering them together, they amount to a usufructuary mortgage and therefore the plaintiffs were not entitled to recover the principal amount as long as they were left in peaceful possession of the plots. Let it be noted that it was nobody's case that the plots leased were occupancy holdings

or of such a nature that their transfer was in contravention of the provisions of the Tenancy Act. The Court below has accepted this contention and has come to the conclusion that as the plaintiffs have admitted that they are in possession of the two bighas of fields, their suit for recovery of money was not maintainable. In revision by the plaintiffs, it is argued that even though the two transactions may, when combined, resemble a usufructuary mortgage, but they do not amount to a usufructuary mortgage as contemplated by the Transfer of Property Act and therefore there was nothing to prevent the plaintiffs from bringing a suit for the recovery of the money due under the promissory note. Reliance was placed by learned counsel for the applicant on the case of 1930 All 375 (1). The facts of that case were very similar to the facts of the present case and in that case Niamatullah, J., held that:

"the two transactions did not amount to a usufructuary mortgage and therefore the plaintiff was entitled to the principal due on the foot of the note."

The ratio decidendi was that unless there was a transfer of an interest in the specific immovable property for the purpose of securing payment of money advanced, there can be no usufructuary mortgage. There as well as in the present case, the lease was not for the purpose of securing the payment of principal money advanced, but was only an arrangement for the payment of interest. I can see therefore no bar to the plaintiffs' instituting the present suit for the recovery of the sum of Rs. 200. The result therefore is that I allow this application, set aside the decree of the Court below and decree the plaintiffs' suit with costs in both Courts.

K.S. *Application allowed.*

1. Chotey Lal v. Mohnanian, 1930 All 375=127 I C 425.

A. I. R. 1935 Allahabad 151

YOUNG, J.

Mt. Beni Kunwar—Plaintiff—Appellant.

v,

Shah Mohammad Ahsan Ullah—Defendant—Respondent.

Second Appeal No. 891 of 1930, Decided on 6th December 1933, from decision of Dist. Judge, Ghazipur, D/- 5th March 1930.

Agra Tenancy Act (1901), S. 165 (1)—Cosharer deriving profits from plot in abadi—He must account for profits to general body and such profts are divisible among general body of cosharers.

A cosharer in a mahal occupies a house in the abadi by the license of the other cosharers, and so long as he occupies only his correct share of the abadi, he would not be responsible to the other cosharers for any profits. This might be otherwise if he was occupying a larger share in the abadi than he wou'd be strictly entitled to. Where however the cosharer derives profits from his plot in the abadi, there is no reason why he should not have to account for those profits to the general body and where, the plot of land had yielded profits by the production of crops, there can be no reason why those profits should not be divisible among the general body of cosharers. The mere fact that the profits are obtained from the abadi area makes no difference in law.

[P 151 C 2; P 152 C 1]

K. Verma—for Appellant.

Shah Zamir Alam—for Respondent.

Judgment.—This is a second appeal from the decision of the learned District Judge of Ghazipur. The plaintiff brought an action for recovery of her share of profits of a mahal under the old Tenancy Act. The revenue Court decreed the suit. The lower appellate Court has dismissed the suit.

The dispute concerned a plot of land in the abadi of the village. The plaintiff and the defendant are co-sharers in the mahal. The defendant had a house in the abadi in which he lived. In the years 1330, 1331 and 1333 Fasli, the house having disappeared, the land was cultivated by the defendant through some sub-tenants. The lower Courts have found that the plaintiff's share of the profits for the three years if recoverable, amounted to Rs. 22 odd. The lower appellate Court came to the conclusion that as this was abadi land and the plot had been used for a house by the defendant, the profits arising in these three years would not be divisible among the general body of co-sharers.

In my opinion, the lower appellate Court is wrong in law. S. 165 (1) of the Act of 1901, says that a co-sharer may sue another co-sharer for settlement of accounts and for his share of profits of a mahal or any part thereof. A co-sharer in a mahal occupies a house in the abadi by the license of the other co-sharers, and so long as he occupies only his correct share of the abadi, he would not be responsible to the other co-sharers for any profits. This might be otherwise if he was occupying a larger share in the abadi than he would be strictly entitled to. Where however the co-sharer derives profits from his plot in the

abadi, there is, in my opinion, no reason why he should not have to account for those profits to the general body, and where, as in this case, the plot of land had yielded profits by the production of crops, there can be no reason why those profits should not be divisible among the general body of co-sharers. The mere fact that the profits are obtained from the abadi area makes no difference in land. It may well be that even if there was a house on the plot and the co-sharer obtained profits by letting that house to a tenant, those profits would also be divisible among the general body.

In this view of the matter the appeal must be allowed. The decree of the lower appellate Court is set aside and that of the trial Court restored. The appellant will have her costs throughout. As this appears to be a point on which there is no authority, leave is allowed to appeal in Letters Patent.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 152

KENDALL, J.

Sukhdeo—Plaintiff—Appellant.

v.

Donger and *others*—Defendants—Respondents.

Second Appeal No. 139 of 1931, Decided on 18th December 1933, from decision of Addl. Dist. Judge, Aligarh, D/- 24th November 1930.

Occupancy Rights—Sale of well appurtenant to occupancy holding is illegal—Equally so total destruction of it.

The sale of a well appurtenant to an occupancy holding by auction in execution of a decree is contrary to the provisions of the Agra Tenancy Act and the fact that there is a decision of the execution Court to the contrary will be of no avail; and the purchaser has no right to remove the bricks and other materials of the well because if a transfer by a sale is illegal, the total destruction of the well as such must a fortiori be illegal.

[P 152 C 2; P 153 C 1]

G. Agarwala and *R. N. Agarwala*—for Appellant.

Judgment.—The plaintiff-appellant in the suit from which this appeal arises had bought a well from one Bhopal, who had purchased it at an auction-sale in execution proceedings in which Donger and Narain Lal, respondents 1 and 2, were the judgment-debtors. They had made an objection to the sale of the well in those proceedings. but the matter was decided against them, and they failed to bring a suit for establishing their alleged right. They afterwards continued to use the well for irrigation purposes and consequently the plaintiff-appellant brought the present suit for damages and an injunction. The Courts below have decided that the well was not transferable by sale in execution of a decree in spite of the decision of the executing Court, and they have therefore held that the plaintiff-appellant had no right to sue.

No one has appeared in this Court on behalf of the respondents, and it appears from the judgment of the trial Court that they did not appear there and the suit was heard ex parte. As I have already said they did not take any steps to reverse the finding of the execution Court against them, it is clear that they have not been at all diligent in their own defence.

The lower appellate Court held that the sale of the well by auction in execution of a decree was contrary to the provisions of the Agra Tenancy Act, but it has not referred to any particular provisions of the Act, and the reasoning appears to be that as an occupancy holding cannot be transferred in execution of a decree, and as this well had been held by the trial Court to be appurtenant to the occupancy holding, the well also could not be transferred by sale in this way. I have referred to the judgment of the trial Court and its finding is that the well stood in an occupancy holding which was being irrigated by it, and it was therefore part and parcel of the holding and could not be sold. The plaintiff was well aware of the fact that the well in dispute appertained to the occupancy holding of the defendants and therefore its sale was prohibited by the Tenancy Act. Mr. Girdhari Lal Agarwala, has contended on behalf of the appellant that the well is not really appurtenant to the holding, and that the tenants are still in a position to irrigate their fields from it provided that they do so with his consent and on payment. He also contends that the tenants are bound by the decision of the Court in the execution proceedings. It appears to me that if the sale of the well was invalid because it was contrary to the provisions of the Tenancy Act, the fact that there is a decision of the execution Court to the contrary will be of no avail. It further appears to be clear that the finding to the effect that the well was appurtenant to the holding, that is to say, that it was a part of the holding, leads inevitably to the

conclusion that it was no more transferrable by auction-sale than the rest of the holding. Lastly, it is contended that even if the sale of the well was legally invalid the plaintiff-appellant has at any rate the right in virtue of his purchase to remove the bricks and other materials of the well. To my mind this would amount to a violation of the spirit of the Tenancy Act, if not of the latter. If a transfer by a sale is illegal, the total destruction of the well as such must a fortiori be illegal. I can find no authority on this particular point, but inspite of the negligence of the respondents in pressing their pleas both in the Courts below and in this Court, I am of opinion that the decision of the lower appellate Court is correct, and the result is that I dismiss the appeal with costs. Mr. Girdhari Lal Agarwala has applied for leave to appeal under the Letters Patent and as the question before the Court is a novel one, I consider that permission ought to be given and it is given accordingly.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 153

BENNET, J.

Messrs Munna Lal & Sons—Plaintiff—Applicant.

v.

Chairman Municipal Board—Defendant—Opposite Party.

Civil Revn. No. 61 of 1934, Decided on 23rd October 1934, against decree of Small Cause Court Judge, Jhansi, D/- 21st November 1933.

(a) U. P. Municipalities Act (1916), S. 128 (1) (viii) — Octroi — Schedule—Electric fittings in house come under heading of building materials and furniture.

Electric fittings in a house do come under the heading of building materials and furniture: 1934 *All* 550, *Dist.* [P 153 C 2]

(b) U. P. Municipalities Act (2 of 1916), Ss. 128 (1) (viii) and 160 (1)—Octroi is one of other taxes under S. 160 (1)—Fixing of octroi duty payable on goods after examining them is assessment—And appeal lies to District Magistrate from such assessment.

'Octroi' is referred to in S. 128 (1) (viii) as one of the taxes which may be imposed by a Municipal Board. Accordingly it must be one of the other taxes under S. 160 (1) which are subject to an appeal to the District Magistrate and the process by which an octroi muharrir examines goods and refers to his schedule and comes to the conclusion that certain goods come under certain heads of that schedule and should pay a certain tax is a process which is correctly described as "assessment." An appeal can be made to the District Magistrate against an assessment under the octroi schedule. [P 154 C 1]

S. C. Das—for Applicants.

Shiva Prasad and *Shankar Sahai Verma*—for Opposite Party.

Order. — This is a civil revision brought by a plaintiff against a decree of the Small Cause Court in Jhansi. The plaintiff imported into Jhansi a number of articles on which he was charged Rs. 237-7-9. The plaintiff contends that the articles which he imported do not come under the headings in the octroi schedule under which they have been assessed to octroi. The articles in question are shown in a number of invoices to consist of fuses, cables wire, fuse handles, britalux fittings, electric bulbs, etc. The series of schedules under which these articles have been assessed refer to articles made of brass, copper, bronze, rubber Nos. 80 to 83, and earthen ware No. 44. Some objection was taken that No. 44 comes under the heading of "building materials and furniture" and learned counsel argued that electric fittings would not come under either of those heads. He failed to explain under what head of house construction electric fittings would come. It appears to me that electric fittings in a house do come under the heading of building materials and furniture. Learned counsel argued that an octroi schedule should be framed on the lines that every single article which might be imported into a Municipality on which duty was to be levied should be described by name. In other words that Britalux fitting should be so mentioned and also fuse handles. I do not consider that this is a possible method of framing an octroi schedule. The method which is adopted is to use general terms under which the innumerable different articles are included and they are classified as regards the metals of which they are composed.

It would not be possible to frame an octroi schedule which would have ten millon different kinds of articles mentioned. The finding therefore of the lower Court that these articles come under these headings appears to me to be correct. I am referred by learned counsel to a ruling of a learned Single Judge of this Court reported in 1934 All 550 (1). That ruling laid down that an electric fan motor would not come under the term "hardware" in an octroi schedule because "hardware" referred to articles such as pots and pans and domestic appliances and simple articles made of metal. The pre-

1. Municipal Board, Benares v. Krishna & Co. 1934 All 550=148 I C 508.

sent case does not involve the term "hardware" in the schedule and that therefore the ruling has no application to the present case. A further argument was made by learned counsel that the lower Court was wrong in stating that S. 164, U. P. Municipalities Act, 2 of 1916, barred the present suit. That section states in subS. (1):

"No objection shall be taken to a valuation or assessment, nor shall the liability of a person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act."

In S. 160 (1) it is provides as follows:

"In the case of a tax assessed upon the annual value of buildings or lands or both an appeal against an order passed under sub-S. (3) of S. 143 under sub-S. (3) of S. 147, and in the case of any other tax, an appeal against an assessment, or any alteration of an assessment, may be made to the District Magistrate or to such other officer as may be empowered by the Local Government in this behalf."

In my opinion this allows an appeal to be made to the District Magistrate against an assessment under the octroi schedule. Learned counsel argued that this sub-section referred only to taxes on lands and buildings, but the sub-section clearly refers to the case of any other tax. "Octroi" is referred to in S. 128 (1) (8) as one of the taxes which may be imposed by a Municipal Board. Accordingly it must be one of the other taxes under S. 160 (1), which are subject to an appeal to the District Magistrate. Argument was made by learned counsel that there is no assessment in the case of octroi. I consider that the process by which an octroi muharrir examines goods and refers to his schedule and comes to the conclusion that certain goods come under certain heads of that schedule and should pay a certain tax is a process which is correctly described as "assessment." Therefore the correct remedy open to the applicant was to proceed by way of appeal to the District Magistrate under S. 160, Municipalities Act, and under S. 164, Municipalities Act, the applicant was precluded from making the claim in Court which he has made.

For these reasons I dismiss this application in revision with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 154

NIAMATULLAH AND BENNET, JJ.

L. Ram Nath and *another* — Defendants—Appellants.

v.

Lala Ram Chandra Mal—Plaintiff — Respondent.

Second Appeal No. 1050 of 1932, Decided on 22nd December 1933, from decision of Dist. Judge, Moradabad, D/- 9th August 1932.

Negotiable Instruments Act (1877), S. 118(a) —Suit on promissory note—Plaintiff failing to prove cash consideration but defendant admitting execution—Suit should be decreed —Promissory note.

The plaintiff sued on a promissory-note and a receipt on which he claimed that Rs. 2,000 cash had been lent to the defendants. The defendants, on the other hand, admitted the execution of the promissory note and the receipt but they denied that there was a loan of Rs. 2,000 cash. The plaintiff failed to prove consideration and the defendant also did not prove the allegations made by him:

Held: that under S. 118 (a) there is a presumption that every negotiable instrument was made or drawn for consideration. That presumption applied in the present case and that suit should be decreed. [P 155 C 1]

N. P. Asthana and *B. N. Sahai* — for Appellants.

K. Verma—for Respondent.

Bennet, J.—This is a second appeal by the defendants against a decree passed by the lower appellate Court in favour of the plaintiff. The plaintiff sued on a promissory note dated 4th January 1928, and a receipt, on which he claimed that on that date Rs. 2,000 cash had been lent to the defendants. The defendants on the other hand admitted the execution of the promissory note and the receipt, but they denied that there was a loan of Rs. 2,000 cash and they pleaded in para. 4 of their additional pleas that their wives had undertaken to execute a sale-deed in respect of a shop and house in favour of one Daroga Prasad and that as the wives did not execute the sale-deed, for the satisfaction that they would not deviate from the contract Daroga Prasad obtained the promissory note and receipt in question in favour of plaintiff from the defendants. The evidence was conflicting and the lower appellate Court came to the conclusion that the defendants had failed to prove their allegations. The lower appellate Court also came to the conclusion that the plaintiff had failed to prove that there was a cash payment of Rs. 2,000. The judgment terminated with this conclusion:

"I think on these findings the defendants having admitted execution the suit should be decreed, for the defendants have certainly failed to prove their case that no consideration passed and the burden of proving that case was on them."

Under S. 118 (a), Negotiable Instruments Act, there is a presumption that every negotiable instrument was made or drawn for consideration. That presumption applies in the present case. Therefore the decree of the lower appellate Court was correct. We dismiss this second appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 155 (1)

MUKERJI, J.

Jit Singh and *others*—Appellants.

v.

Shah Munir and *others*—Respondents.

Second Appeal No. 1720 of 1930, Decided on 6th December 1933, from decision of Dist. Judge, Shahjahanpur, D/- 29th October 1930.

Registration Act (1908), S.49—Unregistered mortgage-deeds are admissible to prove nature of possession—Mortgage.

An unregistered mortgage-deed is admissible in evidence to prove the nature of possession : 1924 *Mad* 292 ; 1919 *P C* 44 and 1924 *All* 837, *Ref.* [P 155 C 2]

N. C. Sen—for Appellants.

S. B. Johari—for Respondents.

Judgment.—The plaintiff-respondent, Shah, Munir, brought the suit out of which this appeal has arisen for recovery of a certain amount of money as arrears of rent due to his (Shah Munir's) assignors, Jumman and Minnat Ali, defendants 4 and 5, to the suit. It was alleged in the plaint that the first three defendants to the suit were sub-tenants of the principal tenants, who were holders of occupancy rights.

The defence of the first three defendants was that they were not tenants, but held as mortgagees from the principal tenants. They produced in support of their allegation an unregistered mortgage-deed, but this was rejected and was not allowed to be put into evidence on the ground that the deed was not registered. Although an unregistered deed could not create a mortgage the mortgage would be created by delivery of possession. It is common ground that the first three defendants are in possession. The question is whether they are in possession as sub-tenants of the defendants 4 and 5, or as their mortgagees. The document, which was not admitted into evidence, would have shown, if duly proved, the nature of the possession of the defendants 1 to 3.

There is abundant authority for holding that the document was admissible into evidence see for example: 1924 Mad 292 (1), following 1919 P C 44 (2) and then 1924 All 837 (3). The learned District Judge on appeal by the defendants also held that the document was inadmissible in evidence. As I have already mentioned, this view is wrong.

In the result I allow the appeal, set aside the decrees of the Courts below and remand the suit to the Court of first instance through the lower appellate Court and direct it to receive the document, if tendered by the defendants 1 to 3 into evidence, to allow the said defendants to prove the document and then to proceed to decide the case de novo. Costs here and hitherto will abide the result.

K.S. *Appeal allowed.*

1. Appanna v. Venkatasami, 1924 Mad 292=79 I C 510=47 Mad 203.
2. Varada Pillai v. Jeevarathnammal, 1919 P C 44=53 I C 901=46 I A 285=43 Mad 244 (PC).
3. Kesri Singh v. Channo, 1924 All 837=78 I C 955.

A. I. R. 1935 Allahabad 155 (2)

KENDALL, J.

(*Firm*) *Nanak Singh Mela Ram*—Decree-holder—Applicant.

v.

Girdhari Lal and *another*—Judgment-debtors—Opposite Parties.

Civil Revn. No. 47 of 1933, Decided on 14th September 1934, against order of Small Cause Court Judge, Allahabad, D/- 5th November 1932.

Execution—Decree binding—Decree payable in instalments—Execution taken by decree-holder — Application by judgment-debtor that matter had been adjusted between parties by compromise by which decree was allowed to be paid again in instalments and Court finding it true—Court can allow such adjustment—Civil P. C. O. 21, R. 2.

The judgment-debtor committed default in payment of the first instalment of decree which was payable by instalments and the decree-holder put his decree into execution. Pending execution the judgment-debtor made an application to the Court to the effect that the matter had been adjusted between the parties by a compromise, by which instalments were to be again allowed and the Court found it true and allowed the adjustment.

Held : the Court was fully justified in allowing the adjustment : 1932 *All* 273, *Dist.*
[P 156 C 2]

S. C. Das and *Panna Lal Khatry*—for Applicant.

M. L. Chaturvedi—for Opp. Parties.

Order.—At the time when this case was called for hearing the applicant's counsel was not present. But as he had already concluded his argument before me on the last date of hearing, the matter has to be disposed of on its merits.

The application is one for the revision of an order passed by the Judge of the Small Cause Court of Allahabad allowing an adjustment between the parties in execution proceedings. The decree under execution was a money decree pronounced on 16th December 1926 and payable by instalments, the first of which fell due on 15th March 1927. That instalment having failed, the decree-holder put his decree into execution. But on 25th August 1932 the judgment-debtor made an application to the Court to the effect that the matter had been adjusted between the parties by a compromise by which instalments were to be again allowed . Originally the decree had been payable by four six-monthly instalments, and under the settlement alleged to have been arrived at the instalments were still to be six-monthly. The decree-holder on being called on to reply to this application, denied that there had been settlement; but the Court after recording the statements of the parties, accepted the judgment-debtor's statement and passed the order which is now the subject of this application.

It was argued on behalf of the applicant that the Court in execution proceedings had no jurisdiction to amend the decree and I was referred to a Full Bench decision of this Court, namely, the case of 1932 All 273 (1). That however was a case in which the Court had allowed the parties in execution to substitute a new decree for the decree originally passed. The learned Chief Justice remarked on p. 586:

"In some cases the Courts have gone so far as to hold that the original decree can be altogether superseded by a new arrangement entered into in the execution department enabling the decree-holder to execute the substituted decree. I would say with great respect that such a position is utterly untenable. The original decree cannot be altered or varied by the parties, even with the sanction of the Court."

1. Gobardhan Das v. Dau Dayal, 1932 All 273= 138 I C 583=54 All 573 (F B).

In the present case the nature of the decree, which was a money decree payable by six monthly instalments, has not been altered. All that has happened has been that the decree-holder has agreed to allow further time. I have no doubt therefore that the Court was fully justified in allowing the adjustment and there is no force in the application, which is dismissed with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 156

KENDALL, J.

Firm Nawab Boot House—Plaintiff — Applicant.

v.

Secy. of State—Defendant — Opposite Party.

Civil Revn. No. 110 of 1934, Decided on 2nd November 1934, against decree of Small Cause Court Judge, Agra, D/- 10th August 1933.

Limitation Act (1908), Art. 31 — Suit for damages for wrongful conversion of goods is not governed by Art. 31.

A suit for damages for wrongful conversion is not for compensation for non-delivery but one for damages for tort and as such Art. 31 is not applicable: 1926 *Nag* 57, *not Foll.*; 1927 *Lah* 471 and 1934 *Pat* 507, *Rel. on.* [P 157 C 1]

M. L. Chaturvedi—for Applicant.

Order.—The facts of the case from which this application in revision has arisen are given clearly in the judgment of the trial Court. The learned Judge of the Small Cause Court has dismissed the plaintiff's suit on the issue of limitation holding that Art. 31 Limitation Act applied to the case. It is contended by Mr. Chaturvedi in support of the present application that Art. 31, Limitation Act, does not apply because the plaintiff's suit was not one "for compensation for non-delivery of or delay in the delivery of the goods," but was clearly one as set forth in para. 7 of the plaint for wrongful conversion" of the goods, to which Art. 48 or Art. 49, Limitation Act, could be applied so that the period of limitation would be three years and not one.

The trial Court has relied on three decisions, but the two Allahabad cases are really by no means parallel to the present one. The case 1926 Nag 57 (1) is no doubt an authority for his decision. It was held there that a suit against a carrier for compensation for

1. G. I. P. Ry. Co. v. Radhakisan, 1926 Nag 57= 90 I C 135.

non-delivery of goods is governed by Art. 31, whether the non-delivery is due to conversion or to any other reason. There are passages in the judgment which suggest any action which may be brought against a carrier will be governed by Art. 31, Limitation Act, on the principle of "genralia specialibus non derogant." The plaint in the present suit however is worded as if the plaintiff was suing for damages for a tortious act, and that, so far as I am able to judge from the review of the facts given by the trial Court, was his real purpose and was not merely an ingenious framing of his plea. The distinction between "conversion" and non-delivery of goods, is discussed at considerable length in 1927 Lah 471 (2) and again in 1934 Pat 507 (3). In this latter decision it has been held that in a suit for damages for conversion Art. 48, Limitation Act, applies.

The Judge of the trial Court has considered the matter and has given a decision which is supported by authority. But it appears to me that the authority on the other side is to be preferred, and that as the present case is not one that could be called "A suit against a carrier for compensation for non-delivery of goods," but was definitely one for damages for tort Art. 31 has been wrongly applied, and the plaintiff has therefore been unjustly deprived of an opportunity of proving his case on the merits. I therefore allow the application with costs, if any, set aside the decree and order of the trial Court, and direct that the suit be re-admitted on its original number and decided on the merits according to law.

K.S. *Application allowed.*

2. Haryana Cotton Mills Co., Ltd. v. B. B. & C. I. Ry. Co., 1927 Lah 471=102 I C 149=8 Lah 555.
3. Sundarji Shivji v. Secy. of State, 1934 Pat 507=151 I C 995.

A. I. R. 1935 Allahabad 157

THOM AND KISCH, JJ.

Mt. Parbha—Plaintiff—Appellant.

v.

Lala Suraj Bhan and *others* — Defendants—Respondents.

First Appeal No. 72 of 1933, Decided on 6th December 1933, from order of Second Sub-Judge, Saharanpur, D/- 15th February 1933.

Civil P. C. (1908), S. 15 and O. 7, R. 1 — Court finding that value of relief has been over-valued—Court's duty is to return plaint for presentation in proper Court — It is not necessary that defendant should state that relief has been over-valued to oust jurisdiction of one Court.

If, in the course of a preliminary inquiry in a suit into the value of the reliefs claimed by the plaintiff, whether that inquiry be instituted at the request of the defendant of or the plaintiff, or whatever be the reason assigned for the over-valuation of the reliefs, it becomes clear to the Court that there has been gross over-valuation, it is the duty of the Court on the motion of either party or ex proprio motu to order that the plaint be returned for presentation in the proper Court, if the value be held to be not higher than the figure upto which the Court has jurisdiction, and it is not necessary that defendant should state that the reliefs have been inflated by plaintiff for the purpose of ousting the jurisdiction of one Court and obtain jurisdiction of another : *Case law reviewed.* [P 160 C 1]

G. S. Pathak and *S. K. Mukerji* — for Appellant.

S. K. Dar and *Shiva Prasad Sinha*— for Respondents.

Thom, J.—This is a plaintiff's appeal against an order of the Subordinate Judge of Saharanpur directing that the plaint in the suit in which the order has been passed should be returned to the plaintiff for presentation in the Court of the Munsif.

In the plaint the plaintiff prayed for a decree for absolute possession on the dispossession of the defendants and removal of their appropriations in respect of property mentioned in Sch. (B) and for a decree of joint possession in respect of property mentioned in Sch. (C). The plaintiff further claimed a number of minor reliefs. She claimed alternatively:

"If for any reason the defendants may consider that they would not get their full half-share by separate possession, then the Haweli mentioned in list (A) may be caused to be partitioned through the Court Amin and separate possession over half the partitioned share may be awarded. This relief is laid at Rs. 10,000."

The property in question was at one time the joint property of a Hindu family. It was partitioned some considerable time abo, one-half going to the predecessors of the plaintiff and one-half to the predecessors of the defendants. A certain proportion of the property was retained in common.

The plaintiff in the plaint valued the relief in relation to the property in Sch. (B) at Rs. 4,000. The relief in relation to the property in Sch. (C) was valued at Rs. 1,000. The minor reliefs were valued at Rs. 330.

The defendants took the preliminary plea that the reliefs had been grossly over-valued by the plaintiff for the purpose of embarrassing the defendants in

costs, etc. There was no statement on behalf of the defendants that the plaintiff's object in over-valuing the reliefs claimed was to oust the jurisdiction of the Munsif's Court. At an early stage in the proceedings certain questions between the parties were adjusted which resulted in eliminating certain of the reliefs claimed.

The parties then agreed, in view of the plea taken by the defendants, that the reliefs had been over-valued, that there should be an investigation into the question of the true value of the outstanding portions of the property which were claimed by the plaintiff. The Court directed the Amin to value these outstanding portions. The Amin valued the property and reported that the tolal value of the property still in dispute between the parties was Rs. 3,080. The Amin's report was produced in Court and the plaintiff was given an opportunity of leading evidence in support of her contention that the value of the reliefs claimed was Rs. 5,330.

The Court having the Amin's report before it and having considered the evidence led by the plaintiff has come to the conclusion that the value of the property now in dispute is as stated in the Amin's report, namely, Rupees 3,080.

The Munsif has jurisdiction in suits upto the value of Rs. 5,000. In the circumstances the Subordinate Judge having held upon the evidence that the true value of the reliefs claimed by the plaintiff was less than Rs. 5,000, namely Rs. 3,080, he made the order complained against, that the plaint should be returned to the plaintiff for presentation in the Munsif's Court.

Learned counsel for the appellant in inviting us to upset this order has contended in the first place that the value of the reliefs claimed by the plaintiff must be taken as the value put upon the alternative relief, namely, Rs. 10,000. We have quoted this relief in full above and we have no hesitation in finding that it discloses no cause of action whatever. The defendants had at no time challenged the old partition of the property which was a private partition and they never had at any time indicated that it was their intention to claim repartition by the Court. In these circumstances we hold that this alternative relief which is valued at Rs. 10,000 is inept and should not be taken into consideration in estimating the true value of the suit.

Learned counsel for the appellant argued however in the second place that inasmuch as the defendants had not taken the plea that the suit had been over-valued for the purpose of ousting the jurisdiction of the Munsif, it was not open to the Subordinate Judge even although he did hold that the value of the reliefs claimed was less than Rs. 5,000, to refuse to entertain the suit on the ground that he had no jurisdiction. In support of this argument learned counsel for the plaintiff has referred to S. 15, Civil P. C., and to O. 7, R. 1. S. 15 enjoins that:

"every suit shall be instituted in the Court of the lowest grade competent to try it."

Order 7, R. 1 is to the effect that the plaint shall contain certain particulars and (1):

"a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits."

Learned Counsel has contended that in deciding which Court has jurisdiction to entertain a particular suit the plaint and the plaint alone must be looked to. In support of his argument he has referred us to a number of authorities which we shall now consider. The first case is 13 All. 320 (1). In that case it was held that:

"for the purpose of determining the proper appellate Court in a civil suit what is to be looked to is the value of the original suit, that is to say, the amount or value of the subject-matter of the suit. Such amount or value of the subject-matter of the suit must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint."

In the course of that judgment the learned Judges who heard the appeal stated:

"Whilst holding that the value of the subject matter of the suit for the purpose of jurisdiction is the value as stated by the plaintiff in his plaint, we entirely agree with the learned Judges in the Bombay case to which we have been referred that the jurisdiction of the Court properly having cognizance of the cause is not to be ousted by unwarrantable additions to the claim, and that an exaggerated claim which cannot be sustained and which there is no reasonable ground for expecting to sustain, brought for the purpose of getting a trial in a different Court from the one intended by the legislature, is substantially a fraud upon the law and must be rejected, whether it arises from mere recklessness or an artful design to get the adjudication of one Judge instead of that of another."

Learned counsel has argued upon the strength of this decision and of the passage quoted from the judgment that

1. Mahabir Singh v. Behari Lal, (1891) 13 All 320=1891 A W N 107.

unless it be pleaded and shown that the design of the plaintiff in over-valuing her suit was to get the adjudication of one Judge instead of that of another, it is not open to the Court to refuse to entertain the suit even though it be convinced upon the evidence that the suit, for some other, ulterior or dishonest motive has been grossly over-valued by the plaintiff. We do not think that this authority supports the proposition for which the learned counsel has contended. In the case referred to it may well have been that the intention of the plaintiff was to oust the jurisdiction of one Court and to secure the adjudication of another Judge, but nothing is said in the course of the judgment about the case of a plaintiff who grossly over-values his suit for the purpose of embarrassing the defendant in regard to costs, etc. The next case referred to by learned counsel for the appellant was 16 All 286 (2). In this case it was held that:

"the pecuniary jurisdiction of a civil Court on its original or appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint; and if a suit, having regard to the valuation in the plaint, is within the jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its pecuniary jurisdiction should be given to the plaintiff."

In the course of their judgment the learned Judges approved of the dictum quoted in 13 All 320 (1). In fact the Court in this case followed the decision of the earlier case. We see however nothing in this decision to support the proposition contended for by learned counsel for the appellant that unless the defendants specifically attributes to the plaintiff an intention to oust the jurisdiction of a Court, the Court before whom the case is pending has no right to refuse to entertain it. In 17 All 69 (3), the learned Judges who tried the case stated in the course of their judgment:

"We have indicated what, in our opinion, is for the purposes of jurisdiction, the value of a suit under S. 283, Act 14 of 1882, when the judgment-debtor or his representative is made, and when he is not made, a party to the suit as a defendant. In either case the value of the suit for the purpose of jurisdiction is the value stated by the plaintiff in his plaint, provided that such value is not understated or overstated with the object of getting the suit admitted in a Court in which, by reason of the true value of the suit and S. 15, Act 14 of 1882, the suit does not lie."

Learned counsel for the plaintiff has argued again upon the basis of this decision that the law is that unless the over-valuation is proved to have been for the purpose of ousting the jurisdiction of one Court the Court, in which the suit is filed has no right to refuse to entertain it upon the basis that the value has been grossly inflated for some other purpose by the plaintiff. We do not think however that this proposition can be deduced from the decision in this case.

Learned counsel for the appellant also referred to 20 Bom 675 (4). That was a case where the plaint prayed for a declaration that a certain tax was illegal and also for damages for an illegal entry into the plaintiff's house. The plaint was presented in the Court of the First Class Subordinate Judge of Surat. The Judge amended the plaint by striking out the portion regarding the reliefs other than the relief for damages and then held that the claim for damages would lie only in the Small Cause Court. In the result he ordered that the plaint be returned for presentation in that Court. It was held however on appeal that the Subordinate Judge was not justified in returning the plaint at that stage in the proceedings. The shape in which the suit was originally instituted is the test of jurisdiction. We fail to see however how this authority supports the proposition which learned counsel for the appellant has advanced. The question as to what was the duty of the Court where it is clearly established before it that a claim has been grossly over-valued, was never raised in that case.

Learned counsel for the respondents has maintained that the law on this point has been correctly stated in the case of 1932 All 413 (5). In concluding their judgment in that case the learned Judges stated:

"the plaintiff cannot be allowed to put an arbitrary value upon his claim, nor can he be allowed to over-value or under-value his claim with a view to choose his forum."

We consider it unnecessary to refer to the other authorities which were quoted to us by learned counsel for the defendants. In our view the law is perfectly clear. If it is established in the course of a preliminary enquiry that the valuation of the reliefs claim-

2. Madho Das v. Ramji Patak, (1894) 16 All 286=1894 A W N 84.
3. Dwarka Das v. Kameshar Prasad, (1895) 17 All 69=1895 A W N 3.
4. Mota Bhai Moti Lal v. Surat City Municipality, (1896) 20 Bom 675.
5. Inayat Husain v, Bashir Ahmad, 1932 All 413=141 I C 141.

ed by the plaintiff has been grossly inflated then it is the duty of the Court to return the plaint for presentation in the Court which has jurisdiction. We can see no reason for accepting the distinction which learned counsel for the appellant has attempted to draw. His argument appears to be as follows: If the defendants when they object to the valuation by the plaintiff of the reliefs claimed state that the object of the plaintiff is to embarrass the defendants, then the Court cannot refuse to entertain the suit even though it may be proved that there has been a gross inflation of the value of the reliefs claimed. On the other hand, if the defendants state that the reliefs have been inflated by the plaintiff for the purpose of ousting the jurisdiction of one Court and obtaining the jurisdiction of another and it be found that there has been gross inflation, then the Court is entitled to order the plaint to be returned to the plaintiff for presentation in the proper Court. We are of the opinion that there is no foundation in principle or in any authority to which we have been referred for this distinction.

It is clear in our view that when the issue as to the value of the reliefs was adjusted between the parties in the present case it was their intention that the question of jurisdiction should be agitated. In any event, we hold that if in the course of a preliminary enquiry in a suit into the value of the reliefs claimed by the plaintiff, whether that enquiry be instituted at the request of the defendant or of the plaintiff, or whatever be the reason assigned for the over-valuation of the reliefs, it becomes clear to the Court that there has been gross overvaluation, it is the duty of the Court on the motion of either party or ex proprio motu to order that the plaint be returned for presentation in the proper Court if the value be held to be not higher than the figure upto which the Court has jurisdiction.

In the present suit the preliminary point was taken by the defendants who alleged that there has been gross overvaluation of the reliefs. Evidence was led as to the true value of the property in dispute. Upon the evidence led the learned Subordinate Judge has come to the conclusion that the value is less than Rs. 5,000. The evidence which was led before him by the plaintiff proved nothing at all. We have been referred to the testimony of the plaintiff's leading witness and although he says that the property is worth more than Rs. 5,000 it is quite clear from his cross-examination that he knows nothing whatever about the real value of the property. In any event we should be slow to interfere in this matter with the finding of fact arrived at by the learned Subordinate Judge.

In the result the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 160

BAJPAI, J.

Kallan Khan and *another* — Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 828 of 1934, Decided on 29th October 1934, from order of Sess. Judge, Benares, D/- 29th June 1934.

(a) Penal Code (1860), S. 332—Vaccinator ordered to vaccinate ladies and children in certain house knocking at door — Admission not refused and entry of vaccinator into house—Implied consent to enter held must be presumed—Person obstructing or assulting is guilty under S. 332.

A vaccinator who was ordered to vaccinate ladies and children knocked at the front door and the door behind the house. It became known to the inmates of the house as to who was seeking admission. She waited for five minutes, during which time admission was not refused. The door was not closed from inside and she entered, whereupon she was assulted by the accused:

Held: under these circumstances the person seeking admittance should assume that he or she had the implied consent of the house-owner to enter and if the person making the entrance happens to be a public servant who has entered the premises in order to discharge his or her public duties, and if he or she is obstructed or assaulted, as the vaccinator was assaulted, an offence under S. 332 is made out: 28 *All* 481, *Dist*, [P 161 C 2]

(b) Cantonments Act (2 of 1924), S. 247—Four hours notice is necessary only for entry without consent.

The entry which is contemplated in S. 247 which requires four hour's written notice is an entry without the consent of the occupier of the owner, [P 162 C 1]

S. K. Ghosh—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment.—Kallan Khan and Muhammad Hanif, two brothers have been convicted by a Magistrate under S. 332, Penal Code, Kallan Khan has been sentenced to two months' rigorous imprisonment and to pay a fine of Rs. 25 and Muhammad Hanif to pay a fine of Rs. 25 only. Their conviction and sentence were confirmed

in appeal by the learned Sessions Judge.

The prosecution case, as borne out by the statement of Miss Vancell, a nurse, has been believed by the Courts below. It is to the effect that during the prevalence of small-pox in the Cantonment Area at Benares, an order was passed by the Civil Surgeon and communicated to Miss Vancell that she should go and vaccinate ladies and children in the Cantonment Area. It is said that she on 2nd April 1934, went to the house of Kallan Khan and knocked at the front door. On not getting any reply, she went to the door behind the house and knocked at it. Somebody asked from inside the house as to who was knocking and Miss Vancell's identity was announced.

After this nobody either opened the door or objected to the entry of Miss Vancell who thought that, as about 5 minutes had elapsed, there was no objection to her getting inside the house. She opened the door which was not chained from inside and she entered the house when it is said she was roughly handled by the two accused and her frock was torn. She received some hurt at the hands of the two accused. She remonstrated and said that she had come to vaccinate and that the accused should behave politely; but they instead of desisting inflicted some injuries on her.

The story has been believed by the Courts below. The case for the defence however was that Kallan was very anxious to get his family vaccinated and had been trying for the last month or so to obtain vaccination and that a day or two before 2nd April, he had actually gone to the hospital and spoken to Miss Vancell about it when Miss Vancell behaved rudely towards him. He on 2nd April also sent a letter to Dr. Bala Prasad through his brother, Hanif, which was, according to the accused, actually delivered to Dr. Bala Prasad and in this letter Kallan Khan had said that he would not like to be vaccinated by Miss Vancell with whom he had a slight unpleasantness and that he would get himself vaccinated by some other compounder. The sending of this letter on the date of the incident and the unpleasantness with Miss Vancell a day or two before have not been believed by the Courts below. The position therefore is that Miss Vancell knocked at the front door and the door behind the house. It became known to the inmates of the house as to who was seeking admission. She waited for 5 minutes, during which time admission was not refused. The door was not closed from inside and she entered. Under these circumstances the person seeking admittance should assume that he or she had the implied consent of the house owner to enter and if the person making the entrance happens to be a public servant who has entered the premises in order to discharge his or her public duties, and if he or she is obstructed or assaulted, as Miss Vancell was assulted in the present case, an offence under S. 332, Penal Code, is made out.

It is however argued by learned counsel for the applicant that under S. 247, Cantonments Act, (Act No. 2 of 1924) four hours' written notice of the intention to make an entry was necessary before Miss Vancell could enter the house. But it is clear that the entry which is contemplated in S. 247 which requires 4 hours' written notice is an entry without the consent of the occupier or the owner. In the present case the entry was with the implied consent of Kallan Khan and no question of a 4 hours' written notice arises. If consent is refused or if refusal is anticipated, then it is incumbent on the Cantonment Authority to give a 4 hours' written notice of the intention to make the entry. It is therefore clear that the person, who obstructed Miss Vancell, was guilty under S. 332, Penal Code. Reliance was placed by learned counsel for the applicant on the case of 28 All 481 (1) but the facts of that case are entirely different from the facts of the present case. There a vaccinator attempted against the wishes of the child's father to vaccinate the child and the vaccinator was slightly assaulted by the relations of the child and it was held that it was no part of a vaccinators' duty to insist on vaccinating a child in opposition to the wishes of its parent or guardian and the vaccinator rendered himself liable to a charge of assaulting the child and those who used force in preventing this assault could not be said to be guilty of any offence.

It was then urged that the sentence of fine on Kallan Khan is uncalled for and that Muhammad Hanif should not have been convicted and sentenced if at all. It is said that it is impossible that Kallan Khan who is an insurance

1. Emperor v. Bahal, (1906) 28 All 481=3 Cr L J 368=1906 A W N 98.

agent should have behaved in the manner in which he is said to have behaved according to Miss Vancell. It is submitted that even if the defence version about the sending of a letter to Dr. Bala Prasad and about the unpleasantness with Miss Vancell a day or two prior to the occurrence be disbelieved, it cannot be accepted that Kallan Khan would behave in this unmannerly fashion without any provocation whatsoever from Miss Vancell. The suggestion is that it is almost certain that when Miss Vancell entered and Kallan did not like vaccination at her hands, Miss Vancell behaved in a provocative manner. There might have been some force in this suggestion, if the defence had been made on those lines. At the same time it is just possible that Miss Vancell was not as roughly handled as she tries to make out.

The accused, Kallan Khan, has served out the whole of the sentence of imprisonment that was passed on him. No portion of the fine has been ordered to be paid to the nurse by way of compensation and I do not think, that it was necessary to impose any fine in the circumstances of this case. Hanif is a boy of eleven and even according to the nurse, he does not seem to have taken any prominent part in the incident and whatever little he did might have been under the influence of his elder brother Kallan Khan. I feel inclined to set aside his conviction. The result of what I have said before is that I maintain the conviction of Kallan Khan but remit the fine. In the case of Muhammad Hanif I set aside his conviction and sentence. The fine if paid, will be refunded.

K.S. *Conviction set aside.*

A. I. R. 1935 Allahabad 162

HARRIS AND RACHHPAL SINGH, JJ.

Bacha Babu and *others*—Appellants.

v.

Emperor—Respondent.

Criminal Appeal No. 162 of 1934, Deded on 26th November 1934 from order of Sess. Judge, Agra, D/- 19th February 1934.

(a) Penal Code (1860), S. 120-B—Prosecution must prove agreement between two or more persons to do or cause to do illegal act —If agreement is other than one to commit offence, prosecution must prove some act in pursuance of agreement—But if agreement is to do offence, no overt act need be proved —But proof of overt acts will help to prove agreement.

To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means, provided that where the agreement is other than one to commit an offence, the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. But where the agreement, is one to do or cause to be done an act which is itself an offence, no overt act, i. e. any act done by one of the parties to the agreement in pursuance of it, need be proved; the crime of criminal conspiracy is established once such an agreement is proved. Hence where the conspiracy alleged is one to commit a series of serious crimes mere proof of such an agreement between the accused is sufficient to sustain a conviction. Proof of overt acts committed by any one of them is not strictly necessary on this charge, but needless to say, proof that they or some of them were concerned in the overt acts alleged would go far to establish that the agreement alleged was in fact made between them. Though proof of overt acts is not necessary in this case, yet it may well be, that if such acts are proved the Court will be bound to infer that they are not unconnected and isolated acts, but acts which must have been committed in pursuance of an agreement made between them such as that alleged. [P 166 C 1, 2]

(b) Evidence Act (1872), S. 114 (b)—Evidence of approver—Corroboration by independent evidence is necessary—More so in case of criminal conspiracy — Penal Code (1860), S. 120-B.

An accused cannot be convicted on the evidence of an approver, unless it is corroborated by some independent evidence of material particulars. Such a rule is particularly necessary in cases of conspiracy to commit crimes, where the crime of criminal conspiracy is established the moment an agreement between the accused persons to commit such crimes is proved. Evidence of mere agreement can easily be concocted or manufactured, hence the need of independent testimony by way of corroboration is manifestly essential. To amount to corroboration the evidence must implicate the accused, i. e. it must confirm in some material particular not only the accomplice or approver's evidence that the crime has been committed but also that the accused committed it. The corroborative evidence need not show positively that the accused committed the crime; it is sufficient if it is merely circumstantial connecting him with the crime.

[P 167 C 1]

(c) Evidence Act (1872), S. 45—Evidence of expert that one document has been typed on same machine as another is not admissible —Court must come to its own conclusion on such point.

The opinion of an expert that one document has been type-written on the same machine as another document is not admissible under S. 45. The Court may ask the witness points in favour of the view whether the two documents have or have not been typewritten on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion a relevant fact in itself: 1933 *All* 690, *Foll.*

[P 169 C 2]

(d) Criminal Trial—Approver's evidence—Identifications of accused not satisfactory—

It is not sufficient corroboration for conviction.

An identification of accused by witness may be sufficient corroboration of approver's evidence for convicting them; but if such identification is not satisfactory such corroboration is not sufficient. [P 171 C 1]

(e) Criminal Trial—Evidence of approver—Discrepancy between it and evidence of witnesses—Evidence of witnesses cannot be acted upon either by itself or as corroboration.

Where there is a very serious discrepancy between the statements of the approvers and the evidence of the witnesses, it is impossible for the Court to act upon such evidence either by itself or as corroboration of the approvers' testimony. [P 171 C 1]

(f) Penal Code (1860), S. 120-B—Evidence of association to be of value for prosecution should suggest something suspicious—Casual meeting or conversation in public place or park—Inference one way or other cannot be drawn.

Evidence of association to be of any value, should suggest something suspicious in such association, and no inference one way or another can be drawn from a mere casual meeting or meetings or conversation between the parties in a public place or park where mere acquaintances frequently meet and talk. [P 172 C 1]

(g) Criminal Trial—Fact that accused tells lie is not sufficient to convict him by itself nor can it be corroboration of approvers' evidence.

The fact that an accused person tells a lie is not sufficient to convict him by itself, nor can it be corroboration of the approver's statement. [P 173 C 2]

K. N. Katju, Hazari Lal, Kapoor S. B. L. Gaur, G. S. Pathak, Nanak Chand, K. D. Malaviya, Din Dayal, B. S. Darlari, Prabhat Kumar and *S. N. Misra*—for Appellants.

Government Advocate—for the Crown.

Harris, J.—In this case which has been referred to as the Agra Conspiracy Case all six appellants were charged with conspiracy, the charge being that between February 1931 and August 1932 at Agra, they jointly and severally agreed and conspired together with one another and with Dau Dayal, who is absconding, and also with Uma Shankar, Ram Nath and Vishwa Nath, approvers, and with other persons known or unknown and not before the Court, to do or cause to be done jointly and severally illegal acts, the illegal acts being to collect and possess firearms and ammunition and explosive substances, to commit attempts to murder to commit decoities and extortion which are offences under the Arms Act, the Explosive Substances Act, and the Penal Code. In the charge it was further alleged that in pursuance of the aforesaid conspiracy: (a) a revolver and an automatic pistol were stolen on 19th February 1931 and 13th July 1931, respectively; (b) a dacoity was committed in the godown of Manohar Bhagat Dhyan Ram on 14th March 1932, in which firearms were used and a man was hurt; (c) another dacoity was committed on 13th July 1932, in the godown of one Jamna Das in which a man was killed; (d) an attempt was made on the life of S. O. I., Chatta, on 1st April 1932, by throwing a bomb behind his quarters; and (e) another attempt was made on the life of Anandi Lal on 6th April 1932, by placing a bomb at his house in Agra for the purposes of extorting money from him.

The appellant Bachcha Babu alias Kamta Prasad (hereinafter referred to as Bachcha Babu) was further charged: (1) That he abetted the commission of a dacoity before referred to at the house of Manohar Bhagat Dhyan Ram on 14th March 1932, in which one Gulzari Khan received a bullet injury, the abetment being supplying arms to the dacoits which were used in the dacoity and subsequently recovered from his house contrary to S. 395/397, Penal Code, read with S. 109, Penal Code. (2) That he abetted the commission of a dacoity at the godown of Jamna Das on 13th July 1932, in which one Durga was killed by a revolver bullet, the abetment being supplying arms to the dacoits which were used in the dacoity and which were later recovered from his house contrary to S. 395/396, Penal Code, read with section 109, Penal Code. (3) That on 5th August 1932, he was found in possession of a large number of weapons and arms which were recovered from a secret place in his house contrary to S. 20, Arms Act. (4) That on 5th August 1932, he was found in possession of two bottles containing picric acid and ammonia which are ingredients of a highly explosive nature under circumstances which raised a reasonable suspicion that they were not being kept for a lawful object contrary to S. 5, Explosive Substances Act. (5) That on 5th August 1932, he was found in possession of a pistol and a revolver which weapons had been stolen, well knowing that the same had been stolen or having reasonable grounds to believe that the same had been stolen contrary to S. 411, Penal Code.

The appellant Umrao Singh alias Nepali (hereinafter referred to as Nepali) was further charged: (1) That on 1st April 1932, at the police station Chatta in Agra City he threw a bomb in a compound behind the said police

station with intent to cause an explosion calculated to cause danger to human life or serious injury to property contrary to S. 4 (a), Explosive Substances Act. (2) That on 13th July 1932 he committed a dacoity in the godown of Jamna Das in which one Durga was killed by a shot fired by him.

The appellant, Rishi Nath was further charged that he on the 19th day of June 1931, was found in possession of explosive substances in his shop in Kinar Bazar, Agra, which articles exploded and caused injury to his hand and that he was in possession of such articles under circumstances that raised a suspicion that they were not being kept for a lawful purpose contrary to S. 5, Explosive Substances Act. The appellant, Ram Singh was further charged that on 13th day of July 1931, in the house of his uncle Hakim Gyan Singh he stole a revolver belonging to Durvijey Singh who was staying there as a guest contrary to S. 380, Penal Code.

The appellant, Bengali Mal was further charged: (1) That on 14th March 1932, he committed dacoity in the godown of Manohar Bhagat Dhyan Ram during which deadly weapons were used and Gulzari Khan received a bullet injury contrary to S. 395/397, Penal Code. (2) That on 1st April 1932, at police station Chatta, he threw a bomb in a compound at the rear of the said police station with intent to cause an explosion and thereby endanger human life and property contrary to S. 4 (a), Explosive Substances Act. (3) That on 6th April 1932, he abetted the commission of an offence of extortion by supplying a typewriter upon which a threatening letter was typed and which was placed along with a bomb at the house of one Anandi Lal contrary to S. 387, Penal Code, read with S. 109, Penal Code.

The appellant, Jwala was further charged that on 14th March 1932, he committed dacoity at the godown of Manohar Bhagat Dhyan Ram in which dacoity he was armed with deadly weapons and in which Gulzari Khan received a bullet wound. Before the learned Sessions Judge the appellants pleaded not guilty to all the charges. The appellant, Bachcha Babu was convicted on all the charges and sentenced to death under S. 120-B, Penal Code, read with S. 395/396, Penal Code. On the charge under S. 20, Arms Act, he was sentenced to seven years' rigorous imprisonment, on the charge under S. 5, Explosive Substances Act, to five years' rigorous imprisonment and on the charge under S. 411, Penal Code, to three years' rigorous imprisonment; the sentences to run concurrently. As he was convicted and sentenced for conspiracy, no separate sentences were imposed in respect of the charges of abetment of dacoities although he was found guilty and convicted in respect of each of the abetments.

The appellant, Nepali was found guilty on all the charges and sentenced to death on the charge under S. 120-B, Penal Code, read with S. 395/396, Penal Code. He was also convicted and sentenced to death on the charge under S. 395/396, Penal Code. On the charge under S. 4 (a), Explosive Substances Act, he was sentenced to seven years' rigorous imprisonment. The appellant, Rishi Nath was convicted on the charge of conspiracy contrary to S. 120-B, Penal Code, read with the other sections mentioned in the charge and sentenced to ten years' rigorous imprisonment. On the charge under S. 5, Explosive Substances Act, he was found not guilty and acquitted.

The appellant, Ram Singh, was convicted of conspiracy under S. 120-B, Penal Code, read with the other sections mentioned in the charge and sentenced to seven years' rigorous imprisonment. On the charge under S. 380, Penal Code, he was convicted and sentenced to one years' rigorous imprisonment; the sentences to run concurrently. The appellant, Bengali Mal, was convicted of conspiracy under S. 120-B, Penal Code, read with the other sections mentioned in the charge and sentenced to seven years' rigorous imprisonment. On the charge under section 395/397, Penal Code, he was convicted and sentenced to seven years' rigorous imprisonment and on the charge under S. 4 (a), Explosive Substances Act, he was convicted and sentenced to seven years' rigorous imprisonment; the sentences to run concurrently. On the charge under S. 387, Penal Code, read with S. 109, Penal Code, he was convicted, but no separate sentence was given. The appellant, Jwala, was convicted on the charge of conspiracy and sentenced to ten years' rigorous imprisonment and on the charge under S. 395/397, Penal Code, he was convicted and sentenced to ten years' rigorous imprisonment; these sentences to run concurrently. Against all these convictions the six appellants have preferred an appeal to this Court.

The case has proved to be a long and complicated one. In the Sessions Court 114 witnesses were called for the prosecution and the evidence of four other witnesses admitted. For the defence no less than 85 witnesses were examined and the evidence and arguments lasted, so we are told, 48 days. 253 exhibits were produced and proved before the Court. Before us the case has been argued on both sides with great force and we should like to express our appreciation of the ability and exemplary fairness displayed by all counsel concerned. The appeal was a long and difficult one, but throughout we have received the greatest possible assistance from all counsel in the fullest and frankest manner. The case for the prosecution was that Bachcha Babu was a dangerous revolutionary and that he together with the appellants and others had formed a conspiracy to promote revolutionary ideas and to assist in overthrowing the Government by force. Funds however were lacking for these unlawful purposes and it is alleged that these persons subsequently conspired together to steal arms and ammunition and by means of them commit armed dacoities for the purposes of obtaining money to carry out the above mentioned revolutionary objects. Another method employed to obtain money, it is suggested, was extortion and in carrying out these various methods it is alleged that firearms and explosive substances were freely used and that in one case a person was seriously injured and in the other case actually murdered.

The existence of such a conspiracy, it is stated, had been suspected for sometime and the police acting on information in their possession raided the house of Bachcha Babu on 5th August 1932. Two previous searches of this house had been made, but nothing incriminating had been found, but on this last occusion there was found cunningly concealed in a space between a false and the real ceiling of the latrine a pistol, four revolvers, four knives, ammunition in a packet, percussion caps, a hilt of a knife or dagger with a broken piece of blade attached and two bottles. In other parts of the premises were found an air pistol concealed in some bedding, a large bottle containing liquid, pieces of glass, two torches, a bullet and a picture pierced with holes alleged to have been caused by target practice with an air pistol. The bottles were subsequently found to contain picric acid and ammonia, substances which when mixed together form a highly explosive mixture and is frequently used for the purpose of making bombs.

On the pramises were found Bachcha Babu, Vishwa Nath, who subsequently became an approver, and one Sarju Prasad. These persons were immediately arrested and taken to the Kotwali and, according to the prosecution Vishwa Nath evinced an immediate desire to confess and there and then made a statement to the police. Presumably in consequence of that statement Rishi Nath, Ram Singh and Uma Shankar were arrested the same day and in the evening about 9 p. m. Uma Shankar also made a statement to the police. On 7th August 1932, Bengali Mal was arrested and on 19th August 1932, Ram Nath, who later became an approver, was arrested in his own house at Agra and made a statement to the police the moment he arrived at the Kotwali. On 4th October 1932, Nepali was arrested at Bharan, his native village, and on 16th November 1932, Jwala was arrested at Bhind in Gwalior State. Sarju Prasad, though arrested in Bachcha Babu's house, was only detained three days and then released presumably for want of evidence. Uma Shankar, Vishwa Nath and Ram Nath having each expressed a desire to confess were placed before a Magistrate and their confessions were recorded on 7th, 8th and 27th August respectively. It is to be noted, however that Uma Shankar did not complete his confession on the 7th August owing, it is alleged, to the fact that he was too tired, but it was completed on the following day.

These confessions, it is suggested, made it clear that a conspiracy, as alleged, did, in fact, exist. These confessing accused referred to a number of crimes which up to that time had never been satisfactorily cleared up and consequently investigation was continued with the greatest vigour. As stated previously, arrests were made and the facts relating to these previous undetected crimes were thoroughly inquired into. These crimes were: (1) The theft of a revolver from the house of Mr. Kehri Singh, vakil at Agra, on 19th February 1931. Investigation showed that this revolver was amongst the weapons found at Bachcha Babu's house on the raid of 5th August 1932. (2) The theft of a revolver from the house of Hakim Gyan Singh on 13th July 1931. Investigation showed that this revolver was amongst the weapons

recovered from Bachcha Babu's house. (3) On 14th March 1932, a dacoity had taken place in the godown of Manohar Bhagat Dhyan Ram in Gali Bara Bhai, Agra. In this dacoity which was unsuccessful five or six dacoits participated and a number of shots were fired, one wounding Gulzari Khan Chaukidar in the left thigh. Bullets and cartridges were recovered from the scene of this dacoity and it is alleged that later investigation showed that these bullets and cartridges were fired from one of the revolvers found in Bachcha Babu's house. (4) On 1st April 1932, a bomb was thrown at the rear of the police station Chatta in the city of Agra. Explosive materials found on the premises of Bachcha Babu,it was suggested ,might well have been used to make such a bomb. (5) On 6th April 1932, a bomb together with a threatening letter was placed in the house of one Anandi Lal. According to the police, investigation showed that the letter which was typed, had been typed upon a typewriter belonging to Bengali Mal's father and to which Bengali Mal had access. (6) On 13th July 1932, a serious dacoity had taken place at the godown of Jamna Das in Gali Bara Bhai, Agra, in which Durga Prasad was killed.

In this dacoity firearms were used and bullets and cartridges found on the scene afterwards. It is alleged by the police that investigation showed that these bullets and cartridges had been fired from a revolver which was recovered from Bachcha Babu's house during the raid.

As a result of these investigations into these various crimes and the approvers' statements the police were satisfied that these were not isolated crimes. but must have been committed in pursuance of an agreement or conspiracy and consequently a charge of conspiracy under S. 120-B, Penal Code, was launched against the appellants who, with others, had been implicated by the confessing accused who later became approvers. In the event of the failure to prove this charge of conspiracy the charges indicated previously were brought against the individual appellants in respect of the various crimes in which, it is alleged, they had participated. To establish a charge of criminal conspiracy the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means provided that where the agreement is other than one to commit an offence the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. Where the agreement therefore is one to do or cause to be done an act which is itself an offence, no overt act, i. e., any act done by one of the parties to the agreement in pursuance of it, need be proved; the crime of criminal conspiracy is established once such an agreement is proved.

In the present case the conspiracy alleged is one to commit a series of serious crimes and therefore mere proof of such an agreement between the appellants is sufficient to sustain a conviction. Proof of overt acts committed by the appellants or any of them is not strictly necessary on this charge, but needless to say proof that the appellants or some of them were concerned in the overt acts alleged would go far to establish that the agreement alleged was in fact made between them. though proof of overt acts is not necessary in this case yet it may well be that if such acts are proved the Court will be bound to infer that they are not unconnected and isolated acts, but acts which must have been committed in pursuance of an agreement made between the appellants such as that alleged.

To prove the case of conspiracy against the appellants the prosecution relied in the main upon the evidence of the three accomplices Vishwa Nath. P. W. 2, Ram Nath. P. W. 3 and Uma Shankar, P. W. 4, who became approvers in the case. There is no rule of law in India which prevents a Court convicting on the sole evidence of an approver, but adopting the practice which has for many years been followed in England no Court in this country will convict an accused person upon such evidence unless it is corroborated by some independent testimony. The reasons for this very salutary rule of English practice were given in the judgment of the Court in the well-known case of (1916) 2 K B 658 (1), and these reasons apply in our judgment with equal, if not greater. force to the conditions existing in India. The necessity for corroboration of the evidence of an approver has been emphasised time and again in recent Indian decisions and this rule of practice has now become in India, though

1. Rex v. Baskerville, (1916) 2 K B 658=86 L J K B 28=80 J P 446=60 S J 696=115 L T 453.

possibly not in England, as binding upon the Courts as a rule of law. Such a rule is particularly necessary in cases of conspiracy to commit crimes where the crime of criminal conspiracy as established the moment an agreement between the accused persons to commit such crimes is proved. Evidence of a mere agreement can easily be concocted or manufactured, hence the need of independent testimony by way of corroboration is manifestly essential.

In (1916) 2 K B 658 (1), previously cited the Court of Criminal Appeal in England considered what evidence could and could not properly be regarded as corroboration. In that case which has been followed and approved many times by this and other Courts in India it was laid down that evidence in corroboration must be independent testimony connecting or tending to connect the accused with the crime. To amount to corroboration the evidence must implicate the accused, i. e., it must confirm in some material particular not only the accomplice or approver's evidence that the crime has been committed, but also that the accused committed it. The corroborative evidence need not shew positively that the accused committed the crime; it is sufficient if it is merely circumstantial connecting him with the crime. It must be evidence which shews or tends to shew that the approver's evidence implicating the accused is true; it must be independent testimony on a material particular or material particulars demonstrating to the Court the truth of the approver's evidence implicating the accused. Evidence to amount to corroboration must be independent testimony and therefore the evidence of one approver cannot amount to corroboration of the evidence of another. The fact that a witness is an approver creates a suspicion in the mind of the Court and that suspicion cannot be removed by merely calling another approver. To hold that one approver could corroborate another would result in wiping out the salutary rule that independent testimony is required by way of corroboration of such evidence and this indeed has been conceded by the Crown in this case. The Government Advocate with his customary frankness admitted that he could not ask us to convict the appellants unless the evidence of these three approvers was corroborated by other witnesses who were not themselves in the alleged conspiracy. In the present case therefore the Court cannot convict upon the charge of conspiracy or any of the other charges upon the evidence of the three approvers unless there is independent testimony on a material particular or material particulars which, in our judgment, shews that the approvers' evidence implicating the accused in the conspiracy or in the other crimes charged against them is true.

It was contended however by the prosecution that there was in this case ample independent testimony of the character previously indicated which clearly shewed that the approvers were speaking the truth when implicating the accused in the various crimes with which they were charged. With these considerations in mind it will now be convenient to consider in some detail the various classes of evidence adduced by the prosecution to establish their case.

Before discussing the evidence of each individual approver it will be convenient at this stage to make some general observations upon the evidence of the three of them. All three showed a most extraordinary and immediate desire to confess, and it is difficult to believe that such a desire was genuine. Vishwa Nath, who was arrested at Bachcha Babu's house in the raid on 5th August 1932, made a statement that very evening to the police, and although the terms of that statement were not before us, we can safely presume that it was in the nature of a confession because he was placed before a Magistrate on the 8th August, and his confession recorded. Uma Shankar was arrested later in the day on 5th August 1932, and likewise made a statement that very evening. His confession was recorded on the 7th and 8th August. So it will be seen that within three days of the raid which gave rise to this charge of conspiracy two of the accused had actually confessed before a Magistrate.

Ram Nath was not arrested until the 19th August, but he admitted that he made a statement the moment he arrived at the Kotwali, and on the 24th August his confession was recorded by a Magistrate. Further it is admitted that in the entry in the jail register these three persons were from the first described as approvers, and no satisfactory explanation has ever been forthcoming as to how this entry came to be made. It would appear that from the very outset these persons were to be regarded as approvers and therefore

it has been suggested on behalf of the defence that these three persons were tools of the police and were nothing more than police spies. Again from the outset these three approvers were treated differently from the other co-accused. In evidence they admitted that they never wore fetters as the others did, and the learned Magistrate who committed the appellants, noted at the request of their counsel that the approvers appeared in Court well dressed and well groomed and in a condition very different from the other appellants. According to the note, Uma Shankar was actually wearing a flower in his coat whilst the other accused were wearing fetters. This undoubted preferential treatment causes grave suspicion in our minds, and though the defence have not satisfied us that these approvers were nothing more than spies or informers, the prosecution have themselves to blame for such a suggestion being made by counsel on behalf of the appellants. We must express our disapproval of such conduct on the part of the prosecution.

Further it is on the record that the warrant for the arrest of Ram Nath was actually issued on the 11th August 1932; whereas he was not arrested until the 19th August, when the arrest took place at his house in the outskirts of the city of Agra. Ram Nath explains this failure to execute the warrant by saying that he had after the raid fled from his home to Neemuch. In cross-examination, however he could not say with whom he had stayed or whether his alleged host was a relative of a friend of his or not. In short he could give no explanation of his stay at Neemuch, and we cannot accept his statement that he ever stayed at Neemuch or in fact ever left his home. It follows therefore that the failure to execute the warrant and to arrest Ram Nath until the 19th August, is wholly unexplained, and this delay and the overwhelming desire to confess the moment he arrived at the Kotwali raises in our minds most serious doubts as to the voluntary nature and genuineness of this confession. If Ram Nath, who had been implicated by Uma Shankar, had not left Agra, the police could have arrested him immediately. The fact that he was not arrested suggests that he was being used for some purpose.

Again all three approvers give the same reason for confessing, namely, a desire to speak the truth and to expiate their sins, an explanation which we find impossible to believe in the circumstances of this case. There is another extraordinary feature in these confessions which is obvious to any one on a most cursory reading of them. In each case the general scheme and order of the confession is the same. Each begins with the history of his childhood, boyhood and early education. Each then goes on to describe how he became interested in politics and how later he became involved in revolutionary politics. Then follows an account of his introduction to Bachcha Babu and then a full account of the part which he and others played in the conspiracy. How three young men with only very ordinary education came independently of each other to make detailed confessions in precisely the same manner following exactly the same order is difficult to understand. The similarity in the general scheme and order of these confessions is amazing, and we cannot believe that it is a mere coincidence. In our view there was a mind guiding the minds of these three confessing accused and that the general scheme and order of facts adopted by each emanated from that guiding mind and not from the minds of the approvers. No suggestion has been made against the learned Magistrate who recorded all three confessions, and therefore in our view the inference is irresistible that the approvers were carefully coached by some one before they were taken before the Magistrate.

A comparison between the confession of Uma Shankar and that of Ram Nath discloses further disquieting features. The gaps left by Uma Shankar appear to have been carefully closed up by Ram Nath whose confession was recorded some three weeks later. But it will be more convenient to discuss these features when dealing with the evidence of each individual approver. (After dealing with their evidence in turn His Lordship proceeded). From the foregoing summary of the evidence of the three approvers it will be seen that all three deposed to a conspiracy as alleged by the prosecution and that Bachcha Babu was the leader of it. Uma Shankar and Ram Nath further deposed that the appellants Nepali, Rishi Nath, Bengali Mal and Ram Singh were members of this conspiracy and Uma Shankar further stated that Jwala was also in the conspiracy. All three deposed to the fact that Bachcha Babu kept arms, ammunition and explosive substances on his premises and

that such were kept for the purpose of dacoities and terrorism. Uma Shankar and Rishi Nath make it clear that it was Bachcha Babu who enginerred and provided arms for these dacoities.

Uma Shankar and Ram Nath implicate Nepali, Rishi Nath, Bengali Mal and Ram Singh in the dacoity of 13th July 1932, at the godown of Jamna Das. Both also implicate Nepali and Bengali Mal in the bomb incident at Chatta thana though neither were concerned in the affair. They deposed that they were told of the incident by Bachcha Babu and other members of the conspiracy. They also implicated Ram Singh in the theft of the pistol from the house of his uncle Hakim Gyan Singh whilst Uma Shankar deposed further to the fact that it was Bachcha Babu who arranged for the placing of the bomb at Anandi Lal's house and actually handed the bomb and the type-written letter to Dau Dayal who placed it there. Uma Shankar further stated that the letter had been typed by or with the assistance of Bengali Mal.

Objection was taken by counsel for the appellants to the admissibility of the statements made to the approvers by one appellant implicating the others. In certain circumstances such statements might be admissible by reason of S. 10, Evidence Act. Having regard however to the view which we take of the evidence regarding the alleged conspiracy in this case it is unnecessary for us to decide whether such evidence is or is not admissible.

Apart from the evidence of the approvers, the prosecution called a large number of witnesses to establish either directly or by way of corroboration of the approvers' evidence, the guilt of the appellants. It was contended on behalf of the Crown that this evidence taken by itself or together with the approvers' testimony showed that there was a conspiracy as alleged and that the appellants were parties to it and further that the individual appellants were guilty of the crimes specifically charged against them. The object of this evidence was to show that the various criminal acts alleged were not isolated acts independent of each other but were so linked up one with the other as to give rise to an irresistible inference that they were committed by persons acting together in furtherance of a common intention and object. In short that there were common factors in all these criminal acts and that such common factors proved the complicity of Bachcha Babu in each of them and the other appellants in some if not all of them.

It is therefore necessary to consider this evidence in some detail to ascertain whether it establishes the guilt of the appellants independently of the approvers' evidence or, if it does not, whether it is sufficient corroboration of the approvers' testimony to warrant a Court acting upon the latter. (After examining the evidence of some of the witnesses His Lordship proceeded). Mr. Scott also gave evidence with a view to showing that the letter found with bomb at Anandi Lal's house on 6th April 1932, was typed on a typewriting machine proved to have been in the possession of Bengali Mal's father and to which Bengali Mal had access. Evidence of this kind cannot be regarded as expert evidence as it has been laid down in the well-known Meerut Conspiracy case; 1933 All 690 (2), that the opinion of an expert that one document has been type-written on the same machine as another document is not admissible under S. 45, Evidence Act.

The Court may ask the witness points in favour of the view whether the two documents have or have not been type-written on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion a relevant fact in itself. We called for and saw the original letter placed with the bomb and letters admittedly typed on this type-writing machine. Further we caused various letters of the alphabet to be typed in our presence on this machine and examined and compared them with the letter placed with the bomb. Again we found similarities and differences and we are not satisfied that the incriminating letter was typed on the type-writing machine proved to have been in poseession of Bengali Mal's father. In any event even if the letter had been typed on this type-writer the prosecution would still have to prove that either Bengali Mal typed or caused it to be typed or permitted the use of the machine. There is no evidence of any kind before us suggesting either of these alternatives.

Mr. B. N. Pal, P. W. 98, an authority on explosives was called to prove that substances said to have been found near the Chatta thana after the explosion were fragments of an explosive

2. Jhabwala v. Emperor, 1933 All 690=1933 Cr C 1202=145 I C 481=34 Cr L J 967.

bomb and that picric acid and ammonia mixed together form a highly explosive substance. Even if this evidence is accepted it proves nothing, for it in no way connects Bachcha Babu or any other of the appellants with the actual bomb which was thrown at the rear of the Chatta thana. Bachcha Babu may have kept ammonia and picric acid for the purpose of making bombs, but it in no way proves that the actual bomb which exploded at the Chatta thana was made by Bachcha Babu or out of materials in Bachcha Babu's possession.

Upon the evidence already discussed other than that of the approvers' we are satisfied that arms, ammunition and explosive substances were found at Bachcha Babu's house and that they had been secreted there by Bachcha Babu for some unlawful purpose. We are further satisfied that two of the weapons found on the premises were weapons which had been stolen from the houses of Kehri Singh and Hakim Gyan Singh and that Bachcha Babu either knew that they had been stolen or had good grounds for believing that they had been stolen. We are not satisfied however that Bachcha Babu instigated the thefts of these revolvers or that they were stolen in pursuance of any conspiracy. Though the mode of concealment convinces us that these weapons, ammunition and explosives were intended for some unlawful purpose; the evidence does not satisfy us that there was any connexion between these arms, ammunition and explosives and the two dacoities and the bomb incidents at the Chatta thana and the house of Anandi Lal.

In short the evidence already discussed other than that of the approvers' does not of itself prove a conspiracy in which Bachcha Babu was the central figure and further affords no corroboration of the approvers' evidence that such a conspiracy existed. This evidence does not establish any common factors between the arms ammunition and explosive substances found at Bachcha Babu's house and the various criminal offences which it is alleged are the overt acts of this conspiracy.

A large number of witnesses were also called with regard to the various overt or criminal acts alleged. These were called with a view to proving the factum of each particular overt or criminal act and to identify the persons concerned in the commission of such act. It was the submission of the prosecution that this evidence also showed that these acts were the result of a conspiracy, as a number of the appellants were identified as taking part in the various crimes and that in each crime a connexion with Bachcha Babu was established. This according to the prosecution went beyond the realm of coincidence and permitted of only one inference, namely, that Bachcha Babu and the appellants were acting together with a common intention and object and that these crimes were committed in pursuance of such common intention or object. Further this evidence was also tendered to prove the guilt of the individual appellants in respect of the specific crimes which were charged against them.

Again it is necessary to examine this evidence to ascertain whether it establishes a conspiracy and the participation of the various appellants in it and in the overt acts alleged to have been committed in pursuance of it, or if it does not whether it amounts to sufficient corroboration of the approvers' evidence to sustain a conviction for conspiracy or for any of the other crimes charged against the appellants. This class of evidence is concerned in the main with three incidents: (a) the unsuccessful dacoity at the house of Manorath Bhagat Dhyan Ram on 14th March 1932; (b) the bomb explosion at the Chatta thana on 1st April 1932; and (c) the dacoity attended with murder at the godown of Jumna Das on 13th July 1932. It will be convinient therefore to deal with the evidence with regard to each incident separately to ascertain whether the appellants or any one of them were concerned in each particular crime. (a) Dacoity at house of Manorath Bhagat Dhyan Ram on 14th March 1932.

That such a dacoity took place is beyond question and is not challenged by the appellants. The witnesses, Gulzar Khan, P. W. 21, Deo Narain, P. W. 10 Sohanpal, P. W. 20, Inderjit, P. W. 33 and Sukhdeo Prasad, P. W. 12, prove it beyond doubt. In this dacoity revolvers were fired and Gulzar Khan was hit in the left leg. This witness later identified Jawla as one of the dacoits at an identification parade in Bhind Jail. Deo Narain also identified Jwala at Bhind Jail and Bengali Mal at an identification parade in Agra Jail. The witnesses Sohanpal, Inder Jit and Sukhdeo Prasad failed to identify any one.

The identification of Jwala by two witnesses and Bengali Mal by only one witness might if the identification was

satisfactory be sufficient to convict them of the dacoity particularly when they have been both implicated by approvers. An examination of the record however shows that these identifications were far from satisfactory. The identification proceedings at Agra were carried out in the presence of Mr. Triloki Nath, a Magistrate of the First Class, and in his report and evidence he stated that Deo Narain, though he identified Bengali Mal correctly, made one mistake identifying one non-suspect. In our judgment it would not be safe to convict Bengali Mal on this evidence alone or upon the approvers' statement corroborated only by such an identification. (After further examining the evidence, the judgment proceeded). There is therefore a very serious discrepancy between the statements of the approvers and the evidence of these witnesses which makes it impossible for us to act upon such evidence either by itself or as corroboration of the approvers' testimony.

Raghbar, P. W. 17, saw the party that night and in jail identified Uma Shankar. He however failed to identify him in Court and consequently his evidence is worthless. Sham Lal, P. W. 35, deposed to the fact that he spoke to Ram Nath and Rishi Nath late in the evening upon which the dacoity took place. The point at which he met them was a matter of a mile and a half or so from the scene of the dacoity. There appears to be no reason why this witness who knew Rishi Nath and Ram Nath well should have remembered this incident. But even if it took place, it does not in our view amount to corroboration of the approvers' statement. He might well have met these persons at the time he did; but even if he did, it does not in any way corroborate the approvers' statement that Rishi Nath and Ram Nath were present earlier in the evening at the scene of the dacoity a mile and a half away.

In our judgment the evidence of these eye-witnesses of the party proceeding to and from the dacoity at Jumna Das's godown is worthless and is neither direct proof that the appellants or any of them were concerned in the dacoity nor corroboration of the approvers' statement. It is evidence that could easily be procured after Ram Nath's confession, and we have no hesitation in rejecting it. In our judgment therefore it has not been proved by the prosecution that any of the appellants were concerned in the dacoity in which murder was committed at the godown of Jumna Das on 13th July 1932.

No eye-witnesses were produced to identify any persons connected with the placing of the bomb and letter at the house of Anandi Lal on 6th April 1932. That such a bomb and letter was placed there is abundantly proved by Kastur Chand, P. W. 39, Constable Mahandra Singh, P. W. 27 and Sub-Inspector, Mohd. Ali Khan, P. W. 36. As we have stated previously, we are not satisfied that the letter was typed on the machine owned by Bengali Mal's father to which Bengali Mal had access. Previous letters demanding money by threats had been received by Anandi Lal who had reported the matter to the police and in this case an attempt was made to connect Bachcha Babu with these letters. Anandi Lal, P. W. 37, deposed that after he had received two of the letters, a man stopped his car who he was told was one Tek Chand. The latter asked him if he had received any letters, and on being told that he had warned him that he had better pay as the letters came from a very dangerous man whom he later named as Bachcha Babu. Anandi Lal never told the police of this incident, although he had already reported to the police the receipt of the letters and it is difficult therefore to believe that this incident ever took place. The learned Sessions Judge accepted this evidence, but in our view even if it were true, it is inadmissible against Bachcha Babu or any of the appellants. It is not alleged by the prosecution that Tek Chand was a conspirator, and therefore we cannot see how anything he said could be evidence against Bachcha Babu or any of the other appellants. In our judgment the prosecution has wholly failed to prove any connexion between the appellants and the placing of the bomb at Anandi Lal's house or the letters demanding money by menaces which preceded it.

A number of witnesses were called to show that the appellants were frequently seen together during the period it was alleged that the conspiracy existed.

Sharif Uddin, P. W. 100, Mohd. Husain, P. W. 101 and Shujat Husain, P. W. 102, deposed to having seen Bachcha and various members of the alleged conspiracy from time to time in Hewett Park in deep conversation and later identified a number of the appellants in jail. Ladli Prasad already referred to also refers to association between Bachcha Babu and some of the

other appellants and reference is made also to such association in the evidence of a number of other witnesses. It is unnecessary to consider this evidence in any detail, because in our view it cannot assist the prosecution. It is not denied that the appellants knew each other and they might well have met in the park or elsewhere in the cool evening to converse without being guilty of conspiracy or having any unlawful purpose. Evidence of association to be of any valut should suggest something suspicious in such association and no inference one way or another can be drawn from a mere casual meeting or meetings or conversation between the parties in a public place or park where mere acquaintances frequently meet and talk. It is not suggested by any of these witnesses that there was anything suspicious or strange or secret in the way these persons met and spoke. It is true that some witnesses said that Bachcha Babu and his friends in the park stopped their conversation when the witnesses approached, but there is nothing strange in this. There might have been 101 reasons other than the existence of a conspiracy which would induce Bachcha Babu and his companions to stop conversing whilst these witnesses were within earshot. In any event we find it difficult to believe that these witnesses could remember such incidents particularly when they attached no importance whatsoever to them when they occurred. Evidence of this kind is easily procurable, and it is significant that none of these witnesses ever reported anything suspicious in the conduct of Bachcha Babu or any of the appellants until after the raid on the 5th August and investigation into this alleged conspiracy had commenced.

In our view therefore the prosecution have wholly failed to establish the conspiracy alleged by them. The evidence called independent of the approvers proves nothing at all neither does it afford any corroboration of the statement of the approvers. Having regard to the circumstances in which these approvers first confessed and the obvious discrepancies between the confessions themselves and between the confessions and the subsequent evidence which they gave, we are not inclined to give any great weight to their evidence, but whatever weight we give to it, we cannot act upon it alone in the absence of corroboration. Having regard to the nature of the approvers' evidence, it would require very strong and cogent corroboration before we would regard it as safe, to convict these appellants of conspiracy. There is no such strong and cogent evidence by way of corroboration; in fact there is no corroborative evidence worth the name at all. Further, in our view, the prosecution have wholly failed to establish that any of the appellants were concerned in the criminal acts charged against them in this case excepting always the charges brought against Bachcha Babu in connexion with the possession of arms, ammunition and explosive substances discovered at his house on 5th August 1932.

In conclusion it is necessary for us briefly to consider the case against each appellant.

Bachcha Babu. For the reasons already given, the prosecution have failed to prove that Bachcha Babu was guilty of the conspiracy alleged. They have further failed to prove any connexion between this appellant and the two dacoities of 14th March 1932 and 13th July 1932. The convictions therefore for conspiracy and abetment of these two dacoities cannot stand. For the reasons already given we are satisfied that the appellant was in unlawful and secret possession of a large quantity of arms, ammunition and explosive substances in circumstances which created offences under S. 20, Arms Act, S. 5, Explosive Substances Act, and S. 411, Penal Code. He was therefore in our view, properly convicted by the learned Sessions Judge on these charges.

In the result we set aside the conviction and sentence of death passed upon this appellant for conspiracy contrary to S. 120-B, Penal Code, read with the other sections mentioned in the charge. We further set aside the convictions on the two charges of abetment of dacoities for which no separate sentences were imposed upon him by the learned Sessions Judge. We however uphold the conviction and sentence of seven year's rigorous imprisonment under S. 20, Arms Act, and the conviction and sentence of five years' rigorous imprisonment under S. 5, Explosive Substances Act, and the conviction and sentence of three years' rigorous imprisonment under S. 411, Penal Code. The sentences will run concurrently as directed by the learned Sessions Judge. To this extent the appeal of Bachcha Babu is allowed.

Nepali. As we are not satisfied that the prosecution have proved the charge of conspiracy, the conviction and sen-

tence of Nepali for conspiracy cannot stand. Further, in our view, it has not been proved that this appellant was concerned in the Chatta thana bomb incident of 1st April 1932, or the dacoity at Jamna Das's godown on 13th July 1932, and the convictions and sentences in respect of these charges are therefore in our judgment not justified. We therefore allow the appeal of this appellant and set aside the convictions and sentences of death passed upon him for conspiracy contrary to S. 120-B, Penal Code, read with the other sections mentioned in the charge and for dacoity with murder under S. 395/396, Penal Code, and the conviction and sentence of seven years rigorous imprisonment under S. 4 (a), Explosive Substances Act. We direct that this appellant be set at liberty forthwith unless required by the authorities upon any other charge.

Rishi Nath. As we are not satisfied of the existence of conspiracy, his conviction under S. 120-B, Penal Code, read with the other sections mentioned in the charge is not justified. In his case there is a further reason why he should be acquitted. A body of evidence was called on his behalf which proved beyond doubt that this appellant was not in Agra between about 20th May 1932 and 20th June 1932, yet Ram Nath approver spoke of meeting him on a number of occasions during this period and of introducing him about this time to Bachcha Babu. The learned Sessions Judge accepted this alibi evidence and rightly so, as it appears to us to be convicing, straight forward and truthful. This evidence makes it clear that Ram Nath is either most inaccurate in his testimony or deliberately untruthful. Rishi Nath further called evidence to show that he was away from Agra on the night of 13th July 1932, when the dacoity was committed at Jamna Das's godown. This evidence was rejected by the learned Sessions Judge and it is not necessary for us to discuss it in any detail. But it does raise in our minds very grave doubts about the accuracy of the approvers statement that Rishi Nath was connected with the dacoity of 13th July 1932. However it is for the prosecution to prove the case and as the case against Rishi Nath stands entirely upon the evidence of the approvers, his conviction cannot be sustained.

We have not discussed the evidence which was tendered to show that this appellant was in unlawful possession of exposives on 19th June 1931, and therefore guilty of an offence under S. 5, Explosive Substances Act. The learned Judge was not satisfied that the undoubted explosion which took place on that day on Rishi Nath's premises was due to explosives. In his view it might have been caused by petrol vapour as alleged by the accused. He therefore acquitted the accused upon this charge and, in our view rightly. In our judgment, evidence relating to this incident cannot therefore be used upon the charges of conspiracy. In the result we allow the appeal of this appellant and set aside the conviction and sentence of 10 years' rigorous imprisonment for conspiracy under S. 120-B, Penal Code, read with the other sections mentioned in the charge and direct that he be set at liberty forthwith unless he is required by the authorities upon any other charge.

Ram Singh. This appellant told an obvious lie as to his movements on the night of the dacoity on Jamna Das's premises and a body of evidence was called to prove this. However the fact that an accused person tells a lie is not sufficient to convict him by itself, nor can it be corroboration of the approvers' statement. For the reasons we have already given we are not satisfied that the conspiracy is proved, nor are we satisfied that this appellant was the person who stole the revolver from the house of his uncle Hakim Gayan Singh on 13th July 1931, and therefore the convictions and sentences upon these charges cannot be sustained. We therefore allow the appeal of this appellant, set aside the conviction and sentence of seven years' rigorous imprisonment under S. 120-B, Penal Code, read with the other sections mentioned in the charges and the conviction and sentence of one year's rigorous imprisonment under S. 380, Penal Code, and direct that this appellant be set at liberty forthwith unless he is required by the authorities upon any other charge.

Bengali Mal. For the reasons stated we are not satisfied that this appellant is guilty of the charge of conspiracy. Nor are we satisfied that he was present at the dacoity of 14th March 1932 at the house of Manohar Bhagat Dhyan Ram. Further, we are not satisfied that he threw or was concerned in the throwing of a bomb at the Chatta thana on 1st April 1932. For the reasons we have already given we are also not satisfied that this appellant abetted the crime of extortion by pro-

viding a type-writer on which the letter to Anandi Lal accompanying the bomb was typed. In the result we allow the appeal of this appellant, set aside the conviction and sentence of seven years' rigorous imprisonment under S. 120-B, Penal Code, read with the other sections mentioned in the charge and the conviction and sentence of seven years' rigorous imprisonment under S. 395/397, Penal Code, and the conviction and sentence of seven years' rigorous imprisonment under S. 4 (a), Explosive Substances Act, and the conviction under S. 387, Penal Code, read with S. 109, Penal Code, for which no separate sentence was given as the offence and punishment were merged with the conspiracy and direct that this appellant be set at liberty forthwith unless required by the authorities upon any other charge.

Jwala. As we are not satisfied that the prosecution have proved the charge of conspiracy, the conviction of this appellant under S. 120-B, Penal Code, read with the other sections mentioned in the charge cannot be sustained. Further we are not satisfied that this appellant was present at the dacoity which took place at the godown of Manohar Bhagat Dhyan Ram on 14th March 1932, and therefore his conviction for that offence is also not justified. In the result we allow the appeal of this appellant, set aside the conviction and sentence of seven years' rigorous imprisonment under S. 120-B, Penal Code, read with the other sections mentioned in the charge and the conviction and sentence of seven years' rigorous imprisonment under S. 395/397, Penal Code, and direct that he be set liberty forthwith unless he is required by the authorities upon any other charge.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 174

BAJPAI, J.

(*Lala*) *Shiam Lal*— Defendant — Appellant.

v.

Mohamad Ali Asghar Husain and *others*—Plaintiff and Defendants — Respondents.

Second Appeals Nos. 1465 and 1512 of 1931, Decided on 20th March 1934, from decision of Sub-Judge, Budaun, D/- 20th June 1931.

(a) Declaratory suit — Mere entry of name does not debar person against whom entry is made from suing for declaration for all time —Fresh invasion of right amounting to denial of title gives fresh right to sue.

A mere entry of names does not debar the person against whom the entry is made for all time to come from suing for a declaration. Any new invasion of rights which amounts to a fresh denial of title confers on the owner in possession a fresh right to sue. The right to sue accrues when there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted : 31 *All* 9, *Dist.* and 1930 *P C* 270, *Rel on.* [P 176 C 2]

(b) Civil P. C. (1908), O. 2, R. 2—Causes of action different —No Bar under O. 2, R. 2.

Where the cause of action of the former suit is entirely distinct from the cause of action in the later suit, the bar under O. 2, R. 2 does not operate. [P 178 C 1]

(c) Adverse Possession — Property in possession of usufructuary mortgagee -- Person merely by getting his name recorded in village papers for several years cannot acquire title by adverse possession —Mortgage — Record of Rights.

A person could not acquire a title by adverse possession to land which was the subject of a usufructuary mortgage and therefore in the possession of the mortgagees, merely because he had managed to get his name recorded in the village papers for a series of years in respect of the mortgaged property : 34 *I C* 171, *Foll.* [P 178 C 1]

(d) Declaratory suit — Relief granted by lower Court — Appellate Court will not refuse in appeal unless lower Court has acted arbitrarily or perversely — Specific Relief Act (1877), S. 42.

A declaratory relief given by the lower Courts cannot be refused by the appellate Court, unless it comes to the conclusion that the Courts below in the exercise of their discretion have acted in an arbitrary or perverse manner. [P 178 C 2]

Mustaq Ahmad—for Appellant.

A. M. Khwaja—for Respondents.

Judgment.—This is a second appeal by Lala Shiam Lal who was defendant 4 in a suit brought by Muhammad Ali Asghar Husain. This appeal is connected with Second Appeal No. 1512 of 1931 which was filed by Jagannath Prasad who was defendant 8 in the same suit. Both of these appeals might be disposed of by a single judgment.

The facts are that one Hashmat was the owner of some immovable property. He died in 1886 leaving four widows, Mt. Sogha, Mt. Munira, Mt. Sabza and Mt. Chaman. He had two brothers surviving him, Aijaz and Baqar. We know nothing about the heirs of Baqar but we know that Aijaz died in 1886 leaving behind him a widow, Mt. Niazunnissa, a son, Hamza Ali, and two daughters, Kaniz Bano and Shahr Bano. It is common ground that Hashmat was a Shia and not having left any children his property under the Shia Law would devolve upon his two

brothers, Aijaz and Baqar. The plaintiff Muhammad Ali Asghar Husain is a purchaser from Mt. Kaniz Bano, one of the daughters of Aijaz Husain under a document dated 23rd December 1929.

This plaintiff's case is that the property in dispute which is a small share comprising 1 biswansi out of a very much larger area in patti Soghra Begum, mohal Narain Das, khata kewat No. 4, mouza Mauama belonged to Hasmat and after his death it was inherited by Aijaz and Baqar and from Aijaz a portion was inherited by Mt. Kaniz Bano who sold it to the plaintiff in the year 1929. It is also alleged that the property originally belonged to one Tufail Ahmad who executed two mortgages dated 22nd August 1874, and 22nd April 1875, in favour of one Fazal Ahmad. Tufail Ahmad executed a sale-deed of the mortgaged properties in favour of Hashmat Husain and that is how Hashmat Husain became the owner of this property which devolved on the plaintiff as mentioned before. The property was mortgaged usufructuarily to Fazal Ahmad and is in possession of his heirs as usufructuary mortgagees which heirs have not been impleaded in the present suit. The plaintiff then goes on to say that Sogra Begam died on 9th March 1918 and after her death Mt. Sabza Begum and Mt. Chaman Begam made certain transfers in favour of one Muhammad Jan on 9th February 1920 and 20th May 1921, and the said Muhammad Jan at first hypothecated the property in dispute to Jagannath Prasad, defendant 8, and subsequently sold the same to Shiam Lal defendant 4. The dates of the hypothecation in favour of Jagannath Prasad and the sale in favour of Shiam Lal are not given in the plaint, but the plaintiff's case is that all these transactions are fictitious and collusive transactions and cast a cloud upon the plaintiff's title who is interested in the equity of redemption and entitled to redeem the heirs of Fazal Ahmad, the original usufructuary mortgagee. The plaintiff therefore prayed for the relief that on proof of the plaintiff's right of ownership as against the defendants it may be declared that the plaintiff is, as the owner, entitled to get the property in dispute redeemed at the stipulated time. It may be mentioned that the time fixed for redemption of the mortgages of 1874 and 1875 is 1936. The other defendants to the suit were two widows of Hashmat Husan namely Sabza Begum and Chaman Begum and certain other transferees from the widows. As mentioned before, the heirs of the usufractuary mortgagee, were not impleaded in the suit.

I am concerned with the written statement of Jagannath Prasad and Shiam Lal alone for they are the appellants in the present second appeals. They did not mention in their written statement as to when they obtained the hypothecation or the sale from Muhammad Jan and as I said before these dates are not mentioned in the plaint. The case of the defendants was that Hashmat had gifted his entire property including the property in dispute to his widow and consequently Aijaz and Baqar did not get any portion of Hashmat's inheritance and the plaintiff by obtaining a sale deed from Mt. Kaniz Bano did not obtain any interest in the disputed property. They further pleaded that the plaintiff's suit was barred by estoppel vide O. 2, R. 2, and S. 41, T. P. Act.

The Courts below have decreed the plaintiff's suit for the declaration claimed by him. In second appeal it is contended before me that the finding of the Court below that Hasmat did not make a gift of the property in dispute to his widows is not correct inasmuch as the lower appellate Court has misread the evidence of Hanwant Sahai, the principal witness in this case. I am not prepared to set aside the finding of fact recorded by the lower appellate Court on this point. It is true that the learned Judge has referred to the statement of Hanwant Sahai as negativing the case of the defendants but that Court has also relied on several other considerations in arriving at the finding; moreover, there has not been a real misreading of the evidence of Hanwant Sahai. Hanwant Sahai's evidence is more or less hearsay and Hanwant Sahai does not in his cross-examination say that Hashmat had told Hanwant Sahai that Hashmat had made a gift of his entire property in favour of his widow. As I said before, the finding is based not only upon the evidence of Hanwant Sahai but on a variety of circumstances and the finding is to my mind a finding of fact which cannot be challenged in second appeal.

It was then contended on behalf of the defendants that the plaintiff and his predecessor, Mt. Kaniz Bano is estopped from asserting that the widows of Hashmat did not get the entire property from Hashmat under a

gift because on 17th July 1915, Mt. Muniran one of the widows executed a gift in favour of Mt. Niazunnissa, the mother of Mt. Kaniz Bano, and Mt. Kaniz Bano having inherited from Mt. Niazunnissa it is not open to Mt. Kaniz Bano or to Mt. Kaniz Bano's transferee to question the right of the widows. The simple answer to this contention is that it does not appear that Mt. Kaniz Bano derived any title from Mt. Niazunnissa and Mt. Kaniz Bano is undoubtedly the heir of her father Aijaz Husain who has not accepted any gift from Mt. Muniran and who in no sense of the term can be said to be estopped. Another answer, which is perhaps simpler, is that it is not known whether Mt. Niazunnissa is dead, and that fact not being known. it cannot be said that Mt. Kaniz Bano has inherited anything from Mt. Niazunnissa. The Courts below have further held that the deed of gift dated 17th July 1915, is a fictitious document executed without the knowledge of Mt. Niazunnissa.

The next contention of the appellant is that the plaintiff's suit is barred by time. In this connection it is said that the plaintiff's suit being for declaration it must be governed by Art. 120, Limitation Act and it is conceded by the plaintiff that Art. 120 does apply to the facts of the present case. It is said that the names of the widows of Hashmat were mutated on this property some time in 1886 and the plaintiff's suit having been instituted more than six years from that date it is barred by time. The principal defendants to the suit are Mt. Sabza and Mt. Chaman whose names were recorded as against this property some time in the year 1886. Reliance is placed upon the case of 31 All 9 (1). That case however was a peculiar case in which the defendant's name had been entered in 1895 and nothing more happened except a refusal in 1903 on the part of the defendant to get the entry corrected. The former entry in 1895 was made after a contest with the plaintiff. Their Lordships accordingly held that the cause of action accrued when there was a definite denial by the defendant in 1895 and the subsequent refusal of the defendant to get the entry corrected was a continuance of the original cause of action and not a fresh denial of title. 31 All 9 (1) has been considered in a number of subsequent cases and it is now well established that a mere entry of names does not debar the person against whom the entry is made for all times to come from suing for a declaration and any new invasion of rights which amounts to a fresh denial of title confers on the owner in possession a fresh right to sue.

It was argued on behalf of the plaintiff that the plaintiff's right to sue came into existence on 23rd December 1929, when he took the sale deed from Mt. Kaniz Bano and therefore anything which took place prior to 23rd December 1929, should not be taken into consideration when deciding the question of limitation. I am not prepared to accede to this submission on behalf of the respondent because this would lead to the anomaly that a person who himself might have allowed limitation to run against him confers a right to sue unfettered by the plea of limitation by transferring the property to another. Indeed this would amount to saying that no rule of limitation applies to a declaratory suit where the defendants are interested in denying the plaintiff's right within the meaning of S. 42, Specific Relief Act. As observed by their Lordships of the Privy Council in 1930 P C 270 (2), the right to sue accrues when there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. It is said in the plaint that the cause of action arose on 27th December 1929, or thereabout when the defendants finally denied the plaintiff's right. This statement of the plaintiff would not give the plaintiff a right to sue. If the plaintiff asked for an acknowledgment of his right from the defendants some time in December 1929 and the defendants refused to acknowledge the plaintiff's right that would not give the plaintiff a right to sue. The fresh act must be on the part of the defendants which can be said to amount to a fresh invasion of the plaintiff's right or a fresh attempt to cast a cloud on the plaintiff's title and not merely a denial of the plaintiff's title when the plaintiff attempts to assert his title because this denial would be merely a continuation of the denial made long ago.

In this case it is suggested on behalf of the plaintiff that there was a denial of the title of the plaintiff's

1. Akbar Khan v. Turban, (1909) 31 All 9=1 I C 557.

2. Balo v. Koklan, 1930 P C 270=127 I C 737=57 I A 325=11 Lah 657 (PC).

predecessor in 1886 when the names of Hashmat's widows were recorded on the property, there might be said to be another denial of the title of the plaintiff's predecessor in February 1920 and in May 1921, when Mt. Sabza and Mt. Chaman made transfers in favour of Muhammad Jan but there has been no subsequent cloud on the plaintiff's title and therefore the present suit which is instituted on 2nd January 1930, is barred by the six years' rule of limitation. There has to my mind been yet another invasion of the title of the plaintiff's predecessor and that was when the transfers were made by by Muhammad Jan in favour of Jagannath Prasad and Shiam Lal and when the names of Jagannath Prasad and Shiam Lal were mutated over the property.

The plaintiff in para. 9 of the plaint mentioned the various transfers that were made by Mt. Soghra Begam and Muhammad Jan and then in para. 10 he alleged that these transfers were collusive. His cause of action may therefore be taken to be these various transfers made not only by Soghra Begam but also by Muhammad Jan and the entry of the names of Jagannath and Shiam Lal in the revenue papers. As I said before, neither in the plaint nor in the written statement has it been mentioned as to when Muhammad Jan executed the hypothecation in favour of Jagannath and the sale in favour of Shiam Lal. Mr. P. M. L. Verma on behalf of the respondent has drawn my attention to a sale deed executed by Muhammad Jan in favour of Shiam Lal which is Ex. G. of my record. Mr. Khwaja on behalf of the plaintiff has accepted this document as being the transfer in favour of Shiam Lal but he has pointed out that this was drawn up on 11th November 1925, and the plaintiff's suit of 2nd January 1930, is well within six years of that date. It was however said on behalf of the respondent that in this very sale deed there is the mention of a hypothecation in favour of Jagannath Prasad dated 21st November 1921, but beyond this recital nothing has been pointed out to me from which I can find out the date of the hypothecation in favour of Jagannath Prasad, the hypothecation which is mentioned in the plaint and admitted in the written statement. Mr. Khwaja is not prepared to accept this recital as evidence of the date of the hypothecation nor am I prepared to accept this as conclusive. This might well be another mortgage deed in favour of Jagannath. The position therefore is that the plaintiff's suit cannot be said to be barred by time inasmuch as we do not know the date of this fresh invasion. I might in this connection mention the observations of Sulaiman and Sen, JJ. in 1929 All 529 (3):

"The plaintiffs in the present case alleged their cause of action to have arisen from the wrong entries of the names of the contesting defendants 1 to 4 and not their ancestor Mt. Sakina Bibi. It is not clear from the record whether this occurred within six years of the suit and the present action therefore cannot be thrown out simply on the ground of limitation."

It has not been proved to my satisfaction that the hypothecation in favour of Jagannath and the entry of his name on the revenue papers was made more than six years prior to the institution of the suit and the sale in favour of Shiam Lal was undoubtedly within six years of the suit. I therefore overrule the plea of limitation advanced on behalf of the defendants.

It was then contended that the plaintiff's suit is barred by S. 41, T. P. Act, because it is said that the defendants took the transfer from Muhammad Jan with the express or implied consent of the plaintiff's predecessor and the defendants were not aware of the real state of affairs. This plea comes with a very bad grace from the defendants Jagannath and Shiam Lal. It has been pointed out by the Court of first instance that both Shiam Lal and Jagannath knew everything about the state of Hashmat's family and that these two persons have been trying their best in conjunction with Kaniz Bano's brother to damage the claims of Mt. Kaniz Bano. The lower appellate Court also agreed with the observations of the Court of first instance and held that Shiam Lal and Jagannath "appear to have been playing a game of backgammon." There is therefore no force on the plea of S. 41, T. P. Act.

It was then contended that the plaintiff's suit is barred by O. 2, R. 2, Civil P. C. Both the Courts below have repelled this contention. It appears that in 1912 a suit was instituted by Mt. Kaniz Bano against certain defendants and in that suit the deed of gift executed by Mt. Soghra on 15th February 1909, and subsequent transfers made by the donees were challenged. The cause of action for that suit as pointed out by the Courts below was entirely different from the

3. Aftab Ali Khan v. Akbar Ali Khan, 1929 All 529=121 I C 209.

cause of action for the present suit. In that suit it was said that Mt. Soghra had no right to execute the deed of gift dated 15th February 1909, because she did not inherit anything from Hashmat who was a Shia but it was held that the property which Mt. Soghra had gifted came to her possession from Hashmat by virtue of the fact that Hashmat gifted that property in favour of Mt. Soghra. In the present case it has been found by both the Courts below that Hashmat did not make a gift of the present property to his widows. The plea of O. 2, R. 2 also has no force because the cause of action of the former suit is entirely distinct from the cause of action in the present suit.

It was then contended that the equity of redemption now vests in the predecessors of the defendants, they having acquired a title to the said equity of redemption by adverse possession. It may be conceded that an equitable estate as well as a legal estate can become barred by time and an equity of redemption can become by adverse possession the property of a person but I am satisfied that in the present case it cannot be said that the defendants Jagannath and Shiam Lal or their immediate predecessor Muhammad Jan or even the widows of Hashmat have become the owners of the equity of redemption by adverse possession. The property in dispute is in the possession of the usufructuary mortgagees and the mere fact that the names of the widows of Hashmat were recorded in the revenue papers as mortgagors would not justify me in holding that they became the owners of the equity of redemption by adverse possession. I am bound by a Division Bench ruling of this Court in 1916 All 79 (4), in which it was held that a person could not acquire a title by adverse possession to land which was the subject of a usufructuary mortgage and therefore in the possession of the mortgagees, merely because he had managed to get his name recorded in the village papers for a series of years in respect of the mortgaged property.

It was also contended on behalf of the appellant that there should be a presumption in favour of the defendants that Mt. Kaniz Bano agreed to relinquish all claims to Hashmat's property in favour of the widows of Hashmat and reliance was placed on the case of 1923 All 447 (5). It cannot be said that Mt. Kaniz Bano acquiesced in the rights of the widows of Hashmat; indeed we know that in the year 1912 she fought valiantly up till the High Court to assert her rights against the rights of the widows in respect of certain other property; and the case which has been cited relates to the case of co-heirs and ex hypothesi in the present case Mt. Soghra and the other widows of Hashmat are no heirs to Hashmat's property under the Shia Law.

Finally, it was argued on the authority of 1929 All 529 (3) in that this is not a fit case in which a declaratory decree should have been granted to the plaintiff. It is said that in the present case as in that case the heirs of the mortgagee have not been impleaded and the decree passed in favour of the plaintiff would not be effective. In that case the sixty years period for bringing a suit for redemption was about to expire. In the present case a suit for redemption can be brought up till the year 1996, and the plaintiff is not saying that he is entitled to the entire equity of redemption. It is conceded by Mr. Khwaja that the plaintiff is only interested in a portion of the equity of redemption and as the defendants and not the mortgagees are denying the right of the plaintiff and as the plaintiff has still a number of years for filing a suit for redemption a declaratory relief should be given unless barred by any other rule of law, lest the evidence which is available now might become unavailable to the plaintiff by lapse of time. I feel inclined to hold that this is a fit case in which a declaratory decree might be given; moreover, I have got to consider the case from a different aspect also. This is not a case in which a declaratory relief has been refused by the Courts below and I am asked to grant it in appeal; this is a case in which a declaratory relief has been given by the Courts below and I am asked to refuse this relief in appeal. I cannot do so unless I come to the conclusion that the Courts below in the exercise of their discretion have acted in an arbitrary or perverse manner and I am not prepared to hold upon the materials on the record that the Courts below have exercised their discretion in an arbitrary or unjudicial manner.

4 Kunwar Sen v. Darbari Lal, 1916 All 79=34 I C 171=38 All 411.

5. Shakur v. Husaini Bibi, 1923 All 447=71 I C 653.

The result is that I dismiss this appeal with costs. Leave to file an appeal by way of Letters Patent is granted.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 179

BENNET, J.

Ganesh Prasad and *another* — Decree-holder—Applicants.

v.

Ram Karan Shukla — Judgment-debtor Opposite Party.

Ex. Second Appeal No. 1407 of 1933, Decided on 30th October 1934, from decision of Subordinate Judge, Mirzapur, D/- 22nd September 1933.

Civil P. C. (1908), O. 21, Rr 11 & 30 & O. 34, R. 5—Application for execution of money decree by attachment and sale—Part of property hypothecated to decree-holder as security bond — Objection by judgment-debtor that suit on bond should be instituted first is not maintainable.

In an application for execution of simple money decree by attachment and sale of properties, the judgment-debtor filed an objection stating that the judgment debtor had hypothecated a certain house which had been attached in lieu of the amount due to the decree-holder by a security bond and as long as the decree-holder did not file a suit in the Court on the basis of the security bond and obtain a decree for sale and for enforcement of the hypothecation lien, the said house could not be sold in execution of the decree for the amount according to law :

[P 179 C 2]

Held : that it was open to the decree-holder to proceed on the security and if he desired to do so it would very probably have been necessary for him to proceed by a suit. That question was not before the Court and the application filed should be granted. The matter of the security bond was introduced merely by the judgment-debtor and it could not be said that because there had been a hypothecation lien the rights of the decree holder under his simple money decree had ceased to exist : 1933 *All* 269 (*F B*), *Rel on.*

[P 180 C 1]

Shiva Prasad Sinha—for Applicants.

K. N. Malaviya—for Opp. Party.

Judgment.—This is an execution second appeal by a decree-holder whose application for execution has been dismissed by the lower appellate Court which sustained the objection of the judgment-debtor. The decree-holder had a simple money decree against the judgment-debtor dated 10th May 1927. which had been upheld in appeal, the appellate order of this Court in second appeal being dated 12th February 1931. An application was made under O. 21, R. 11. for execution of the decree. The method in which execution was desired in column 10 of the form states:

"The decree-holders say that Rs. 1,693-11-6 may be caused to be realized by attachment and sale of the property given in the inventory attached hereto."

This was the ordinary application for execution of a simple money decree by attachment and sale of the property under O. 21, R. 30. No objection was taken to this application as such but on 10th April 1933, the judgment-debtor filed an objection stating that the judgment-debtor had hypothecated a certain house which had been attached in lieu of the amount due to the decree-holder by security bond, dated 28th March 1928, and as long as the decree-holder did not file a suit in the Court on the basis of the security bond and obtain a decree for sale and for enforcement of the hypothecation lien the said house could not be sold in execution of the decree for the amount according to law. The Court of first instance held that it was the original decree which was under execution and there was no proceeding in execution for realising the security money, and the objection was dismissed. The judgment-debtor made an appeal to the lower appellate Court in which he urged that the amount payable under the decree of the original Court and costs of the appellate Court decrees had merged in the security bond and that no amount remained outside the the security bond which can be realised by the execution Court, and therefore it was necessary for a suit to be brought on the hypothecation bond. The lower appellate Court framed an issue:

"Whether the house could be put to sale in execution of the decree without the decree-holder obtaining a decree under O. 34, R. 5, Civil P. C., in respect of that house by a separate suit."

The lower appellate Court failed to notice in its judgment that the application was an ordinary application for execution of a simple money decree by attachment and sale and it appears to have persuaded itself that the application was one for realisation of the security bond. It held that a suit must be filed for the sale of the property mortgaged by the judgment-debtor and the application in execution was dismissed. In this Court learned counsel for the judgment-debtor relies on the ruling of a Full Bench in 1933 All 269 (1). In that case the appellant sued for a declaration that he was not bound by the first final decree for sale passed

1. Khair-un-nissa Bibi v. Oudh Commercial Bank, Fyzabad, 1933 All 269 =142 I C 510=55 All 346=1933 A L J 142 (FB).

in a mortgage suit. The suit was dismissed and she filed an appeal in the High Court and applied for an order restraining the respondent from executing the decree for sale. The Court ordered an additional security of Rupees 6,000 to be deposited. The appeal was dismissed by this Court and the respondent applied for the sale of the property in execution proceedings. On p. 145 (of 1933 A L J):

"The question to be determined is whether for the realization of security given on 14th May 1926, by Khair-un-nissa Bibi, the Oudh Commercial Bank should have recourse to a suit or whether it can execute any decree or order, and if so, what decree or order."

It was held that the order in question was not executable as an order and the remedy of the respondent lay in the institution of a suit for the sale of the property mortgaged by the appellant. These facts show that the proceeding in question was quite different from the present execution proceeding. In the Full Bench ruling there was no case of a decree-holder asking for attachment and sale in execution of a simple money decree. On the contrary the decree-holder asked for the enforcement of a hypothecation lien on immovable property mortgaged as security in a suit. In the present case it was open to the decree-holder to proceed on the security and if he desired to do so it would very probably have been necessary for him to proceed by a suit. That question is not before me and it is not necessary for me to determine it under the circumstances of this particular case. The question which is before me is whether the decree-holder should be allowed to proceed by way of attachment and sale in satisfaction of a simple money decree as he has applied to do in his application. The matter of the security bond was introduced merely by the judgment-debtor. The objection put forward by the theory that because there had been a hypothecation lien the rights of the decree-holder under his simple money decree had ceased to exist. No authority has been shown by learned counsel for the judgment-debtor for that proposition, nor has he attempted to argue the case before me on those lines. I consider that there is no force in such an objection. Under these circumstances the case stands now that no other objection has been taken to the application for execution. The application therefore is one which ought to be granted. Accordingly I allow this second appeal and I restore the order of the Court of first instance dismissing the objection and directing that execution should proceed. The decree-holder is allowed costs in all Courts.

Learned counsel asks for permission for Letters Patent Appeal, but it is not shown what material there is which he can lay before a Letters Patent Bench. The application is therefore refused.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 180

SULAIMAN, C. J. AND GANGA NATH, J.

Sewa Ram and *others*—Appellants.

v.

Giyan Singh and *others*—Respondents.

Second Appeal No. 809 of 1933, Decided on 25th October 1934, from decision of Addl. Sub-Judge, Muzaffarnagar, D/- 5th September 1933.

Civil P. C. (1908), O. 22, R. 12 — Allahabad High Court amendment is not restrospective — Suit abating after preliminary decree —Unless abatement is set aside, final decree cannot be prepared even if amendment is passed in meantime.

The amendment of O. 22, R. 12 by Allahabad High Court has no retrospective effect. Hence where a suit abates after the preliminary decree is passed before the passing of amendment, no final decree could be prepared unless the previous abatement had been set aside. The mere fact that the law was changed which would now not make a suit abate on the death of a defendant after the passing of a preliminary decree cannot have the effect of automatically reviving all suits which had abated previous to the amendment.

[P 181 C 1]

P. L. Banerji and *K. Masud Hasan*—for Appellants.

Panna Lal—for Respondents.

Judgment.—This is a defendants' appeal in which the only question is whether the suit had abated against two defendants, Kabul Singh and Munshi Lal or not. Admittedly these defendants died in March 1929 and the lower appellate Court has found that there cannot be the least doubt that, at least by April 1931, the plaintiff was aware of their deaths because a notice of a suit brought by the heirs against him was served on him on that date. He took no steps to bring the heirs of the deceased on the record within 90 days of the knowledge of their deaths but waited and long afterwards applied for the preparation of a final decree against their heirs. Objection was at once taken by the latter that the suit had abated as against Munshi Lal and Kabul Singh and no final decree should be prepared. The Court below has overruled this objection on the

ground that R. 12, O. 22, Civil P. C., was amended on 14th February 1931 under which there would no longer be an abatement once a preliminary decree for sale on a mortgage has been passed. But obviously this amendment could not have a retrospective effect. The suit having previously abated as against Kabul Singh and Munshi Lal the preliminary decree as against them was non-existent and no final decree could be prepared unless the previous abatement had been set aside. The mere fact that the law was changed which would now not make a suit abate on the death of a defendant after the passing of a preliminary decree cannot have the effect of automatically reviving all suits which had abated previous to the amendment. We think that the Court below has erred in thinking that the law which applies to the facts of this case was the law which was in force on the date when the application for the preparation of the final decree was made. In our opinion the abatement having taken place under the old law the decree against the two deceased respondents was non-existent and without the abatement having been set aside on a proper application being made within time no final decree can be prepared.

We accordingly allow this appeal and setting aside the decree of the lower appellate Court restore that of the first Court with costs in this Court and in the lower appellate Court. The order as to costs in the first Court will stand.

K.S. *Appeal allowed.*

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* A. I. R. 1935 Allahabad 181

KISCH, J.

Girdhari Lal Agarwala—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. Appeal No. 693 of 1934, Decided on 26th September 1934.

*** Criminal P. C. (1898), S. 491—Release of prisoner temporarily so as to enable him to be at bed side of his sick relative does not amount to remission of unexpired portion of sentence—Subsequent re-arrest and confinement in jail without fresh trial is not illegal.**

The release of a prisoner by the Government temporarily so as to enable him to be at the bed side of his sick relative does not amount to remission of the unexpired portion of the sentence and re-arrest and confinement in jail of such prisoner without fresh trial is not illegal. Nor has the High Court any power to question the manner in which the Government exercises its prerogative of mercy. Even if it had such power, it would ill-become it to do anything that would interfere with the freedom of the Government to act in matters of this kind according to the dictates of humanity. [P 181 C 2]

G. Agarwala—for Applicant.

Judgment.—Mr. Girdhari Lal Agarwala applied as amicus curiae that Pandit Jawahar Lal Nehru at present serving a sentence of imprisonment in Naini Central Jail be set at liberty forthwith.

The application is made under S. 491, Criminal P. C., and Mr. Agarwala contends that Pandit Jawahar Lal is illegally or improperly detained in the said jail within the meaning of Sub-Cl. (b) of that section.

It is admitted that Pandit Jawahar Lal has been convicted by a competent Court and sentenced to undergo 2 years' simple imprisonment. It is difficult to see how any person undergoing a sentence of imprisonment imposed by a competent Court can be said to be illegally or improperly detained in jail.

Mr. Agarwala's contention is that because Pandit Jawahar Lal was released from custody for some days on or about 12th August 1934, to enable him to be at the bedside of Mrs. Jawahar Lal Nehru who unfortunately was seriously ill. The release amounted to a remission of the unexpired portion of his sentence, and his subsequent re-arrest and confinement in jail without a fresh trial and conviction for a subsequent offence was illegal.

It is impossible to accept this contention. Mr. Agarwala argues that there is no provision in law or the Jail Manual which permits the execution of a sentence of imprisonment by instalments. This may be so. But there is no suggestion that the days during which Pandit Jawahar Lal was allowed to remain in his home are not to be considered as part of his sentence. Therefore there is no question of the sentence being carried out by instalments.

Mr. Agarwala further argues that there is no provision either in law or in the Jail Manual whereby prisoners may be allowed to go to their home temporarily for any purpose. This is so. But neither is there any provision of law against it.

I do not think that this Court has any power to question the manner in which the Government exercises its prerogative of mercy. Even if this Court had such power, it would ill-become it to do anything that would interfere with the freedom of the Government to act in matters of this kind

according to the dictates of humanity. The application is dismissed.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 182

BENNET AND BAJPAI, JJ.

(*Syed*) *Ibne Ali* — Judgment-debtor—Appellant.

v.

(*Sahu*) *Dharam Kirti Saran*—Decree-holder—Opposite Party.

First Appeal No. 102 of 1933, Decided on 24th October 1934, from order of Addl. Sub-Judge, Moradabad, D/- 2nd May 1933.

(a) Civil P. C. (1908), O. 21, Rr. 69 (1) and 90—Sale adjourned — Omission to mention hour is not material irregularity.

Order 21, R. 69 (1) only provides that where the Court adjourns a sale, the Court should specify the day and hour, but the rule does not provide that the officer making an adjournment should also specify the hour Presumably the reason is that for the officer, the Allahabad High Court has already fixed the hour in General Rules (Civil), Vol. 2, Appendices, p. 3, Appendix 1; further this omission to specify an hour is not a material irregularity : 1933 *All* 546, *Rel on.*

[P 182 C 2]

(b) Civil P. C. (1908), O. 21, R. 90 — Objection that sale proclamation was not posted in locality and beat of drum was not properly made — Negative evidence let in by judgment-debtor — Evidence to contrary by decree holder—Test as to genuineness of objections is to see whether judgment-debtor is willing to purchase property and to make deposit.

Where the objections raised in an application to set aside a sale were that the sale proclamation was not posted at the locality and beat of drum was not properly made, and judgment-debtor relied on four witnesses who stated that they did not see the proclamation in the villages and that they did not hear in the village beat of drum, but there was evidence to the contrary by the decree-holder :

Held : that negative evidence of this sort proved very little because the witnesses may have been unobservant or may not have been in a position to make observations. The acid test by which the genuineness of such objections is usually ascertained is to see whether there is evidence produced for the judgment-debtor that he is willing to purchase the property and make a deposit.

[P 183 C 1]

M. A. Aziz—for Appellant.

S. N. Sethi—for Opp. Party.

Judgment.—This is a first appeal from order by a judgment-debtor. The appellant made objections against a sale of his property in execution of a civil Court decree. The sale was conducted at the Collector's office by the revenue Court amin. The first objection taken is that the nine items of property situated in three different villages and two different parganas were sold in one lot contrary to the terms of the sale proclamation. It is a fact that the sale proclamation set out that these nine items of property should be sold separately. The lower Court states that the sale officer's note of the date of sale, 29th March 1932, is that in the midst of the public auction gathering the property was on that date first put for sale in separate lots and subsequently all together. Learned counsel for appellant argued that there was no such note on the record and he referred to the documents for each sale. We have however ascertained that there is such a note in such terms. Two witnesses were produced for the judgment-debtor who stated that they were prevented from purchasing particular shares, but they admit that they did not ask the sale officer to sell the shares separately. Further it is not shown that the villages are not adjacent, we consider that the appellant has failed to prove that there was any irregularity on this account.

The next argument taken is that in the order of adjournment no hour is prescribed at which the sale should take place. The sale was fixed in the sale proclamation for 21st March 1932. On that date the sale officer noted that no time was left as time had been taken up with the sale of other properties and therefore the sale of this property was adjourned to 29th March 1932. He did not fix an hour for the adjourned sale. Learned counsel relies on the provision in O. 21, R. 69 (1) which states:

"The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may, in his discretion, adjourn the sale, recording his reasons for such adjournment."

Learned counsel fails to note that this sub-rule, only provides that where the Court adjourns a sale the Court should specify the day and hour, but the rule does not provide that the officer making an adjournment should also specify the hour. Presumably the reason is that for the officer this Court has already fixed the hour in General Rules (Civil), Vol. 2, Appendices p. 3, Appendix 1, "Sale of land other than ancestral in execution of civil Court decrees" R. 2, which states:

"The sale shall commence at noon at all reasons in all Districts."

It has also been held in 1933 All 546 (1) that this omission to specify

1. Chuttan Lal v. Muhammad Ikram Khan, 1933 All 546=143 I C 673=55 All 519.

an hour is not a material irregularity. Further we may note that learned counsel did not take this objection before the lower Court.

The last objection that has been argued in ground No. 1, that the sale was not properly proclaimed. The ground does not set forth in what way the sale was not properly proclaimed, but learned counsel states that he means that the sale proclamation was not affixed in the different villages and the drum was not beaten. These objections are somewhat vaguely put in the application of objection to the lower Court which states that sale proclamation was not posted at the locality and beat of drum was not properly made. No specification is made as to what is meant by "the locality" and it is not stated that the drum was not beaten, merely that it was not properly beaten. However learned counsel has now made clear what his client intends. He relies on four witnesses who state that they did not see the proclamation in the villages and that they did not hear the beat of drum. Negative evidence of this sort proves very little because the witnesses may have been unobservant or may not have been in a position to make observations. There is evidence to the contrary of three witnesses for the decree-holder. No witness has been produced for the judgment-debtor to state that he is willing to purchase any item of the property and is willing to make a deposit and has made an application of that nature to the execution Court. This is the acid test by which the genuineness of such objections is usually ascertained. We consider that no case has been made out for the appellant and that the objections are merely of a frivolous nature. The property was sold for Rs. 38,000, which is a considerable sum, and no evidence has been brought to our notice to show that this sum was insufficient under the present circumstances of agricultural sales. Under these circumstances we dismiss this first appeal from order with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 183

SULAIMAN, C. J. AND BAJPAI, J.

Lachhoo—Plaintiff—Appellant.

v

(*Firm*) *Munnilal-Babu Lal* — Defendant—Respondent.

Letters Patent Appeal No. 36 of 1933, Decided on 5th October 1934.

(a) Civil P. C. (1908), S. 47 and O. 21, R. 58 — Legal representative of deceased judgment-debtor brought on record —Objection to attachment by him that property belongs to him is under S. 47 and not under O. 21, R. 58.

Where a person is brought on record as the legal representative of a deceased judgment-debtor and he objects to the attachment of property in execution of decree on the ground that it belongs to him, the objections must be deemed to have been made under S. 47 and not under O 21, R. 58, which deals only with questions arising between the decree-holder and strangers to the decree : *Case law referred.* [P 184 C 1]

(b) Civil P. C. (1908), S. 47 — To see whether application comes under S. 47, substance of application must be examined and not heading given to it by party—Pleadings.

In considering whether an application is under S. 47 or not, the Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by a party : 1933 *Mad* 130, *Rel on.* [P 185 C 1]

(c) Civil P. C. (1908), O. 21, R. 58—Procedure to be followed under should not be summary.

Under O 21, R. 58, the procedure to be followed is not a summary procedure, but the Court proceeds to investigate the claims and objections and cannot shut out any party from producing evidence. [P 185 C 2]

S. C. Das—for Appellant.

S. B. L. Gaur—for Respondent.

Judgment.—This is an appeal under S. 10, Letters Patent, against the decision of a learned Single Judge of this Court. After having heard the parties, we have come to the conclusion that the decision is correct and this appeal ought to be dismissed.

There is no dispute about the facts and they may be stated briefly. The defendant to the present suit obtained a decree against the firm of Chiranji Lal Babu Lal. Both parties were dissatisfied with the decree passed by the first Court and two appeals were filed. The firm of Chiranji Lal-Babu Lal had been sued through Babu Lal who died after the decree of the first Court during the pendency of the appeal. No efforts were made in any of the appeals to bring the legal representatives of Babu Lal on the record. We have not been told as to what the result of the appeals was, but this much is clear that the defendant to the present suit even after the decision of the appeal had some sort of a decree against the firm of Chiranji Lal-Babu Lal and in execution of that decree he applied to have the names of Lachhmi Narain alias Lachhoo and Mt. Asharfi substituted in place of Babu Lal. Lachhmi Narain objected, but his objection was disallowed and he was brought on the

record as a legal representative of Babu Lal. There was an appeal against this decision. Subsequently the decree was transferred to Hathras for execution and some property in the hands of Lachhmi Narain was attached. Lachhmi Narain objected to the attachment of the property on the ground that it was the personal property of Babu Lal and not the property of the firm and that it had come into the possession of Lachhmi Narain by survivorship. These objections were headed in the execution department by Lachhmi Narain as being under S. 47, Civil P. C. But the heading was amended later and they were described as under O. 21, R. 58, Civil P. C. The learned Munsif in whose Court the objections were filed, allowed the amendment, but when the decree-holder appeared to reply to the objections, he averred that the objections were really under S. 47, Civil P. C. The learned Munsif however treated them under O. 21, R. 58. Civil P. C., and disallowed the objections of Lachhmi Narain.

Lachhmi Narain then brought the present suit under O. 21, R. 63, Civil P. C., and this suit in spite of the objections of the defendant, was decreed by the Courts below. The second appeal filed by the defendant was allowed by a learned Single Judge of this Court who held that the suit was not maintainable. There can be no doubt that when Lachhmi Narain made objections to being impleaded as a representative of Babu Lal, deceased, a question arose between him and the decree-holder as to whether Lachhmi Narain was or was not the representative of the judgment-debtor and that question had to be decided under Cl. (3), S. 47, Civil P. C. The decision of the execution Court that Lachhmi Narain was the representative of the judgment-debtor was a decision under S. 47, Civil P. C., and was appealable; but no appeal was preferred by Lachhmi Narain. The position therefore was that Lachhmi Narain became the representative of the judgment-debtor and at the time Lachhmi Narain filed objections at Hathras when some property in his hands was attached, the objections must be deemed to have been made under S. 47 and not under O. 21, R. 58 Civil P. C., which deals only with questions arising between the decree-holder and strangers to the decree. Lachhmi Narain himself had originally headed his objections under section 47, Civil P. C.; the decree-holder all along protested that the objections were under S. 47, Civil P. C., and it was Lachhmi Narain who got his objections amended, may be that the learned Munsif also thought that the objections were under O. 21, R. 58, Civil P. C., but this does not in any way alter the nature of the objections and the decision of the learned Munsif on those objections must be deemed to be a decision under S. 47, Civil P. C., against which an appeal lay and a regular suit is not maintainable.

Reliance was placed by Lachhmi Narain's counsel on 1931 All 65 (1), but the facts of that case were entirely different, because there nobody was brought on the record as the legal representative of the judgment-debtor, whereas in the present case Lachhmi Narain, the plaintiff, was brought on the record as the legal representative of the deceased Babu Lal and from that stage onwards all questions arising between Lachhmi Narain and the decree-holder in connexion with the execution satisfaction or discharge of the decree must be deemed to be questions arising and capable of determination under S. 47, Civil P. C.

It was next contended that as Babu Lal died during the pendency of the appeal and no legal representative was brought on the record, the appellate decree must be considered to be a nullity. On this point as stated before learned counsel for Lachhmi Narain has not been able to inform us as to whether the decree of the trial Court was modified in any way by the appellate Court or not and it may be that even if the decree of the appellate Court be deemed to be a nullity the decree of the trial Court remains good, and in the present state of the record, it is not possible for us to say as to whether the decree-holder is trying to execute any decree other than what was given by the trial Court. There is therefore no force in this contention. The main argument of the plaintiff-appellant however is that the Court treated the objections of Lachhmi Narain in the execution department as objections under O. 21, R. 58, Civil P. C., and therefore Lachhmi Narain is entitled to file a suit under O. 21, R. 63, Civil P. C. Learned counsel relies on the case of 1924 All 144 (2). It was held there that:

"The right of appeal does not depend on what a Court ought to have done but on what it actually did and where therefore, a Court dismisses

1. Ram Narain Kishen Dayal v. Ram Prasad, 1931 All 65=130 I C 712=52 All 964.
2. Nasir Khan v. Itwari, 1924 All 144=74 I C 905=45 All 669.

an appeal categorically on the merits an appeal will lie although the Court ought in the circumstances to have dismissed it not on the merits but for default of appearance by the appellant."

This is really a converse case and it does not help the appellant. This is only an authority for the proposition that where the Court under a mistake as to the nature of the proceedings before it decides the matter in a particular manner and if that decision by reason of the Court deciding it in a particular manner is appealable then an appeal would lie. If for instance an objection which should really be an objection under O. 21, R. 58, is filed as an objection under S. 47, Civil P. C., and the Court decides the objections, treating them under S. 47, Civil P. C., then an appeal would lie although the objections should really have been treated under O. 21, R. 58. In the present case the appellant wants us to hold that because the execution Court treated the objections under O. 21, R. 58, a regular suit is maintainable by the aggrieved party. This cannot be done because the right of suit depends upon the true nature of the investigation that was conducted in the execution department and there can be no doubt that the objections of Lachhmi Narain could only be under S. 47, Civil P. C. In 1929 Pat 141 (3), it was held that:

"The nature of the claim preferred will be determined by the character of the claimant and not by the label used by the party and the jurisdiction to try the claim cannot also be affected by a mere misdescription of the character of the claim."

The same view was taken by the Madras High Court in 1933 Mad 130 (4) where it was held that:

"In considering whether an application is under S. 47 or not, the Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by a party."

Similar observations occur in the case of 1931 Rang 314 (5) and in 1925 All 594 (6), it was held that:

"Where a person was brought upon the record as a representative of the deceased judgment-debtor and he set up his own right to the property and filed objection under O. 21, R. 58, the objections must be deemed to have been filed under S. 47, Civil P. C."

We are therefore clearly of the opinion that the objections of Lachhmi Narain must be deemed to have been decided under S. 47, Civil P. C. It was then argued that under S. 47, Cl. (2) the Court may treat a proceeding under this section as a suit or a suit as a proceeding and that we should treat the present suit as a proceeding under S. 47, Civil P. C. There is no objection to converting the present suit as a proceeding under S. 47, Civil P. C., but that will not be of any practical advantage to the plaintiff because he would at once be met by the plea of res judicata. The question that he wants to be decided in the present suit has already been decided against him in an earlier execution proceeding and no Court can now try a matter which was directly and substantially in issue in a former proceeding between the same parties. In this connexion it was argued that the former decision of the learned Munsif was a summary decision and it cannot be said that the Court had heard and finally decided the controversy between the parties. It is a mistake to say that the former decision was a summary decision and was not an adjudication which would have the force of res judicata. Even under O. 21, R. 58, the procedure to be followed is not a summary procedure, but the Court proceeds to investigate the claims and objections and cannot shut out any party from producing evidence. In any event, it was the duty of the objector to have put forward before the Court all the evidence available to him and to have insisted that his claim be properly decided he should indeed, have insisted on his objection being treated under S. 47, Civil P. C., and should not have got them amended.

It was finally argued that the Courts below decided the present suit in favour of the plaintiff on the merits and therefore justice is entirely with him and our decision has the effect of defeating a just cause. We have got to administer the law as it stands and cannot be influenced by other considerations. The position is that the plaintiff instead of filing the present suit ought to have filed an appeal against the decision of the Munsif in the execution department. It may be that even now Lachhmi Narain may be able to satisfy the Court where an appeal lay against the decision of the learned Munsif in the execution case that he was misled either by the wrong advice of counsel or by the attitude of the learned Munsif and it will be for the appellate Court to decide whether a case has been made out for

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3. Madho Bibi v Hazari Mal, 1929 Pat 141=115 I C 695=8 Pat 717.
4. Bullayya v. Subbayya, 1933 Mad 130=140 I C 779.
5. Maung Ba v. Maung Tha Yan, 1931 Rang 314 =135 I C 328.
6. Jhunni Lal v. Natha Lal, 1925 All 594=87 I C 287.

admitting an appeal which otherwise is barred by time under S. 5, Limitation Act. But it is not possible for us to help the plaintiff in the present proceedings. The result is that we dismiss this appeal with costs.

K.S. *Appeal dismissed.*

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BENNET, J.

Secy. of State—Judgment-debtor—Applicant.

v.

Raghuber Singh— Decree-holder—Opposite Party.

Execution First Appeal No. 22 of 1934, Decided on 1st November 1934, from decision of Sub-Judge, Mainpuri, D/- 11th December 1933.

*** Torts— Damages- Prospective— Prospective damages on tort must be given in decree itself and cannot be determined in execution—Order of Court in decree that it will be determined in execution does not give executing Court jurisdiction to determine it—O. 20, R. 12 has no application—Civil P. C. (1908), O. 20, R. 12 - Execution.**

In an action for damages on tort, it is within the jurisdiction of the trial Court to award damages for the injury, etc., which the plaintiff has suffered up to date and it is also within the jurisdiction of the trial Court to pass a decree for prospective damages, i. e., damages which would include probable and future injury which would result to the plaintiff from the wrong act of the defendant. More than one action will not lie on the same cause of action and therefore prospective damages must be ascertained and awarded at the time of the trial, and it cannot be inquired into in execution proceedings. The mere fact that the decree directs that it will be determined in execution proceedings cannot vest the executing Court with any jurisdiction which is not given to it by the Civil Procedure Code, or by any other law. O. 20, R. 12 does not apply to such cases as it is connected with only property and cannot include damages to person : 1921 *All* 118 (*F B*) and 1918 *Cal* 742, *Rel on.*

[P 186 C 1, 2; P 187 C 1, 2]

Muhammad Ismail—for Applicant.

B. S. Darbari - for Opposite Party.

Judgment.—This is an execution first appeal by the Secretary of State for India in Council judgment-debtor. The facts are that the opposite party is a decree-holder in a suit which was brought for Rs. 7,000 damages on account of physical injury sustained by the opposite party when driving a motor lorry on a level crossing and colliding with an express train. The decree in question was passed by a Subordinate Judge. It was within the jurisdiction of the Subordinate Judge to award damages for the injury, etc., which the plaintiff had suffered up to date and it was also within the jurisdiction of the trial Court to pass a decree for prospective damages, i. e., damages which would include probable and future injury which would result to the plaintiff from the wrong act of the defendant. It is laid down in Underhill's Law of Torts, 3rd (Indian) Edition, in Art. 38, "Prospective Damages," p. 115, that more than one action will not lie on the same cause of action and therefore prospective damages must be ascertained and awarded at the time of the trial. The trial Court however did not comply with this provision of law and instead of granting prospective damages the trial Court passed an order that as for further damages for the period following December 1930:

"the matter would be taken up in execution proceedings. It might be then found that the plaintiff's condition would improve or that motor vehicle drivers could be had cheap or he might have been provided with a job in the Railway Department."

The order stated:

"I decree the claim for Rs. 932, with proportionate costs minus defendant's costs in proportion to the claim dismissed and provide that the defendant would be liable to pay such further damages with costs as the plaintiff may prove in the execution department as suffered after December 1930, owing to his suffering caused by the incident concerned. The rest of the claim is dismissed."

Neither party made any appeal against the decree of the Subordinate Judge. It was open to either party to object in appeal that this provision in regard to prospective damages was illegal. Neither party did so. The decree-holder has now made an application in the execution department for the ascertainment of damages for the period from December 1930, up to 19th January 1933, and he claims a sum of Rs. 40, for medical treatment and Rs. 1,000 as damages at the rate of Rs. 40 per mensem on the allegation that he still has trouble with his eyes and is unfit to be a motor driver. The lower Court has made an inquiry and held that the decree-holder is entitled to Rs. 382-8-0 damages. This amount is ascertained by taking Rs. 25 per mensem as the wages which the decree-holder might have earned as a motor-lorry driver if he had not been injured and deducting Rs. 10, per mensem which he is able to earn at present. The Civil Surgeon gave evidence that the decree-holder is of sound mental condition and can work as a mechanic, cleaner or shop-keeper, that there is no atrophy of any muscle of any part of his body, that he cannot do ordinary labouring manual work because he has

got some stiffness in his right wrist and left knee and that he is not fit to be a motor driver as he has got photophobia and lactrymation and his distant vision is not yet normal. The objection has been taken in first appeal that the lower Court had no jurisdiction to determine the amount of damages suffered by the plaintiff after passing the original decree and that there was no executable decree before the lower Court to execute and that the lower Court could not go behind the decree. Further that the amount of profits awarded was excessive. Both parties agreed in argument that the decree as it stood was final. That being so recourse cannot be had to O. 20, R. 12, which provides for an ascertainment in regard to future mesne profits from the institution of the suit until delivery of possession to the decree-holder. In that case there is a preliminary decree passed and later a final decree. The lower Court did not adopt this method of procedure of a preliminary and a final decree.

It might conceivably have been open to the lower Court to do so in view of the definition of "decree" in S. 2 (2) and its explanation in the Civil Procedure Code. I may also note that the provision in O. 20, R. 12, is only in regard to mesne profits and under the definition of mesne profits in S. 2 (12), the expression is connected with property and cannot include damages to the person. Learned counsel for the respondent stated that the application for execution would come under O. 21, R. 10. That rule merely states that an application may be made for execution of any decree. Learned counsel was not able to refer to any rule of O. 21, which would grant an execution Court jurisdiction to hold an inquiry as to the amount of damages which had arisen after the passing of a decree. The Civil Procedure Code, following the English procedure on the point contemplates that a decree for damages should be final and should state the full amount of damages to be granted. It is only in the case of mesne profits that there is an exception to this rule. In the case of the English procedure no doubt the fact that damages are assessed by a jury prevents any procedure of a further inquiry as to the amount of prospective damages after the case has been decreed. I consider that the lower Court had no jurisdiction to make any such inquiry in execution. It was contended for the respondent that the fact that the decree directed that the matter would be taken up in execution proceedings was an order which would endow the execution Court with jurisdiction. I do not consider that a direction of that nature in a decree can invest a Court with jurisdiction which is not given to it by the Civil Procedure Code or by any other law. This view is also strengthened by a Full Bench ruling in 1921 All 118 (1). That was a case in which a decree had been passed directing the sale of an occupancy holding. This direction was contrary to the provisions of S. 20, Agra Tenancy Act of 1901. It was held by the Full Bench that the mere provision in the decree could not endow an execution Court with jurisdiction to do something which was contrary to law and therefore that the execution Court was barred from executing this portion of the decree. I consider that that principle will govern the present case. The provision for the future inquiry in execution proceedings in a decree is a provision which is contrary to the procedure of the Civil Procedure Code. Therefore the execution Court is barred from adopting that procedure. I may also refer to a ruling reported in 1918 Cal 742 (2), where a Bench held that a decree directing that mesne profits should be ascertained in the execution department was a decree which was not capable of execution because the Code did not provide for any such inquiry, the provision in the Code being under O. 20, R. 12, that the inquiry should be made by the trial Court.

For these reasons I allow this first appeal with costs in both Courts and I dismiss the application for execution.

K.S. *Appeal allowed.*

1. Katwari v. Sita Ram Tiwari, 1921 All 118=63 I C 264=43 All 547 (F B).
2. Ganga Prasad v. Hemangini Debi, 1918 Cal 742=37 I C 997.

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NIAMATULLAH AND COLLISTER, JJ.

Sri Krishna Dutt Dube — Plaintiff — Appellant.

v.

Mt. Ahmadi Bibi and *others* — Defendants—Respondents.

First Appeal No. 471 of 1930, Decided on 28th September 1934, from decision of First Addl. Sub-Judge, Jaunpur, D/- 26th July 1930.

(a) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4 — Accretion on one man's land from neighbour's land — If it can

be identified, latter will be deemed to continue to be owner.

Under S. 4 if the land, which has gradually accreted to the estate of one of the riparian proprietors, can be identified as the land belonging to another such proprietor, the latter shall be deemed to continue to be the owner thereof in spite of gradual accretion: 1927 *P C* 89, *Foll.*; and 1934 *P C* 17, *Ref.* [P 190 C 2]

(b) Evidence Act (1872), Ss. 33 and 13 — Boundary dispute between two villages — Proceedings before Settlement Deputy Collector are not judicial proceedings and as such statement made before Settlement Deputy Collector are not admissible under S. 33 in subsequent judicial proceeding regarding existence of custom — But they are admissible under S. 13 to see whether report of Settlement Officer is based on evidence.

Section 33, Evidence Act, makes evidence given by a witness in 'a judicial proceeding' admissible in evidence in a subsequent judicial proceeding, where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence, etc. The proceedings before a Settlement Deputy Collector cannot be considered to be 'judicial proceedings' where the dispute is in respect of the boundary between two villagers for fiscal purposes, and therefore S. 33, Evidence Act, will not make the statements made before him admissible in proof of the custom subsequently sought to be made out in judicial proceeding. At the same time, the statements cannot be excluded altogether. They may not be admissible by themselves as evidence of the custom in controversy, but they can be looked into to assess the value of the Deputy Collector's report and of the Settlement Officer's order which recognized the existence of the custom in question. It cannot be doubted that the report and the order are admissible in evidence under S. 13, Evidence Act, as recognizing the custom now in dispute. To ascertain whether the recognition then extended to the custom was based on substantial evidence, it is permissible to refer to the evidence on which it was based. The statements are not evidence by their own force on the question of custom but only furnish evidence of the materials on which the Settlement Authorities based their view. [P 192 C 1,2]

(c) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 2—Oral evidence as to existence of custom by witness speaking from personal knowledge for over 20 years—Material corroboration by documentary evidence —Custom held proved.

An immemorial custom within the meaning of S. 2, Bengal Regulation 11 of 1825 is established on the evidence of witnesses who speak from their personal knowledge of what happened during 20 years and from hearsay as regards remote past. Where oral evidence of that description is very materially corroborated by documentary and circumstantial evidence, custom can be said to be proved to exist: 1925 *P C* 213 and 1934 *All* 993, *Rel on.* [P 194 C 2]

(d) Alluvion and Diluvion—Submersion — Person in whom title is vested should be deemed to be in constructive possession during period of submersion.

During the period of submergence, a person who has the title vested in him should be deemed to be in constructive possession of the land under water. This state of constructive possession should, on that hypothesis, hold good for something every year, so that he should be deemed to have been in possession every year before the institution of the suit: 29 *Cal* 518 and 1923 *All* 75, *Rel on.* [P 195 C 1]

P. L. Banerji, *Gopalji Mahrotra* and *Kalim Jafre*—for Appellant.

K. N. Katju and *K. Verma* — for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of possession and mesne profits in respect of 78.78 acres of land, alleged to form part of the plaintiff's mahal in village Birampur Kham in the district of Jaunpur. Defendant 1 is a "mutawalli" of a certain "wakf" to which villages Gaura and Bhelpur belong. The other defendants, 55 in number, are tenants in cultivating possession of the land in dispute. The suit was dismissed by the lower Court, and the plaintiff appeals.

The plaintiff's village Birampur Kham lies on the northern bank of river Gomti. The defendants' villages Gaura and Bhelpur, lie on the south with a westerly direction. The plaintiff's case, as set out in his plaint, is as follows:

The land in dispute lay on the north of river Gomti before 1894, and was an intergral part of village Birampur Kham. The river was flooded in the year 1894, and since that year gradually shifted to the north throwing up land on the south adjoining the defendants' villages Gaura and Bhelpur. This was in course of a number of years the river slowly receding to the north, throwing up land on the south, with the result that the land in dispute which was situate before 1894 on the north of the river, was thrown up on the south adjacent to villages Gaura and Bhelpur. It is clearly stated in the plaint that the river changed its course slowly and gradually. The plaint does not show how long this process of gradual accession on one side and loss on the other continued; but from the other evidence in the case which will be hereafter mentioned it appears that it must have continued till, at least, 1906. The plaint goes on to assert that the land in dispute was not culturable, being covered with sand and certain plants of spontaneous growth for a considerable length of time, and the tenants, parts of whose holdings were submerged and were thrown up on the south, surrendered those parts and

discontinued paying rent to the plaintiff. According to the plaintiff, the defendants took possession of the lands in dispute in 1921, when a suit relating to the entire estate of the plaintiff was pending, and the plaintiff could not, owing to his pre-occupations, institute a suit for possession earlier than he did. The suit was instituted on 2nd July 1928. On these allegations the plaintiff claimed possession of the entire land which is indicated in a map prepared by the Commissioner, which also shows the present bed of the river and its course in 1894.

Separate written statements were filed by defendant 1 and other defendants; but their defences are more or less identical. It was pleaded that the river Gomti had from ancient times been the boundary between the village Birampur on one side and villages Gaura and Bhelpur on the other, and that according to an immemoral custom the southern half of the bed of the river appertained to the defendants' villages and the northern half to the plaintiff's. According to the aforesaid custom, all land lying to the south of the deep stream belongs to villages Gaura and Bhelpur and that on the north of it to the plaintiff's village Birampur. Whenever any land is added by the river changing its course—whether the change is gradual or sudden—the deep stream continues to be the boundary between the plaintiff's village and the defendants' villages. The defendants also pleaded that the land in dispute had gradually accreted to their villages between the years 1885 and 1910 and that the plaintiff had never been in possession of any part of that land after 1910 since when the defendants had been cultivating the same. On these allegations the defendants put forward two distinct pleas: (1) They claimed the land in dispute to be theirs, as it had been acquired by them by gradual accretion within the meaning of Regulation 11 of 1825, and (2) apart from the aforesaid regulation, the defendants allege to have become entitled to the land by virtue of the custom above referred to, under which all land to the south of the Gomti and adjacent to villages Gaura and Bhelpur belonged to the proprietor of these villages. The defendants also pleaded limitation and adverse possession. A plea of misjoinder was also put forward, but it was overruled by the lower Court and has not been reiterated in this Court.

Three main questions emerge from these pleadings: (1) Whether the land in suit was so added to the defendants' villages by gradual accretion as to become their property under Regulation 11 of 1825? (2) Whether the custom under which all land lying to the south of the river Gomti and adjacent to villages Gaura and Bhelpur belongs to the proprietor of those villages has been established? and (3) Whether the plaintiff's claim is barred by limitation and adverse possession of the defendants?

The learned Subordinate Judge found on evidence that the land in dispute accreted to villages Gaura and Bhelpur slowly and gradually, but that in so far as it can be identified as land once lying to the north of the Gomti and being an integral part of village Birampur, the defendants are not entitled to it under Regulation 11 of 1825. On the question of custom the learned Subordinate Judge found in favour of the defendants, basing his decision on oral and documentary evidence. On the question of limitation the learned Judge held that land lying north-east of a dotted line appearing in the plan prepared by the Commissioner should be considered to have been in the plaintiff's possession within limitation and as to that land the defendants cannot be considered to have acquired any title by adverse possession. As regards that part of the land in dispute which is shown in the Commissioner's map on the south-west of the dotted line, the finding of the learned Subordinate Judge is that the land has been capable of actual possession for a considerable length of time—at least 20 years before the institution of the suit—and that the defendants have been in actual possession thereof openly and adversely. Accordingly the plaintiff's claim with regard to such land has been held to be barred by limitation and adverse possession of the defendants.

In appeal the above three questions have been argued and the findings of the learned Subordinate Judge have been traversed.

The finding of the learned Subordinate Judge that the land in dispute was thrown up on the south of Gomti gradually and in course of a number of years cannot be seriously challenged. Indeed, it is admitted in the plaint itself that this was so. An attempt was made by the plaintiff in course of evidence to resile from the position deliberately taken up in the plaint, and most of the plaintiff's witnesses stated

that there was a sudden change in the course of the river in or about 1894 and the land in dispute was shifted to the south of the deep stream. The learned Subordinate Judge did not believe the plaintiff's witnesses on this point. The learned advocate for the plaintiff did not contend before us that the accretion in question was anything but gradual, as stated in the plaint. It is enough for us to quote the finding of the learned Subordinate Judge on this part of the case, as it has not been seriously challenged before us. It is as follows:

"Plaintiff says that this action of the river was abrupt and sudden, while the defendants say that it was slow and gradual. Let us see which party is correct. Plaintiff's allegations made in para. 4 of the plaint are very material on this point. He says that the river began to erode its northern bank in the floods of 1894, then she began to assume gradually a northern trend and in different years she left land towards south (which is in suit) with the result that she is now flowing in her present channel. Again in para. 5 of the plaint (it) is alleged that the change in the river course was followed by a corresponding formation of portions of land in suit. Further on, being questioned by the Court on 31st July 1929, the date of the settlement of issues, B. Bankey Lal, plaintiff's Pleader, stated that after the floods of 1894, the river began to erode land gradually and the land of plaintiff's mahal began to appear towards south with the advance of the river towards north by the process of encroachment. In view of the above clear admissions of fact made by the plaintiff, there does not remain any doubt that the change in the course of the river was slow and gradual but not sudden and abrupt. Plaintiff had produced a number of witnesses to swear that the change was sudden but I am not going to believe them on the face of the above clear admissions. Some of these witnesses also say that the process was a slow and gradual one. Dalsingar Lal (P. W. No. 2) says that the river has taken its present course after gradual erosion. Ajodhya Prasad (P. W. No. 1) says that the 1st and 2nd changes in the river in years in 1894 and 1915 had been abrupt but subsequent to that she made only gradual changes. Under these circumstances it is not necessary to discuss defendants' evidence when plaintiff's own evidence establishes gradual erosion and slow formation of new land."

But the question arises whether, apart from custom, the defendants can be considered to have acquired a right to the land in dispute, which has been slowly and gradually added to his village by the action of the river. The answer to this question depends upon S. 4, Bengal Regulation 11 of 1825, which provides that:

"When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zamindar or other superior land-holder, or as a subordinate tenure by any description of under tenant whatever. . . . . .

The above rule shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or made by the violence of stream separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity and preventing the recognition of the land so removed."

These rules are subject to S. 2, under which any proved custom in derogation of the general rule enacted in S. 4, is to prevail. The first part of S. 4 creates an impression that in cases of gradual accretion the proprietor, to whose land alluvial land is added, becomes the owner of such land, provided the accretion has been gradual. There is no reference in that part of the rule to the condition that the land should be unidentifiable. The absence of this condition is prominently mentioned in the latter part of the rule which deals with cases of sudden change by which large areas are separated from one estate and added to another. The interpretation which has been placed by their Lordships of the Privy Council on the first part of S. 4, however, shows that, if the land, which has gradually accreted to the estate of one of the riparian proprietors, can be identified as the land belonging to another such proprietor, the latter shall be deemed to continue to be the owner thereof in spite of gradual accretion. In a recent case 1927 P C 89 (1), it was found as a fact that the process of alluvion, by which the land then in suit was formed adjacent to the defendant's land was "slow, gradual and imperceptible."

Their Lordships nevertheless held that the lands continued to belong to the former proprietor as they could be recognised by careful measurement. Their Lordships reviewed earlier cases including the well known case of 13 M I A 467 (2). They approved certain observations occurring in those cases one of which is as follows:

"We are of opinion that the word 'gained' in S. 4, Regulation 11 of 1825, does not extend to cases of land washed away and afterwards reformed upon the old site which can be clearly recognized. . . In such a case we think the land formed by accretion on the old recognized site remains the property of the owner of the orginal

1. Keshava Prasad Singh v. Secy. of State, 1927 P C 89=101 I C 1=54 I A 156=6 Pat 481 (P C).
2. Lopez v. Muddun Mohun Thakoor, (1869) 13 M I A 467=14 W R 11=2 Suther 336=2 Sar 594 (P C).

site. The principle is that where the accretion can be clearly recognized as having been reformed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner."

An argument to the contrary addressed to their Lordships in which it was contended that the old proprietor lost his proprietary right in consequence of gradual accretion to the proprietor to whose land it accreted was not accepted. As against this, our attention has been drawn to a later case reported in 1934 P C 17 (3), in which their Lordships are reported to have held that:

"The principle, that gradual accretion enures to the land which attracts it, is one that has been recognized from very early times. The rule is of general convenience and security and is necessary for the mutual adjustment and protection of property. The general principle of accretion applies even where the former boundaries of the land on the waterfront are known or capable of ascertainment."

The case went up in appeal from Burma where Regulation 11 of 1825 is not in force. At the same time it must be admitted that their Lordships based their decision on general principles and English cases which are also partly the basis of decision in 1927 P C 89 (1) following as it does 13 M I A 467 (2) and other similar cases. For the purpose of the case before us which is governed by Regulation 11 of 1825 we think that the interpretation placed by their Lordships on S. 4 of that Regulation in the Dumraon case must be accepted.

A possible mode of reconciling the apparently conflicting observations made by their Lordships of the Privy Council in the two cases above referred to may be found in the fact that the Rangoon case was between the Crown and subject. In 13 M I A 467 (2) their Lordships observed that:

"It would certainly seem that something more than mere reference to the acquisition of land by increment by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another. In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might take in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the state, a public river belonging to the state; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable."

Where the bed of the river belongs to the Crown and the land on the one side of it also belongs to the Crown as in the Rangoon case any accretion to the land of the proprietor on the other side is at the expense of the state and the consideration mentioned in the above observation may not hold good in such a case.

In view of these authorities we think that the learned Subordinate Judge rightly held that the disputed land having been identified to have been part of Birampur, the defendant cannot claim it only because it has gradually accreted to their villages Gaura and Bhelpur.

The most important point in the case is whether the defendants have succeeded in establishing the custom set up by them. They rely upon the proceedings before the Settlement Authorities in 1880 in respect of a certain land which had been transferred from the northern bank of Gomti to the southern bank. It is not disputed that that land had also formed part of the plaintiff's village Birampur and was by the action of the river added to the defendants' villages Gaura and Bhelpur. The case was started on the report of a sazawal in the service of the Court of Wards under whose superintendence the plaintiff's estate then was. It was stated in that report that an area of 28 bighas odd which was part of village Birampur had been transferred to the other side of the river and it was prayed that the old boundary be maintained so that part of the plaintiff's village would lie on the southern bank of river Gomti. The sazawal's report was confirmed by a report of the patwari of the plaintiff's village. The defendant's village Gaura was at that time held by a lessee who entered appearance and claimed the land for his lessor. Subsequently the latter's karinda also made an application claiming the land to be part of the village Gaura. Both of them rested their claim on the custom under which the deep stream is the constant boundary between the plaintiff's estate and that of the defendant. It was said that half of the bed of the river belongs to Gaura and the other half to Bhelpur wherever the bed of the river may be. A number of witnesses were examined on behalf of the then proprietor of Gaura. They stated that the deep stream is the constant boundary between the two villages. No witnesses

3. Secy. of State v. Foucar & Co. Ltd., 1934 P C 17=147 I C 657=61 I A 18=12 Rang 136 (P C).

were examined on behalf of the Court of Wards. The Settlement Deputy Collector made a report dated 18th October 1880 which is at one place somewhat obscure, directing that the deep stream of the river should be recognised as the boundary between villages Bhelpur and Gaura. He also recorded a finding that the land had gradually accreted to the village Gaura since 1273 Fasli (1865-6). The Deputy Collector expressly repelled the contention put forward on behalf of the Court of Wards that the boundary should be fixed at the old bed of the river. The record of the case was subsequently laid before the Settlement Officer who ordered on 27th November 1888, that: "The river be considered as the boundary and that the case be sent to the Court of the Deputy Saheb."

It is argued on behalf of the plaintiff-appellant that neither in the report of the Deputy Collector nor in the order of the Settlement Officer there is any mention of custom. This is true; but we cannot ignore the fact that the custom had been clearly set up on behalf of the proprietor of Gaura who led evidence in support of it. The order of the Settlement Officer, if not also the report of the Deputy Collector is consistent only with the hypothesis that the custom set up by the proprietor of village Gaura was found to exist. An accretion of about 28 bighas in course of a few years could not confer any title on the proprietor of Gaura in the absence of a custom.

The learned Subordinate Judge treated the statements of witnesses examined before the Settlement Deputy Collector as evidence in this case. The learned advocate for the plaintiff-appellant contended that those statements are not admissible in evidence. It was replied on behalf of the defendants that the statements are admissible under S. 33, Evidence Act, as the same question was involved on that occasion as in the present case. We do not think that this contention is sound. S. 33, Evidence Act, makes evidence given by a witness in "a judicial proceeding" admissible in evidence in a subsequent judicial proceeding, where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence, etc. In this case the proceedings before the Settlement Deputy Collector cannot be considered to be "judicial proceedings" as the dispute was in respect of the boundary between two villages for fiscal purposes and therefore S. 33, Evidence Act, will not make the statements admissible in proof of the custom now sought to be established by the defendants. At the same time, we do not think that the statements can be excluded altogether. They may not be admissible by themselves as evidence of the custom now in controversy, but they can be looked into to assess the value of the Deputy Collector's report and of the Settlement Officer's order which recognised the existence of the custom now in question. It cannot be doubted that the report and the order are admissible in evidence under S. 13, Evidence Act, as recognising the custom now in dispute. To ascertain whether the recognition then extended to the custom was based on substantial evidence, it is permissible to refer to the evidence on which it was based. The statements are not evidence by their own force on the question of custom but only furnish evidence of the materials on which the Settlement Authorities based their view.

It appears that in 1894 some more land was thrown up on the south of the river and the patwari of village Birampur made a report asking for orders as to how the land should be recorded. It does not appear whether any notice was given to the parties. In any case the order which followed does not show that it was passed in the presence of the parties. The Assistant Collector who passed orders on that report directed that the land should be continued to be recorded as part ot village Birampur. The ground on which that order was based is that no custom of dhar dhura is recorded in the wajib-ul-arz. Great reliance is placed on this order on behalf of the plaintiff-appellant. It is contended that it tends to disprove the custom set up by the defendants. While it cannot be denied that the order of the Assistant Collector is a piece of evidence on the question whether the custom exists its value in our opinion is not great. The Assistant Collector expressed that opinion only because the wajib-ul-arz did not record the custom of dhar dhura. If his attention had been drawn to the order of the Settlement Officer passed in 1880, he might have taken a different view. All that the order shows is that the absence of entry as regards custom in the wajibularz was considered to be decisive. We do not think that this is quite correct. As against this, we have the

fact that the land to which the order related has been in possession of the defendants and is part of that now in suit. Though it continued to be recorded as part of village Birampur no acts of ownership were exercised by the plaintiff at any time after that order was passed. The defendants on the other hand have all along been in possession. In these circumstances, we do not think that the Assistant Collector's order above referred to can afford any rebuttal of the order of the Settlement Officer passed in 1880.

Reliance is also placed on behalf of the plaintiff on the wajibularzes of villages Gaura, Birampur and Tilwari According to the plaintiff, the fact that that none of them records a custom of dhura affords evidence of a negative character namely, that the custom did not exist in that locality; otherwise, it is said, it would have been recorded in the wajibularz. We are not impressed by this argument. The only paragraph in which the existence of such a custom (if it existed) could be recorded is No. 10 which is headed thus:

"Mode in which gain and loss caused by alluvion and diluvion should be adjusted among the cosharers inter se."

In some wajibularzes the entry is "nil." In one, that of village Gaura it is stated: "The river Gomti lies towards the north, but it does not cause alluvion and diluvion." The wajibularze was prepared sometime in 1291 Fasli (1883-4). In the first place, the paragraph in question as its heading indicates relates to "Rights of co-sharers amongst themselves on the basis of custom or agreement." that is to say, any arrangement or usage, which is recognised in the village as regards the manner in which alluvial land is to be enjoyed or the loss arising from diluvion is to be borne by the co-sharers of that village, is to be recorded. It has no reference to any custom which is to regulate the respective rights of the riparian owners such as the plaintiff and defendant 1 are.

There is no other documentary evidence which can throw any light on the question of custom. There is a mass of oral evidence adduced by both parties. The witnesses for the plaintiff stated that there is an immemorial custom under which the deep stream of the river Gomti is the constant boundary between the village Birampur on one side and villages Gaura and Bhelpur on the other. It will serve no useful purpose to comment. upon the evidence of individual witnesses. We may refer as a sample to the evidence of D. W. Sitla Bux who states:

"There is dhar dhura custom prevalent in these villages. According to this custom the central portion of the stream is always the dividing line This custom is not affected by the gradual or abrupt formations of new land. . . . The custom of dhar dhura is very old and has been always followed. I have heard it from my ancestors."

Other witnesses examined on behalf of the plaintiff make similar statements. Those examined on behalf of the defendants to negative the custom made it a point to state that the land in dispute was transferred from the north to the south side of river Gomti by a sudden change. The learned Subordinate Judge before whom all the witnesses produced by the parties were examined has disbelieved the defendants' witnesses holding that they have perjured themselves on this point, their evidence being diametrically opposed to what the plaintiff himself admitted in his plaint and through counsel examined on the day of issues.

The witnesses examined on behalf of the plaintiff are decidedly better in quality. It is certainly possible to level some criticism against most of them, but there is no serious flaw in their evidence. Moreover, as the learned Subordinate Judge has pointed out, their evidence finds support not only from the proceedings before the Settlement Officer in 1889 but also from the evidence of one of the plaintiff's own witness Musai who was examined on behalf of the plaintiff on some other point: but the defendants succeeded in eliciting from him a clear statement that the custom set up by them exists. He says:

"Similarly there is immemorial custom in villages Bhelpur, Gaura and Birampur that the centre of the stream is the dividing line."

The conduct of the plaintiff and his predecessor in relation to this and other lands transferred to the south of the river gives rise to an inference adverse to him. Since 1273 Fasli (1865-6) the river has been receding towards the north throwing up land on the south. It is clear from the report of the Settlement Deputy Collector already referred to that the land in question before him had been thrown up after that year. There was some more land transferred from one side of the river to the other between the years years 1880 and 1894 when the patwari made a report and the Assistant Collector passed an order that the land should continue to be recorded as part of village Birampur. We have already referred to that proceeding. It is the

plaintiff's case that part of the land in dispute was lost to him after 1894. The documents which have been filed by the plaintiff will show that there were numerous proceedings between 1898 and 1906 for abatement of rent of tenants holding land washed away after 1894. It is remarkable that since the year 1865 till the institution of the present suit in 1928 the plaintiff never asserted his right to the lands which were formerly his but were added from time to time to the defendants' village by the action of the river. We have it from his own witness Ajudhia Prasad (p. 59) that:

"After 1894 the people of village Birampur did not go to take possession of their respective lands washed out and formed into fresh land on the side of Gaura In the same way land which had been washed out by the river and formed into new land towards Gaura village was not claimed by Birampur people. Birampur tenants never cultivated the said alluvial land."

Another witness Dalsingar examined by the plaintiff makes a similar statement, though he adds that Birampur tenants used to take sarpat, madar and babul from the other side of the river which cannot be believed. The witnesses examined by the defendants state that whenever any land appeared on the south the defendants took possession of it without let or hindrance.

The sum up the evidence for and against the custom set up by the defendants we find that it was recognised by the Settlement Authorities in 1880 and that recognition was based on the evidence of a number of witnesses; that the custom was not recognised in 1894 by the Assistant Collector who however acted merely on the absence of any entry as to custom in the wajibularz; that there is a mass of oral evidence adduced by the plaintiff consisting of the statements of witnesses who depose to having heard the custom from their deceased ancestors; that as against this class of evidence, the oral evidence adduced by the plaintiff is unreliable; and lastly, the conduct of the plaintiff gives rise to the inference that he always acquiesced in the loss of land recognising the river as the constant boundary between his village and those of the defendants. In 1925 P C 213 (4) their Lordships held that an immemorial custom within the meaning of S. 2 of Bengal Regulation 11 of 1825 was established on the evidence of witnesses who spoke from their personal knowledge of what happened during 20 years and from hearsay as regards remote past. In the case before us we have oral evidence of that description which is very materially corroborated by documentary evidence and certain circumstances to which we have referred. The learned Subordinate Judge recorded a definite findings on the strength of the evidence mentioned above that the custom set up by the defendants exists. Having carefully considered the entire evidence and the arguments addressed to us on behalf of the plaintiff-appellant, we do not find any ground for interfering with the well-considered finding of the learned Judge of the Court below. Accordingly we affirm it and hold that the defendants have established the custom under which the deep stream of the river Gomti is the boundary between the village Birampur and the villages Gaura and Bhelpur.

The only other question that remains to be considered is one of limitation and adverse possession. The learned Subordinate Judge held that Art. 144, Limitation Act, is applicable and that the burden lies in the first instance on the defendants to establish their adverse possession. The learned advocate for the defendants-respondents has challenged the correctness of this view and has referred us to two recent decisions of this Court. The case of 1934 All 362 (5) was decided by a Division Bench in which it has been held that where the plaintiff sues for recovery of possession on the allegation that he was dispossessed or that his possession discontinued sometime before the institution of the suit, the proper article to apply is 142. The same view has been taken in 1934 All 993 (6). It is pointed out that in the present case there is a definite allegation in the plaint that the plaintiff was dispossessed in 1921. Accordingly, it is argued, the burden lies on the plaintiff to show that he was in possession of the land in dispute within 12 years before the institution of the suit. It seems to us that for the purposes of the present case it is immaterial whether Art. 142 or Art. 144 be applied. The learned Subordinate Judge has divided the land in dispute into two portions. That lying to the north of a dotted line shown in the Commis-

4. Rajendra Narain Dhanj Deo v. Ganga Nanda Singh, 1925 P C 213=89 I C 737=52 I A 279=4 Pat 788 (P C).

5. Kunji v. Niaz Hussain, 1934 All 962=152 I C 12.

6. Bindhyachal Chand v. Ram Gharib Chand, 1934 All 993=152 I C 1 (F B).

sioner's map has been held to be unaffected by the defendants' adverse possession, as according to the finding of the learned Judge, it used to be under water for sometime every year. As regards the rest of the land which lies on the south of the dotted line, the finding is that it has been in exclusive possession of the defendants for more than 20 years. If these findings be accepted, the conclusion will be the same whether we apply Art. 142 or Art. 144. During the period of submergence the plaintiff—assuming he had the title vested in him should be deemed to be in constructive possession of the land under water. This state of constructive possession should, on that hypothesis, hold good for sometime every year, so that the plaintiff should be deemed to have been in possession every year before the institution of the suit. This view is in accord with the 29 Cal 518 (7) and 1923 All 75 (8), which appears to be on all fours with the present case on this point. As regards the other land, it was argued on behalf of the plaintiff that it was not fit for cultivation for a long time and that it has been cultivated for less than 12 years before the institution of the suit. The learned Subordinate Judge has however found that practically the whole of the uncultivated portion of the land was overgrown with babul and madar trees and sarpat (reed) and that the defendants have been apportioning such benefit as the babul trees and other produce were capable of yielding. We are in agreement with the learned Judge in holding that the defendants' possession of this part of the land was adequate as regards continuity and extent, we have already referred to the evidence which shows that no attempt was ever made on behalf of the plaintiff to take possession of this land and that as any strip of land emerged from water it was taken possession of by some or the other of the defendants. In this view the plaintiff cannot be considered to have been in possession within limitation, and the defendants must be considered to have had adverse possession of the whole of this part of the land in dispute. The result is that this appeal fails and is dismissed with costs.

We place on record our appreciation of the care and thoroughness which characterised the judgment of Mr. Mathura Prasad, the learned Subordinate Judge who tried this case, which must have presented many difficulties in earlier stages and involved difficult questions of law and fact.

K.S. *Appeal dismissed.*

7. Secy. of State v. Krishnamoni Gupta, (1902) 29 Cal 518=29 I A 104=8 Sar 269 (P C).
8. Ram Narain v. Deoki Missir, 1923 All 75=69 I C 912.

* A. I. R. 1935 Allahabad 195

BENNET, J.

Mt. Ram Dei — Defendant — Applicant.

v.

Mangan Lal — Plaintiff — Opposite Party.

Ex. First Appeal No. 100 of 1933, Decided on 29th October 1934, from decision of Addl. Sub-Judge, Allahabad, D.- 12th November 1932.

***Civil P. C. (1908), Ss. 11, 141 and 144 and O. 2, R. 2—Restitution proceedings — S. 141 does not require that O. 2, R. 2 or S. 11, Expl 4 should be applied to such proceedings—Application under S. 144 for principal amount allowed Subsequent application for interest is not barred.**

Section 141, although it applies to proceedings under S. 144, does not require that O. 2, R. 2 and S. 11, Expl. 4 should be applied to those proceedings. Hence where an application under S 144 for the principal amount is allowed, a subsequent application for interest is not barred either by res judicata or under O. 2, R. 2: *Case law discussed.* [P 197 C 1, 2]

N. P. Athana and *B. N. Sahai*—for Applicant.

K. Varma—for Opposite Party.

Judgment. — This is an Execution First Appeal by one Mt. Ram Dei against whom the opposite party Mangan Lal obtained a decree for sale of her share of a house and the share of other persons. In this Court in appeal Mt. Ram Dei obtained a reversal of this decree. Meanwhile the house had been acquired by the Improvement Trust and the four annas share of Mt. Ram Dei had been converted into Rs. 12,800 cash. The opposite party withdrew this money. After the decree of this Court Mt. Ram Dei applied for restitution of this money under S. 144, Civil P. C., which was allowed. Subsequently the present application has been made in which Mt. Ram Dei states that she desires interest on the amount from the date of withdrawal up to 30th June 1932, the date on which she received the sum in question. Objection was taken that as she had made an application under S. 144 for the principal amount she had no further right of restitution both on the ground of her claim being barred by O. 2, R. 2,

and on the principle of estoppel. The lower Court has held that the present application is barred by the principle of res judicata and by the provisions of O. 2, R. 2.

In appeal it is contended by learned counsel for the applicant that his client was unaware of the date of withdrawal of the money by the opposite party and therefore could not claim interest in the first application for restitution. This argument is obviously incorrect because the applicant might have claimed interest with effect from the date of withdrawal whatever it might be. It appears clear that interest was not claimed by an oversight. The appeal further proceeds that on equitable grounds the application should have been allowed and that the Court below erred in applying the procedure for suits to the present case. This is the main question in appeal as to whether O. 2, R. 2, should be applied to the present application and learned counsel for the respondent also relies on the provisions of S. 11, Civil P. C., Explanation 4. This explanation also refers to a former suit. The two provisions are somewhat similar and the question is whether this bar which the Code provides in regard to suits should be applied to the case of an application for restitution under S. 144, Civil P. C. Reference is made to various rulings. For the applicant reliance is placed on the ruling reported in 1917 Mad 185 (1). In that ruling there was a similar case where a judgment-debtor had obtained restitution of a sum of money recovered from him in execution of a decree which was subsequently reversed on appeal, and later the judgment-debtor made a second application to recover interest for the period during which the decree-holder had the use of the money. The application was allowed. The Court held that the application was not barred by res judicata or by O. 2, R. 2. The Court stated that it had been held that these rules did not apply to execution proceedings as a matter of course:

"unless the decision of the question subsequently sought to be agitated was either expressly given or must be assumed to have been necessarily implied in the previous decision."

It is then stated that argument was made that an application for restitution is not a proceeding in execution and the Court observed:

"We are unable to see the difference."

If the ruling had proceeded to state that a proceeding under S. 144, was similar to a proceeding in execution and therefore as the principles of O. 2, R. 2, and res judicata under Expln. 4, S. 11 did not apply to execution proceedings, these rulings should not be applied to proceedings under S. 144, the argument in the ruling would in my opinion have been sound. The Court did however use language which indicates that the Court considered that proceedings under S. 144 were proceedings by way of execution and were covered by the language of S. 47, Civil P. C. I must admit that that view is in conflict with various rulings of this Court and it is not a view which I can accept. In 1922 All 223 (2), it has been held that proceedings under section 144, Civil P. C., are not proceedings in execution and a Bench of this Court has specifically dissented from the ruling in 1917 Mad 185 (1), on this point. It does not however follow that the principle of the Madras ruling is not correct although in justifying that principle the Madras Bench used reasons and language which this Court does not consider correct. The next ruling to which reference was made was 1922 All 238 (3). In that case there were three applications for restitution, the first one being for restitution of possession of certain property in accordance with the decree of an appellate Court. The second application was for refund of costs, and the third application was for restitution of mesne profits. Objection was taken as stated on p. 557 on various grounds, one of which was that as the decree-holder had not asked for mesne profits in the previous application the present application was barred by the provisions of O. 2, R. 2. On p. 560 (of 44 All), one learned Judge stated:

"A further point was raised under O. 2. R. 2 Civil P. C., which obviously has no substance.' On p. 562 the second learned Judge stated of the lower Court : 'Thirdly, it applied O. 2, R. 2 as barring the application. On this ground also it dismissed the application. On appeal before us all the three points have been attacked. The third point has not been pressed.' "

Reference is also made for the applicant to 1918 Pat 396 (4). In that ruling a Bench held that an application for restitution under S. 144, Civil P. C., is neither a suit nor an execution proceeding. It is a miscellaneous proceed-

1. Somasundaram Pillai v. Chokkalingam Pillai, 1917 Mad 185=38 I C 806=40 Mad 780.
2. Jiwa Ram v. Nand Ram, 1922 All 223=66 I C 144=44 All 407.
3. Brij Lal v. Damodar Das, 1922 All 238=66 I C 545=44 All 555.
4. Karupasindu Roy v. Balbhadra Das, 1918 Pat 396=47 I C 47=3 Pat L J 367.

ing to which the rules applicable to execution proceedings do in substance apply. S. 141, Civil P. C., does not apply to an application for restitution and such an application is not therefore subject to the provisions of O. 2, R. 2 of the Code. That ruling proceeded on the grounds that it had been held by their Lordships of the Privy Council in 17 All 106 (5), that S. 141 was not applicable to an execution proceeding:

"And if it is not applicable to an execution proceeding, I fail to see why it should be made applicable to a proceeding which is only of the nature of an execution proceeding. The learned Vakil for the respondents has strenuously contended that though the proceeding is miscellaneous, it is in the nature of an original suit. In my opinion this argument fails, for a suit must always be based on a cause of action. Here the defendant petitioner has no cause of action on which he can claim relief from the plaintiff. If it is urged that the cause of action is a trespass, then the reply is that the plaintiffs were put in possession by a decree of Court and were not trespassers. Nor does the decree of the appellate Court per se constitute a cause of action. In my opinion the defendant had no cause of action on which he could have based a suit against the plaintiffs, even if the law had not expressly forbidden him to proceed by a suit. His only remedy was to apply to the Court to proceed against the plaintiffs in exercise of its special powers. Therefore the rule applicable to several reliefs arising out of the same cause of action cannot be applied here."

I consider that this passage contains sound reasons as to why the rules in question should not be applied to proceedings under S. 144. Learned counsel for the objector points out that in 1922 All 223 (2), it has been held that the provisions of S. 141, Civil P. C., do apply to proceedings under S. 144. The question before the Court was whether the provisions of the Code in regard to restitution of an application dismissed for default would apply to a proceeding under S. 144. I understand that the judgment relates to that portion of the Code only which deals with the power to restore such applications when dismissed for default, and I understand that the ruling does not lay down that all provisions of the Code should apply. In fact S. 141 itself definitely states that that is not so as it says:

"The procedure provided in this Code in regard to suits shall be followed, as far as can be made applicable, in all proceedings in any Court of civil jurisdiction."

The question is whether the rules in question O. 2, R. 2 and Expln. 4, S. 11 should be applied to proceedings under S. 144, Civil P. C. Are they the rules which can be made applicable to S. 144 or are they not ? The mere fact that rules in regard to restitution are rules which can be made applicable does not imply that the other rules in question should also be applied. Now, besides the reasons given in the Patna ruling which I have quoted which are against the application of the rules in question it also appears to me that the rules in question are intended for suits which are of a more formal nature than proceedings under S. 144. It is necessary that a suit should be more formal because in reply to a plaint there is a written statement filed and on it the Court frames issues. In regard to an application under S. 144 it is not usual to frame issues although issues may be framed. In particular in the present case I am told that issues were not framed. Further when a suit is brought the plaintiff ought to be in possession of all information on the subject of his claim. But the position of a person who is making an application under S. 144 may not be the same. He has information that a decree has been granted by an appellate Court in his favour and he at once applies for restitution of the property which was in suit. It may not occur to his legal advisers that besides restitution of the property the applicant may be entitled to further remedies such as mesne profits or interest. It would be contrary to the ends of justice if an applicant were to be dishonest because these matters did not occur to his legal advisers at the time that the application under S. 144, was made. In the case of a plaint the matter is different as the legal adviser drafting the plaint is well aware of the rule in O. 2, R. 2, which requires that all reliefs should be mentioned in a plaint.

For these reasons I consider that S. 141, although it applies to proceedings under S. 144, does not require that the rules in question should be applied to those proceedings. Accordingly I allow this appeal on this preliminary point and I remand the application for disposal on the remaining issues by the lower Court. Costs of this appeal in this Court will be granted to the applicant. Costs in the Court below will abide the ultimate result. The applicant is entitled to refund of the court-fee of this Court. Permission is granted for a Letters Patent Appeal.

K.S. *Appeal allowed.*

5. Thakur Prasad v. Fakirullah, (1895) 17 All 106=22 I A 44=6 Sar 526 (PC).

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KENDALL AND IQBAL AHMAD, JJ.

Satnam Singh — Defendant — Appellant.

v.

Bawan Bhagwan Singh and *another*— Plaintiff—Defendant—Respondents.

First Appeal No. 316 of 1931, Decided on 18th September 1934, from decision of First Addl. Sub-Judge, Benares, D/- 3rd July 1931.

(a) Hindu Law — Religious endowment — Math—Mahant is in position of trustee and has right to resign from office.

A Mahant is in the position of a trustee and as there is no law under which a trustee is prohibited from resigning his trusteeship provided that the proper measures are taken for the protection of the trust, a Mahant can resign if he wishes to do so: 1916 *P C* 256, *Ref.* [P 202 C 2]

(b) Hindu Law — Religious endowment — Math—Property does not vest personally in Mahant but only in institution—On appointment of new Mahant, no transfer by gift or otherwise of property to him is necessary.

A Mahant is in the position of a trustee of the Math property, and the property appertaining to the Math vests not in the Mahant personally, but in the institution, and when a Mahant succeeds he cannot claim the Math property as his personal belonging, but merely as an appurtenance to his office. The property remains throughout the property of the institution, and when a new Mahant is installed there is no transfer of the property to him by gift or otherwise, but he assumes the office, which entails the management of the property appertaining to the "Math." [P 203 C 1]

(c) Hindu Law — Religious endowment — Mahant installing another on gaddi and making him Mahant—Former has no authority to turn out latter.

Where the old Mahant has duly installed another on the gaddi and conferred on him the office of Mahant, he has no authority to turn him out for any reason whatever, whether for rudeness to the Sadhus, or for smoking, or merely because a body of the Nirmal Sikhs preferred another candidate. [P 203 C 1]

Tej Bahadur Sapru, K. N. Katju and *M. N. Raina*—for Appellant.

P. L Banerji, A. Sanyal and *K. N. Malaviya* – for Respondents.

Kendall, J.—This appeal arises from a suit brought by the plaintiff for a declaration that he is the "gaddinashin owner" of the property named in the plaint and the mahanth of Chaitan Math, a Sikh Math, in the city of Benares. The late mahanth, Ratan Singh, died on 23rd June 1928 leaving the defendant-appellant, Satnam Singh, in possession of the math property, after nominating him as his successor and executing a will in his favour. The plaintiff, who is now called Bawan Bhagwan Singh, is by birth a Brahmin, whose Hindu name was Murli, and is the son of a man originally named Mahadeo, who acted as cook of the late mahant for several years. Both father and son were converted to Sikhism and renamed Hardeo Singh and Bawan Bhagwan Singh, and both, according to the evidence for the plaintiff, were initiated as chelas of the late mahant; and subsequently on 13th April 1928, Bhagwan Singh was installed as mahant under the guardianship of his father, but was afterwards turned out in favour of the appellant, Satnam Singh. The case for the plaintiff was that the will executed by the late mahant in favour of Satnam Singh on 5th June 1928 was a collusive document obtained by fraud and undue pressure, and that in view of the fact that the plaintiff had himself been installed as mahant during the life-time of the late mahant, it was invalid, and the ceremonies of nominating Satnam Singh during the life-time of the late mahant and subsequently installing him were ineffective. The suit was contested by the defendant-appellant, Satnam Singh, on the grounds that the plaintiff was not a chela of Ratan Singh's (in the written statement it was said that he was not even a Sikh, but this objection was dropped), that he was never installed as mahant, and that the defendant-appellant himself was a chela and had been nominated and duly installed as mahant; and amongst his evidence he included two photographs of groups taken at his nomination and installation ceremonies. The learned Subordinate Judge has found that the will of the late mahant was duly executed, and that there was no doubt also that the ceremonies of nominating and installing the appellant were observed; but he has also found that the appellant was not a "chela" of the late mahant's. As regards the plaintiff, the finding is that he was duly installed first, and consequently that the late mahant had no longer any disposing power when he executed the will in favour of the appellant, so that it was of no effect, as were the ceremonies of nominating and installing the appellant.

The circumstances that led up to the suit, so far as they appear from the evidence, are as follows:

According to the plaintiff and his witnesses, the plaintiff's father, Hardeo Singh (who is a party to the suit), who had been acting as a cook

to the late mahant for the last 10 or 11 years, and the plaintiff himself were initiated as chelas on 16th March 1927. There has been some juggling with the alleged date of this initiation, for at one time it is said to have been in 1984 Sambat, and that is the date given in the plaint, But the trial Court has found that the earlier date is correct, and we do not feel justified in differing from this decision. As we are clearly of opinion that the plaintiff and his father were initiated as chelas, the exact date on which the ceremony took place is not of great importance. On 23rd March 1928 there was a meeting of Nirmal Sadhus in Benares and a resolution was passed urging the mahant not to give the gaddi to Bhagwan Singh. The meeting has been described by Narhari Narain Singh, a witness for the plaintiff, who stated that, in order to organise the opposition, a president and secretary were appointed, and it was decided that sadhus should be deputed to the Punjab for holding meetings and passing resolutions, etc.; some documents were produced in evidence by the plaintiff to show that these meetings took place and that these resolutions were passed, and some of these are shown by the evidence for the plaintiff to have been received by the mahant, but their authenticity has not been proved. For instance, Exs. 7-11 show that letters were received by the mahant purporting to convey to him the disapproval of the mahants and sants of the maths in various places at the proposed installation of Bhagwan Singh. We cannot accept these documents as proof that the Sikhs in distant parts were agitated at the proposed installation but they do at any rate show that the mahant had received warning that trouble was brewing. On 13th April, a Sikh named Gopal Singh made an application to the District Magistrate of Benares, in which he said:

> For the present I may inform you that Mahant Ratan Singh, who is incharge of the Nirmala (Sikh Sadhu) Math . . . had made up his mind to appoint his successor a minor boy of about 12 years, who is the son of his cook and quite unfit for the responsible position being entrusted to him. The Sikhs and the Sikh Sadhus (Nirmalas) of this place as well as of the Punjab are all against this act of the said Mahant, and hence this agitation here as well as in the Punjab among the Sikhs. . . . The said Math yields a monthly income of about Rs. 1,000 only. Hence it is highly desirable to save it from deterioration in passing into unworthy hands."

This application was sent to the City Magistrate, Mr. Upadhiya, who sent for the mahant and on 27th April recorded an order that there was no danger of breach of the peace and that no steps need be taken. It may be mentioned here that in his evidence Gopal Singh stated that he knew that the gaddi ceremony was to take place on 13th April. It was on that date that the ceremony of installing the plaintiff-respondent, Bhagwan Singh, took place, if indeed it took place at all. On 19th April, the "AJ," a newspaper published at Benares, printed a notice of the gaddi ceremony over the name of Bindraban Singh, a Khattri of Benares, who gave evidence to show that he had sent this notice to the paper with the consent of mahant Ratan Singh; and further, that as there was apparently a contradiction to the notice, two further letters were sent signed by mahant Ratan Singh and dated 21st April, Ex. 18, and 25th April Ex. 14-1 or 22, in which it is stated that the mahant had given the gaddi to Bhagwan Singh and Hardeo Singh after having initiated them in the Nimali Sampardah and made them his disciples. The importance of this evidence will appear when we have to consider whether the ceremony of installing Bhagwan Singh really did take place.

Early in May the pendulum began to swing the other way. On 14th May a notice was published in Benares to the effect that the Tilak ceremony of Bhagwan Singh and Hardeo Singh had taken place on 13th April, but that as they were considered unfit for the service of sadhus, they had been removed from the Asthan on 14th May. This notice purports to be a disclaimer by the mahant of any responsibility for the actions of Bhagwan Singh and Hardeo Singh in realising rent, etc., for the Asthan; but the proprietor of the press that published the notice, who gave evidence, was not able to prove it was issued to him by the mahant himself. There is no doubt however that the plaintiff and his father were removed from the math, and on 20th May an application was made to the District Magistrate written by the appellant, Satnam Singh, and signed by the mahant, referring to a telegram that had been sent on 15th May, and praying for protection from the plaintiff and his father, who had been removed from the gaddi. In the meanwhile the defendant, Satnam Singh, had been nominated as successor by the mahant who on 5th June executed the will to which we have referred above, in which he described Satnam

Singh as his chela. On 23rd June the mahant died, and Satnam Singh was left in possession and subsequently installed with due ceremony as mahant; and on 19th February 1929 the present suit was filed.

The case of the plaintiff respondent turns on the decision of the question whether he was duly installed and whether that installation was valid. We have to be guided in our decision by the rules and customs of this particular math, and the great difficulty in the case is the absence of almost any reliable evidence on this subject. It is agreed by both parties that the chaitan math is a Sikh math, that is to say, it was founded by a Sikh and conducted according to the rites of the Sikh religion. The pedigree given by the plaintiff and the defendant to show the line of the mahants differ in some respects, but there is nothing in the variations to affect our decision, until we come to Ratan Singh and his successor. According to the plaint, Chet Singh, a Sikh of the order called Nanakshahi Nirmali Sampardahi—sixth in degree above Ratan Singh in the pedigree, and presumably about 150 to 200 years prior to him in date—originally found the math, and three generations later Sarup Das, another mahant, acquired much property and other mahants added to the possessions of the math. According to the plaint again, the succession is settled by the presiding mahant nominating one of the chelas without restriction of age, and this chela has a right of inheritance; and a mahant also has a right during his life-time to make a disciple "gaddinashin owner;" in other words, to resign or abdicate in favour of a chosen chela without consulting the other members of the fraternity or bhek. This important claim is made in Cl. (d), para. 5, of the plaint, and it is the real crux in the case. There was however an important modification in the claim originally made in the plaint, to which we shall have to refer later. The case for the defendant-appellant, as set forth in the written statement, was that it was the custom and practice for a mahant to nominate his successor in consultation with the Panchaiti Akhara Nirmala and the bhek or fraternity, the successor being installed by the panchait and the bhek after the death of the mahant, but that the mahant had no power to appoint a successor during his life-time. A good deal has been said in argument about the three different kinds of maths recognised in India, and the plaintiff's case is said to be that the math in suit is a "Maurusi Math" and distinguished from a "Panchaiti Math." But although no doubt these distinctions have been made, we do not think that they are very useful for the purposes of this suit. If a math was to be governed entirely by the law of succession, we imagine that the office would descend from mahant to senior chela automatically, and that the mahant would have no power either to nominate or install any of his chelas in preference to the others; on the other hand, in a math in which the succession to the gaddi is controlled entirely by the votes of the bhek or samparda, there would be no right or inheritance in any one and no nomination by the presiding mahant, but each mahant would have to be selected purely by the bhek. In 5 C L J 360 (1) at p. 365, Mittra, J., remarked:

"The classification of religious institutions as either maurusi, hakimi or panchaiti seems to us to be misleading. It is like most illogical classifications, not exhaustive."

In 43 Cal 707 (2), at p. 714 it is remarked by their Lordships of the Privy Council:

"The question as to who has the right and office of Mahant is one, in their Lordships' opinion, which, according to the well known rule in India, must depend upon the custom and usage of the particular Math or asthain. Such questions in India are not settled by an appeal to general customary law; the usage of the particular Math stands as the law therefor."

In the present case we find that the plaintiff's claim is that the succession is regulated largely by a rule of spiritual primogeniture modified by the right of the mahant to nominate and even install his successor; while the defence is that although the bhek or fraternity have the power to approve or disapprove of a chela nominated by a mahant, their hands are at any rate to some extent tied by the nomination. We have said that there is practically no reliable evidence to prove what the custom of succession is in this math. A number of witnesses on both sides have stated their opinions on the subject; but there is nothing that can be regarded as authoritative, such as the statement of a mahant of a math who had received a tradition handed down from his predecessors. What we do know for certain is that

1. Satya Deo Dass v. Santok Dass, (1907) 5 C L J 360.
2. Ram Prakash Das v. Anand Das, 1916 P C 256=33 I C 583=43 I A 73=42 Cal 707 (P C).

in 1852 the presiding mahant, Sarup Das, executed a will, Ex. 3, in which he directed that the entire property and affairs of the sangat should be made over by his two minor chelas, Saheb Singh and Narain Singh, under the guardianship of their father, and afterwards to the chelas themselves in the presence of certain panches. He further directed that if after his death either of these two chelas or their father took to immoral pursuits, they should be excluded from the sanghat by the panches, who should appoint any competent person to discharge the duties of the mahant. In fact, he dealt with the property of the math as if it were his own, and the panches whom he appointed appear from their names not to be Nirmala Sikhs but Hindus. It appears from the pedigree that Sarup Das was succeeded by Narain Singh, i. e., one of the chelas named in the will; but whether the panches appointed in the will or any other persons had anything to do with the succession, we do not know. Mahant Narain Singh in his turn executed a will in 1896 (Ex. 5) in which he appointed the late mahant Ratan Singh, his disciple:

"to be the owner and proprietor like myself of the entire cash, grain, property, the house and the sanghat, etc., which are in my possession."

These two wills form the only reliable evidence on the record as to the way in which this particular math has been dealt with in the past, and they go some way to prove that the presiding mahant has the sole disposing power of the property and presumably of the office. The origin of the math, so far as we know anything about it, points to the same conclusion. It was founded by a single person, and it was apparently originally his private property, subject to any voluntary restriction that he may have imposed upon himself, or that may have grown up by custom or usage. There is nothing whatever to show that the sect of Nirmala Sikhs—referred to in evidence as the bhek or samparda—had any right to interfere with the mahant in nominating or installing a successor. We should therefore have had little difficulty in disposing of the matter on these lines if it had not been for an important admission which was made by counsel for the plaintiff, Mr. Bahadur Lal, in the trial Court. This admission was made on 10th November 1930 and is to the following effect:

"The plaintiff alone was installed in the gaddi, and for the period of his minority his father, Hardeo Singh, superintended over him. According to custom two Mahants cannot be installed at one and the same time. Nor can nomination take place of two Mahants at one and the same time. Confirmation is necessary at the time of installation to gaddi of Mahantship, and the members of the Nirmala Sangat and Sewaks and Raises are invited. Whether any of these attend or not, confirmation is completed, unless there is some objection as to the gaddinashini. But it is not necessary that that person alone who has been nominated by the Guru should be made the gaddinashin."

At the time when the above admission was made the plaintiff's evidence had been recorded and Atma Ram, the second witness for the defendant was being cross-examined. He had stated apparently in regard to Sikh maths in general that the Akhara could dispense with mahants whenever it liked. The natural interpretation of the admission appears to us to be that although a presiding mahant may nominate his successor during his life-time, it is necessary for the successor to be confirmed in the office by the members of the Nirmala Sanghat at the time of the installation; and also that it is necessary at the time of the installation of a new mahant to invite the members of the sanghat, who have the right on the occasion of the ceremony of either confirming or rejecting the candidate nominated. As there was some doubt in our minds as to the proper interpretation of the admission however we asked Mr. Bahadur Lal who was present in Court, what he had intended to convey, and he stated that he was only referring to a case where a mahant had nominated his successor, but not installed him during his life-time. He did not intend to admit that if a mahant during his life-time resigned and installed a chosen successor on the gaddi, the confirmation of the bhek or sanghat would be necessary. The case for the defendant-appellant had always been that confirmation by the Akhara or the bhek was necessary where a person had been nominated as mahant by the presiding mahant, and further that a presiding mahant had no right during his life-time to resign from office. The plea that, if a mahant can so resign and install his successor, confirmation by the bhek is necessary, was never actually put forward. But it has been argued, with reason, that when once the authority of the bhek to take a hand in the appointment of a mahant by approving or disapproving of the person nominated is admitted, then a fortifri the bhek must have a similar authority in the case of a person who has not only been nominated, but

is actually to be installed on the gaddi in the presence of the presiding mahant. The admission not having been made in regard to an installation during the life-time of the presiding mahant, we should be reluctant to read more into it than it specifically states; but we need not decide the question of whether the bhek had authority to prevent the installation of the plaintiff by the outgoing mahant, because we have on the facts agreed with the finding of the trial Court, that the members of the bhek did by their acts or omissions confirm the installation. (After examining the evidence, his Lordship proceeded). The question of whether the installation had the effect of legally transferring the office of mahant to the plaintiff-respondent has to be considered separately. It will be apparent from what we have said above that this depends on whether Mahant Ratan Singh had a right to resign from the office and whether he had a right to install his own selected candidate. In 43 Cal 707 (2), to which we have already referred, their Lordships of the Privy Council in discussing the nature of the ownership of a mahant have remarked:

"The nature of the ownership is, as has been said, an ownership in trust for the Math or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning Mahant, this trust does exist, and that it must be respected: (p. 714)."

In that particular case the mahant did resign or at any rate it is shown that he had for years relinquished the mahantship, having made over all his duties, together with the properties of the Asthal, to one of the parties in the suit:

"The Mahant, in their Lordships' opinion, is not only a spiritual preceptor, but also a trustee in respect of the Asthal over which he presides. His installation of defendant 2 on the gaddi, and his own retirement from the Mahantship, would thus appear to have created a vacancy in the office: (p. 732)."

The person who was installed in that case, it should be remarked, was disqualified for reasons which are not relevant to the present case, and it certainly appears that their Lordships were of opinion that there was nothing in the nature of the office of a mahant which would prevent a mahant from resigning and installing a properly qualified chela in his place. So far as the present case is concerned, we have said that the evidence of custom is unsatisfactory. One witness however Maha Singh, a sadhu, was put forward by the plaintiff to prove a number of instances in which a mahant had resigned. He quoted 12 such cases, and they are enumerated at pp. 239 and 240 of the paper book. It is not by any means clear that he had personal knowledge that in any one of these cases the mahant had actually resigned, and it has been proved by other evidence that in at least four of them (Nos. 3, 4, 7 and 12) there had only been a nomination and not an installation of a new mahant during his predecessor's life-time. We know of no law under which a trustee is prohibited from resigning his trusteeship, provided that the proper measures are taken for the protection of the trust, and considering this in conjunction with the Privy Council decision referred to above, and the statement of Maha Singh, and also allowing for the fact that no instance has been quoted in which a mahant has attempted to resign and been prevented by legal or customary obligations from doing so, we think we are justified in concluding that the mahant had the right to resign, if he wished to do so.

We imagine that such cases are exceedingly rare. The question of whether he could install a selected chela without the confirmation of the bhek is not one that we have to decide in the present case, because we agree with the trial Court that confirmation by the bhek at the time of installation is sufficiently proved. In discussing the evidence we have shown that several Nirmal Sikhs are proved to have been present at the actual ceremony, and there is no suggestion that any objection was lodged at the time. According to the admission made by Mr. Bahadur Lal, if no objection is lodged at the ceremony itself, the confirmation is to be presumed. This admission is, of course, not binding on the appellant; but it has not been suggested that the disapproval of the bhek after the ceremony has been performed could have any effect. The only question therefore is whether the members of the bhek were prevented in any way from lodging an objection at the ceremony itself. As several of them were present, and as it is quite clear that the intention to hold the ceremony of installation on 13th April was well known in Benares, especially to the sect of Nirmal Sikhs, it cannot be said that they were not given an opportunity of being present. It is not proved that invitation cards were issued to them; nor is it likely that this form of invi-

tation would be adopted for such a ceremony. If the sect as a body had wished to show their disapproval of the installation on the proper occasion, they had ample opportunity of doing so, What appears to have happened however was that some of them went to the ceremony and by failing to protest against it at the time allowed their approval to be taken for granted, while others stayed away altogether and appealed to the District Magistrate. Our conclusion therefore is that the plaintiff was duly installed.

Some minor arguments have been addressed to us on behalf of the appellant, which we may deal with shortly. It has been said that if Ratan Singh intended to transfer the math property to the plaintiff, he could only do so by a written and registered document, under the provisions of S. 123, T. P. Act. It is certainly curious that no document was executed for the purpose of investing the plaintiff with the office of mahant, because the installation of a new mahant during the life-time of the presiding mahant was an unusual event, and there was moreover this additional novelty that the gaddi was to be conferred for the first time on a person who was not a Sikh by birth. We should therefore have expected to find the matter set forth in writing for the sake of security. We are however clearly of opinion that there was no legal obligation to execute a document. From what we have said above about the nature of the office of a mahant, it is clear that he is in the position of a trustee of the math property, and from what their Lordships of the Privy Council have said it appears that the property appertaining to the math vests not in the mahant personally, but in the institution, and when a mahant succeeds he cannot claim the math property as his personal belonging, but merely as an appurtenance to his office. The property remains throughout the property of the institution, and when a new mahant is installed there is no transfer of the property to him by gift or otherwise, but he assumes the office, which entails the management of the property appertaining to the "math." Finally when once it has been proved that mahant Ratan Singh had duly installed the plaintiff on the gaddi and conferred on him the office of mahant, we cannot agree with the appellant that he had any authority to turn him out for any reason whatever, whether for rudeness to the sadhus, or for smoking or merely because a body of the Nirmal Sikhs preferred another candidate.

The result is that we dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 203

BENNET, J.

Kanhaiya Lal—Plaintiff—Appellant.

v.

Mt. Champa Devi—Defendant — Respondent.

Second Appeal No. 46 of 1932, Decided on 22nd October 1934, from decision of Addl. Sub-Judge, Meerut, D/-13th November 1931.

(a) Practice—Pleadings should be definite.

It is necessary that the pleadings should be definite in order that evidence should be produced bearing on the issues. [P 204 C 1]

(b) Hindu Law of Inheritance (amendment) Act (2 of 1929), S. 2—Act is not retrospective.

The Hindu Law of Inheritance (amendment) Act (2 of 1929) does not purport to be retrospective and in S. 2 the tense used is the future. Hence it cannot be applied to determine the succession which opened out in 1921. [P 204 C 1]

N. C. Vaish—for Appellant.

B. Mukerji—for Respondent.

Judgment.—This is a second appeal by a plaintiff who sues for possession of a certain house which he purchased by a sale-deed of 25th June 1929, from one Kishun Lal, the son of the sister of Hulasi. It is found by the lower appellate Court that Hulasi was the last male owner of the house. The defendants were in possession of the house under a sale-deed executed by one Mt. Rukia, dated 22nd September 1928. By implication it was held that Mt. Rukia, the wife of Karwa Chhote Lal was not the owner of the house entitled to make a sale-deed. The written statement alleged that Kishun Lal was not the son of the sister and had no right of inheritance from Hulasi. As the question had not been clearly before the parties, I remanded the following issue:

"Were there any nearer reversioners of Hulasi than Kishun Lal when the succession opened out in 1921 on the death of Mt. Shugan Devi."

Evidence was produced by the parties and the lower appellate Court has come to a finding that Kishun Lal was the nearest reversioner of Hulasi and that the plaintiff is entitled to possession of the house. Objection has been taken by the respondent on the ground that the burden of proof was wrongly thrown on defendant and that the lower Court was wrong in calling on the

defendant to disclose the names of nearer reversioners before the plaintiff produced his evidence. According to the view of learned counsel, the plaintiff should have produced his evidence merely to show that in the opinion of the witness there was no nearer heir than Kishun Lal and when the evidence for the plaintiff had closed the defendant would have produced evidence alleging that certain persons were near heirs. On this view it would have been impossible for the plaintiff to produce evidence to show that these persons were not nearer heirs. I consider that the procedure of the lower Court was correct. It is necessary that the pleadings should be definite in order that evidence should be produced bearing on the issues. Therefore the lower Court was correct in requiring the defendant to state whom the defendant claimed to be nearer heirs, that is Mt. Ram Devi and her alleged brother Tikoli. Having understood that that was the case for the defendant, the plaintiff then was able to produce evidence showing exactly who these people were.

Some further argument was made in regard to the observation of the lower Court that the succession having opened out in 1921, Mt. Ram Devi was not at that time the legal heir to Hulsai deceased. Learned counsel argued that the Hindu Law of Inheritance (Amendment) Act, 2 of 1929, was retrospective. The Act does not purport to be retrospective and in S. 2 the tense used is the future. I consider therefore that this Act of 1929 cannot be applied to determine the succession which opened out in 1921. On the finding of fact of the lower appellate Court I hold that the plaintiff is entitled to possession and accordingly I restore the decree of the Court of first instance with costs throughout. Permission is granted for a Letters Patent Appeal.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 204

BENNET AND ALLSOP, JJ.

Radhey Lal—Judgment-debtor — Applicant.

v.

Mt. Janki Devi and *others* — Decree-holders—Opposite Parties.

Civil Revn. No. 570 of 1933, Decided on 26th October 1934, against order of Munsif, Ghaziabad, D/- 15th March 1933.

Civil P. C. (1908), O. 21, R. 84 and S. 115 —Bidder applying for not enforcing sale on ground that he has bid under misapprehension — Court believing him and ordering return of deposit—There is no material irregularity in exercise of jurisdiction.

Where the bidder at a Court auction files an application before the sale has been sanctioned by the Court, that the Court should not enforce the sale on the ground that he had bid under a misapprehension as to the property purchased and the Court believing him, orders return of the deposit made by him, the Court is not guilty of material irregularity in exercise of jurisdiction.

[P 205 C 1]

N. C. Vaish—for Applicant.

B. Mukerjee and *Nanak Chand* — Opposite Parties.

Order.—This is an application for the revision of an order passed by the learned Munsif of Ghaziabad. It appears that one Kedarnath obtained a decree against the applicant, Radhe Lal, and in execution of that decree two buildings were to be put up to sale. At a sale held on 7th March 1933, Mt. Janki bid a sum of Rs. 1,800 for one of these buildings, which was a shop, and deposited 25 per cent. of the price. Her's was the final bid. Two days later, before the sale had been sanctioned by the Court, she made an application that she had bid for this building under the mis-apprehension that she was bidding for the other building which was a residential house, and that the value of the building which had been put up to sale when she was bidding was much less than Rs. 1,800. The learned Munsif allowed her application that the sale should not be enforced and directed that the 25 per cent. of the purchase money which she had deposited should be restored to her. The present applicant did not appeal against this order, but the decree-holder did so. The applicant attempted to make what he called a cross-objection upon the same grounds as the grounds mentioned in the appeal, but that cross-objection was rejected. Ultimately the decree-holder withdrew his appeal which was consequently dismissed. The applicant now comes to this Court in revision and asks that Mt. Janki should not be allowed to withdraw the deposit that she had made and that if there is any loss due to a re-sale she should make it good.

We see no reason to disbelieve the statement made by Mt. Janki that she bid for the property under a mis-apprehension and that she was not intending to buy the building which was put up to sale. The learned Mun-

sif also believed her. In these circumstances it was open to him to pass the order which he did pass before the sale had been sanctioned by him, and we do not consider that he was guilty of any material irregularity in the exercise of his jurisdiction. In these circumstances we do not feel that there is any sufficient ground for interference in revision. We therefore reject the application, but as learned counsel for the opposite party did not appear when the case was called, we make no order about costs.

K.S. *Application rejected.*

A. I. R. 1935 Allahabad 205

NIAMATULLAH AND BAJPAI, JJ.

Mt. Rasolan Bibi—Appellant.

v.

Mt. Ram Kuar and *others* — Plaintiff and Defendants—Respondents.

First Appeal No. 144 of 1932, Decided on 24th November 1933, from order of Sub-Judge, Allahabad, D/- 7th June 1932.

Civil P. C. (1908), O. 34, R. 1 — Person claiming as owner—Title should not be tried in mortgage suit.

A person claiming the right in the property as owner of the same in denial and derogation of the mortgagor is not a necessary party in a mortgage suit. The determination of such a title in a suit is bound to lead to confusion and hence should be avoided: 1916 *P C* 18; 1918 *All* 81, *Ref.* [P 206 C 1]

S. N. Seth—for Appellant.

Damodar Das—for Respondents.

Bajpai, J.—This is an appeal by the defendant, Mt. Rasoolan Bibi, against an order of remand passed by the lower appellate Court. The plaintiff, Mt. Ram Kuar, brought a suit for recovery of money and sale on the basis of a mortgage against four defendants, Mt. Husaini Bibi, Mt. Sajan Bibi. Abdul Ghafur and Mt. Rasoolan. Her case against the first three defendants was that they were the representatives of the mortgagor, and as such interested in the mortgaged property and the right to redeem. So far as Mt. Rasoolan, the fourth defendant, was concerned, the only allegation against her in the plaint was that she was in possession of the mortgaged property, in what capacity she was in possession was not mentioned. Mt. Rasoolan filed a written statement and she claimed to be owner of the property. She denied the mortgagors' title and the mortgagee's right to sue and set up a paramount title in herself. The other defendants also contested the suit. The Court of first instance dismissed the plaintiffs' title in its entirety. So far as Mt. Rasoolan was concerned he decided only one issue in controversy between her and the plaintiff. The issue was whether Mt. Rasoolan Bibi has been unnecessarily made a party to the suit and is the suit bad against her. The finding of the learned Munsif was that:

"question of paramount title ought not to be gone into in a mortgage suit. Persons claiming paramount title ought not to be made parties to mortgage suit. . . . . If she has got any title to the house and her rights are affected in any way she ought to get them determined in a separate suit. If the plaintiff or her successors-in-interest or the heirs of Abdulla feel that their rights, if any, in the house cannot be sufficiently enforced because of Mt. Rasoolan or her possession over the house they ought to bring a separate suit against her."

With these observations he held that Mt. Rasoolan Bibi upon her plea was unnecessarily made a party to the suit. Mt. Rasoolan had further claimed that she had been in possession of the house in suit as owner adversely for over 12 years. The learned Munsif held that it was not necessary to decide that issue. As we stated before, the plaintiffs' suit was dismissed in its entirety and therefore she went in appeal to the lower appellate Court. That Court decided in favour of the mortgagee so far as Sajan Bibi and Abdul Ghafur, representatives of the mortgagors, were concerned and disallowed their objections, but he was of the opinion that it was not right to leave the question of Rasoolan's title to be decided in a separate suit and, he therefore remanded the suit for the decision of Mt. Rasoolans' proprietary title which she set up on the ground that she was in possession adversely to the mortgagor for over 12 years.

It is contended before us on behalf of Mt. Rasoolan Bibi that the decision of the trial Court was correct inasmuch as she had claimed a paramount title and the determination of her title was absolutely foreign to the mortgage suit. The general provision regarding the joinder of defendants is to be found in O. 1, R. 3, Civil P. C., wherein it is stated that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same transaction is alleged to exist. The special provision regarding mortgage suits is to be found in O. 34, R. 1, Civil P. C., wherein it is stated that subject to the provisions of the Code all persons having an interest either in the mortgage security or in

the right of redemption shall be joined as parties to any suit relating to the mortgage. Now, it is clear that Mt. Rasoolan had nothing to do with the transaction of the mortgage either by herself or by her predecessor, nor can it be said that she had any interest in the mortgage security or in the right of redemption when she, as a matter of fact, says that the mortgagor had absolutely no right to mortgage the property. It is thus clear that the only right which Mt. Rasoolan was claiming was the right in the property as owner of the same in denial and derogation of the right of the plaintiffs' mortgagor and the determination of such a title in a suit based upon a mortgage was bound to lead to confusion. It was held by their Lordships of the Privy Council in 1916 P C 18 (1), that in a suit for sale under a mortgage joinder of persons claiming an adverse title was an irregularity and that it could only tend to confusion. The same view was taken in the case of 1918 All 81 (2), where Banerji and Raoof, JJ., held that in a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. We are therefore of the opinion that the remand of the case for determination of the title of Rasoolan Bibi was absolutely unnecessary.

We therefore allow this appeal and set aside the order of remand with costs to Rasoolan Bibi in this Court as well as in the lower appellate Court. The order of the Court of first instance awarding costs to Rasoolan Bibi is maintained. A decree under O. 34. R. 4 will be prepared against Sajan Bibi and Abdul Ghafar. The plaintiff will be entitled to add his costs to the decretal amount to be recoverable from the mortgaged property. The usual six months are allowed for payment.

R.K. *Appeal allowed.*

1. Radha Kunwar v. Reoti Singh, 1916 P C 18=35 I C 939=43 I A 187=38 All 488 (P C).
2. Gobardhan v. Manna Lal, 1918 All 81=46 I C 559=40 All 584.

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BENNET AND ALLSOP, JJ.

Mt. Fatima Bibi—Applicant.

v.

Shafiullah Khan—Opposite Party.

Civil Revn. No. 566 of 1933, Decided on 26th October 1934.

Court-fees — Decree for possession with mesne profits—Amount for mesne profits not specified—Court-fee on mesne profits need not be paid till mesne profits are ascertained —Civil P. C. (1908), O. 20, R. 12.

Where a suit is decreed for possession and for the mesne profits claimed without specifying any amount, the court-fee is not due for payment until the amount of mesne profits had been ascertained under O. 20, R. 12: 129 *I C* 662, *Rel. on.* [P 206 C 2]

N. U. A. Siddiqui and *Ishaq Ahmad*—for Applicant.

K. Masud Hasan — for Opposite Party.

Order.—This is an application in revision by a plaintiff. The circumstances are that the plaintiff sued for possession and for mesne profits before the suit, estimating the mesne profits for the purpose of O. 7, R. 2 as Rs. 50. A court-fee was paid on that amount. The suit was decreed by this Court for possession and for the mesne profits claimed without specifying any amount. The applicant has made an application under O. 20, R. 12, alleging that the amount of mesne profits due is Rs. 4,899-7-0. The lower Court states that the decree of this Court could only mean an ascertainment of the mesne profits in the suit itself under O. 20, R. 12 and not in execution. No objection was taken by the parties to that view, but the lower Court proceeded to hold that the plaintiff must pay court-fee on Rs. 4,899-7-0, before the inquiry to ascertain the mesne profits prior to the suit could be held. No authority is shown for the proposition as to why court-fee should be paid before the mesne profits are ascertained and the plaintiff contends that it should not be paid before his mesne profits have been ascertained. Learned counsel for the respondent was not able to show any Order of the Civil Procedure Code, which would require that the court-fee should be paid on the mense profits before ascertainment on the application under O. 20, R. 12, A contrary view has been taken in 129 I C 662 (1), where a learned Single Judge of the Patna High Court held in somewhat similar circumstances that the court-fee was not due for payment until the amount of mesne profits had been ascertained under O. 20, R. 12. We consider that this view is correct. We accordingly allow this revision with costs, set aside the order of the lower Court of 15th November 1933, and direct that court-fee need not be paid until the Court of

1. Sheodhin Singh v. Narangi Lal, (1926) 129 I C 662.

first instance has ascertained the amount of mesne profits due to plaintiff before suit.

K.S. *Revision allowed.*

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COLLISTER AND NIAMATULLAH, JJ.

Akhlaq Ahmad and *others*—Defendants—Appellants.

v.

Mt. Karam Ilahi—Plaintiff—Respondent.

Stamp Ref. in Second Appeal No. 1612 of 1931, Decided on 4th October 1934, from decision of Second Sub-Judge, Saharanpur, D/- 22nd June 1931.

(a) Court-fees Act (1870) Sch. 1, Art. 1 and Sch. 2, Art. 17 (3) — Plaintiff requiring not only mere declaration but cancellation of deed also—S. 39, Specific Relief Act, applies and ad valorem court-fee is necessary—Specific Relief Act (1877), S. 39.

A suit under S. 39, Specific Relief Act, for avoiding an instrument, even if there be no prayer for cancellation, carries with it by implication a prayer that the Court may further use the discretion given to it by S. 39, so as to order the said instrument to be delivered up and cancelled.

Where the contents of the plaint indicates that the plaintiff wants something more than a declaration, and wants the instrument to be cancelled and got rid of, Sch. 2, Art. 17 (3), Court-fees Act, is not applicable to this case; and that ad valorem court-fee is payable under Sch. 1, Art. 1 as though there had been a definite prayer for cancellation: 1932 *All* 485, *Foll.*; *Case law discussed.* [P 209 C 2]

(b) Court-fees Act (1870), Sch. 1, Art. 1 and Sch. 2, Art 17 (3)—Suit for declaration of invalidity of document and for avoiding it—Determination of court-fee to be paid—Tests indicated.

Per *Niamatullah, J.*—In each case the question is one of construction of the plaint and of ascertaining the relief which the plaintiff is claiming. Whether he is rightly claiming the relief of declaration need not be considered where the question is one of court-fee only. It is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of S. 39 Specific Relief Act. It may be that such a suit is, in certain circumstances, liable to be dismissed under the proviso to S. 42 of that Act, on the ground that the plaintiff, being able to seek a further relief (e. g. cancellation) than a mere declaration, omits to do so. For the purposes of court-fee, it is not open to a Court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation. [P 210 C 1,2]

Akhtar Husain Khan and *Ishaq Ahmad*—for Appellants.

Govt. Advocate—for the Crown.

Collister, J.—This matter arises out of a report of the Stamp Reporter. The plaintiff sued for a declaration that a sale-deed which had been executed by her on 17th October 1926, in favour of defendants 1 and 2 was void and ineffectual as against her. The plaint was stamped with a court-fee of Rs. 10 only. The defendants appealed, but their appeal was dismissed, and they have filed a second appeal in this Court, and on both appeals, they have paid a court-fee of Rs. 10 only. The Stamp Reporter is of opinion that Rs. 115 is now due from the plaintiff-respondent and Rs. 230 from the defendants-appellants.

The learned Government Advocate supports the view taken by the Stamp Reporter while counsel for the plaintiff pleads that his suit was under S. 42 Specific Relief Act, and that since he was asking for no consequential relief and was prepared to accept the consequences of not having claimed any such relief the plaint was property stamped. In 1931 All 369 (1), it was held by a Bench of this Court that when a plaint—as amended—was to the effect that it be declared that a compromise and decree were ineffectual as against the plaintiff, the suit as framed was to obtain a declaratory decree where no consequential relief was prayed, and therefore it was sufficiently stamped with a court-fee of Rs. 10 and the learned Judges expressed the opinion that the question of court-fee must be decided on the plaint itself. In the course of its judgment the Court reviewed the decisions of other High Courts in which there was a conflict of opinion. The case of 1932 All 316 (2), was also a case relating to a decree and my learned brother there observed:

"The Court has no right to say that the plaintiff should have claimed consequential relief and that not having done so, he should be deemed to have claimed the consequential relief and is therefore liable to pay the court-fees If, having regard to the nature of his claim, the plaintiff ought to have claimed consequential relief and has not done so, his suit might fail under the proviso to S. 42, specific Relief Act. The question of court-fee must be determined with reference to the plaint as it is and not as it ought to have been."

This case was referred to by a Bench of this Court in 1932 All 560 (3). In that case the plaint as amended was for a declaration that an agreement

1. Radha Krishna v. Ram Narain, 1931 All 369=131 I C 604=53 All 552.
2. Muhammad Ismail v. Liyaqat Husain, 1932 All 316=140 I C 191.
3. Brij Gopal v. Suraj Karan, 1932 All 560=141 I C 112.

and a will executed by certain deceased members of the family were null and void and did not bind the plaintiff and that certain property belonged jointly to the parties; and the learned Judges held that:

"For the purpose of determination of the court-fee, the actual relief asked for should be looked into and it is entirely beside the consideration of the Court whether the suit is likely or not to fail, because the plaint did not ask for a consequential relief."

The Court approved the decision in 1931 All 369 (1). It will be observed that in that case the documents had not been executed by the plaintiff himself, but by certain unspecified deceased members of the family. The case of 1932 All 485 (4), was decided by a Full Bench of five Judges and this is the case which the Stamp Reporter has relied upon as authority for the view which he takes. In that case it was held that:

"Where a suit is for the cancellation of an instrument under S. 39, Specific Relief Act, the relief is not a declaratory one; it falls neither under S. 7 (iv) (c) nor under Sch. 2, Art. 17 (iii), but under the residuary article, Sch. 1, Art. 1."

That case differs from the present one in that there was a prayer not only that a certain mortgage be adjudged void and ineffectual as against the plaintiffs, but also that it be cancelled; but at p. 689 (of 1932 A L J), the Court observed:

"A relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one."

In 1933 All 350 (5), the plaint as amended was for a declaration that the plaintiff was the owner in possession of the property in suit and that a certain decree be declared null and void. The Court below had held that the plaintiff was in fact asking for a cancellation of the decree and that this being a consequential relief an ad valorem court-fee ought to be paid in accordance with the view expressed in 1932 All 485 (4). The case was heard by a Bench of which my learned brother was a member and they held that a court-fee of Rs. 10 only was payable. They followed the cases of 1931 All 369 (1) and 1932 All 560 (3), and they distinguished the Full Bench case of 1932 All 485 (4), on the ground that in the latter case there was a distinct prayer for cancellation of the mortgage deed in suit. A Full Bench of this Court in 1933 All 488 (6), held that:

"Where the plaintiff merely asked for a declaration that the previous decree was not in any way binding upon him and was altogether void and ineffectual, his suit was one for obtaining a declaratory decree only and fell under Art. 17 (iii) Sch. 2, Court-fees Act, and the court-fee of Rs. 10 paid by him was sufficient."

Thus it will be seen that that case also was concerned with a decree and not with an instrument. At p. 677 (of 1933 A L J) the Court observed:

"Obviously the Full Bench, i. e. in the case of 1932 All 485 (4) did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court can call upon him to pay court-fees on the consequential relief, which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree but also asks for a relief which he calls 'consequential' relief, the mere fact that he calls it so would not prevent the Court from demanding full court-fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this."

The learned Judges go on however to say:

"On the other hand, there is no doubt that so far as the suits relating to the cancellation of instruments are concerned, the F.B. on p 689 (of 1932 A.L.J.) clearly held that a relief to have a Registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one. It was clearly pointed out that it was not incumbent on a plaintiff to ask in express terms a relief for the instrument to be delivered up and cancelled and that he might merely ask for its being adjudged void or voidable. Nevertheless, a suit which falls under S. 39, Specific Relief Act, was held to be not a suit for obtaining a mere declaratory decree but one for obtaining a substantive relief not otherwise provided for."

They distinguish the case of a decree on the ground that a suit to avoid a decree does not strictly fall under S. 39, Specific Relief Act. The case of 1934 All 56 (7), came before a Bench of which my learned brother was a member. The suit was for a declaration that a deed of gift executed by a third person in favour of the defendant was illegal and ineffectual as against the

4. Kalu Ram v. Babu Lal, 1932 All 485=139 I C 32=54 All 812=1932 A L J 684 (F B).
5. Lakshmi Narain Rai v. Dip Narain Rai, 1933 All 350=148 I C 152=55 All 274.
6. Sri Krishna Chandra v. Mahabir Prasad, 1933 All 488=149 I C 193=55 All 791=1933 A L J 673 (F B).
7. Abdul Samad Khan v. Anjuman Islamia Gorakhpur, 1934 All 56=149 I C 802.

plaintiff and that the defendant had no right to interfere with the possession of the plaintiff. The Court, after referring to the cases of 1933 All 350 (5) and 1933 All 488 (6), observed:

"In the case before us, the plaintiff claimed no more than a declaration. If he might and ought to have claimed any further or consequential relief and has omitted to do so, he may have offended against the provisions of S. 42, Specific Relief Act; but for all purposes of the Court-fees Act, we have to consider merely the relief actually claimed by the plaintiff and not the relief which he ought to have claimed."

In 1929 Nag 71 (8), it was held by the Court of the Judicial Commissioner of Nagpur that a suit which merely asks for a declaration of plaintiff's title to certain property and that a sale-deed executed by him does not affect his title, is really one for declaration of a title and cancellation of the sale-deed and the court-fee is on the value of relief under S. 7 (4), (c) and (d), Court-fees Act. In 5 I C 927 (9), there were 25 plaintiffs in the suit, of whom Nos. 2-25 were minors. Plaintiff 1 sued for himself and as the next friend of plaintiffs 2-25. The suit was for a declaration that a sale-deed be declared invalid and the said deed had been executed by all the members of the tarwad except plaintiff 1, the remaining plaintiffs being represented at the execution by their mothers. A Bench of the Madras High Court expressed the view that the prayer, so far as plaintiffs 2-25 were concerned, must be held to be a prayer for the cancellation of the deed and therefore an ad valorem court-fee was payable. There are however other rulings of various High Courts in which a contrary view is taken. As pointed out by this Court in 1931 All 369 (1), there is a conflict of opinion on the subject. For instance, in 1923 Cal 362 (10), the Calcutta High Court held that where the plaintiff alleged that she was in possession (as is the case here) and all she required was a declaration that the deed executed by her was not her deed and was inoperative, the proper court-fee payable was Rs. 10. In other cases it has been held that an ad valorem court-fee is payable.

It appears to me that the observations by the Full Bench in 1931 All 369 (1), though more or less obiter, since there was a prayer for cancellation are authority for the proposition that a suit under S. 39, Specific Relief Act, for avoiding an instrument, even if there be no prayer for cancellation, carries with it by implication a prayer that the Court may further use the discretion given to it by S. 39, so as to order the said instrument to be delivered up and cancelled. This view was taken by a Bench of this Court of which I was a member in 1934 All 1071 (11). Chap. 5 itself is headed "of the cancellation of instruments," and it seems to me that the words "'and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled" contemplate that if a Court sees fit to use its discretion so as to adjudge the document void, it will at the same time order it to be cancelled. In the circumstances, the words "may sue to have it adjudged void or voidable" appear to me to imply a prayer for cancellation. The present suit clearly falls under S. 39, Specific Relief Act, and it is significant that in para. 12 of the plaint the plaintiff states that, defendant 3 was asked many times to get the said document cancelled by the defendants, but he paid no heed to it, and in para. 13 it is stated that, owing to the subsistence of the said document it is apprehended that the plaintiff's proprietary right to the property will be extinct. The contents of these two paragraphs indicate that the plaintiff wanted something more than a declaration; she wanted the instrument to be cancelled and got rid of. In my opinion Sch. 2, Art. 17 (3), Court-fees Act, is not applicable to this case; an ad valorem court-fee is payable under Sch. 1, Art. 1 as though there had been a definite prayer for cancellation.

Niamatullah, J.—I agree with my learned brother that, on a proper construction of the plaint in this case, the plaintiff must be taken to have sued for cancellation of the sale-deed, dated 17th October 1926, executed by herself. Taking the plaint as a whole, it is clear that the suit is one falling within the purview of S. 39, Specific Relief Act. It is alleged that one of the defendants, taking advantage of the plaintiff's position as a helpless "pardanashin" woman, obtained from her the sale-deed which she did not understand and which she did not intend to execute, that the defendant was repeatedly asked to have "the said document cancelled" and that the plaintiff apprehends that if the document is left

8. Baburao v. Balajirao, 1929 Nag 71=118 I C 465=25 N L R 52.
9. Malikka Meladathil v. Kunji Achammal, (1910) 5 I C 927.
10. Umaranissa Bibi v. Zamirannissa Bibi, 1923 Cal 362=76 I C 448.
11. Suraj Ket Prasad v. Chandra, 1934 All 1071=153 I C 517.

outstanding "it will extinguish her proprietary rights." These allegations are followed by a prayer that the instrument be "declared" to be void and ineffectual against her. The word used in the original plaint is "istiqrar," which may also be translated in English as "adjudged," a word which is used in S. 39, Specific Relief Act. It is quite correct to construe the last paragraph of the plaint, taking it in conjunction with the other allegations above referred to, as containing a prayer that the sale-deed may be adjudged void.

In each case the question is one of construction of the plaint and of ascertaining the relief which the plaintiff is claiming. Whether he is rightly claiming the relief of declaration need not be considered where the question is one of court-fee only. To my mind it is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of S. 39, Specific Relief Act. It may be that such a suit is, in certain circumstances, liable to be dismissed under the proviso to S. 42 of that Act, on the ground that the plaintiff ,being able to seek a further relief (e. g., cancellation) than a mere declaration, omits to do so. There is a class of cases in which it is imperative that a plaintiff should have an instrument set aside or cancelled. Even where it is not so imperative, but the plaintiff is "able to seek further relief," a mere declaration will not be granted. If a plaintiff deliberately prays for a mere declaration that an instrument is void and if the circumstances of the case are such that the document can be completely annulled, he is, at least, "able" to have the instrument adjudged void, which implies that a copy of the decree annulling it shall be sent to the Registration Office for a note to be made on the copy therein retained, so that anyone searching and inspecting the Registration Office may at once find out that the document, though subsisting at one time, was subsequently annulled. In such a case his suit may be dismissed, being barred by the proviso to S. 42, Specific Relief Act. But, for all purposes of court-fee, it is not open to a Court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation.

Another class of cases in which a plaintiff can sue virtually for a declaration that an instrument is void or voidable against him without suing for cancellation is where the instrument has been executed by several persons or affects the interest of several persons against some of whom it is not void or voidable and the plaintiff sues for a declaration of his right to property and of the invalidity of the instrument so far as it affects his interest in such property. In such cases declaratory relief does not necessarily imply the relief that the instrument may be "adjudged" void or voidable with the consequence of a note of annulment being made in the Registration Office and of the Court ordering that the same be "delivered up and cancelled." In the present case however the plaint is clearly one for cancellation, and I agree with my learned brother in holding that the suit is one under S. 39, Specific Relief Act, and the plaintiff is liable to pay ad valorem court-fee.

K.S. *Order accordingly.*

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BAJPAI, J.

Nawal Kishore—Plaintiff—Applicant.

v.

Azim Uddin— Defendant — Opposite Party.

Civil Revn. No. 163 of 1934, Decided on 14th November 1934, against order of Small Cause Court Judge, Khurjan, D/- 10th October 1933.

(a) Civil P. C. (1908), O. 9 and O. 17—O. 9 does not apply where plaintiff or defendant has already appeared but has failed to appear at adjourned date.

The provisions of O. 9 by themselves do not apply to a case in which the plaintiff or defendant has already appeared but has failed to appear at adjourned hearing of the case. For such a case the procedure is laid down in O. 17 which deals with adjournments : 1914 *Cal* 860, *Rel on.* [P 211 C 2]

(b) Civil P. C. (1908), O. 17, R. 1 — O. 17, R. 1 applies to adjournment made at party's instance as also by Court on its own motion.

Order 17, R. 1 applies both to adjournments made at the instance of a party and to adjournments by the Court of its own motion. [P 211 C 2]

(c) Civil P. C. (1908), O. 17, R. 3 — Plaintiff present at earlier hearings and asked to produce evidence — Pleader present with adjournment application — Adjournment refused — Suit dismissed — Suit held was dismissed on merits and not for default.

Where a plaintiff who had appeared before and had been asked to produce evidence did not produce evidence on the adjournment but was represented by a pleader who applied for adjournment and the Court dismissed the suit :

Held : that the dismissal was on merits and not for default : 1933 *All* 41. [P 212 C 1]

G. S. Pathak—for Applicant.

M. A. Aziz—for Opposite Party.

Order.—The plaintiff brought a suit on the basis of a bond in the Court of the Judge Small Causes at Khurja on 4th Jully 1933. The Court fixed 25th August 1933, for the hearing of the case. The parties appeared on that date; the defendant filed his written statement and the Court was of the opinion that on the pleas taken by the defendant, the case needed a close inquiry and therefore the case was adjourned for 13th September 1933. It appears that on 4th or 5th September 1933 the plaintiff applied that the date might be changed and the Court on 5th September 1933, ordered that the case should come up for hearing on 9th October 1933. It is clear that the date of hearing was changed from 13th September to 9th October 1933, at the instance of the plaintiff and time was granted to him to produce his evidence on the altered date. The Court could not put the case on 9th October 1933, on account of contested cases and it adjourned the case for the succeeding date. On that date the plaintiff was not present, but his counsel applied for adjournment on the ground of the plaintiff's illness and on the additional ground that one of the witnesses for the plaintiff had to attend the 13th day ceremony of a relation fixed for the 10th October, and therefore could not be present. The Court did not see its way to adjourn the case and observed as follows:

"Yesterday when the case was postponed for today, it was not said that the plaintiff was ill. It was said for a witness that he was to attend some ceremony and I undertook to release him to-day at 10-30 a. m. after recording his evidence. As such the case called up in the morning at 10-15 a. m. but for sometime the plaintiff did not turn up with his vakil . . . . . I do not believe in such tactics and regard the application as false. It is rejected."

The Court then took up the case and after recording the statement of plaintiff's counsel which was to the effect that he had no instructions in the case beyond moving the application for adjournment, dismissed the plaintiff's suit allowing full costs to the defendant. The two pleas taken by the defendant were that the bond was not a genuine bond and that the entire proceedings on behalf of the plaintiff from the filing of the plaint were taken by one Phool Chand and not by the nominal plaintiff. The Court took down the signature of Phool Chand on a paper and then, as I said before, the Court proceeded to write judgment in the case dismissing the plaintiff's suit. In revision it is contended before me that:

"the suit should not have been dismissed and that there were sufficient grounds for the applicant's non-appearance on 10th October 1933."

Before I proceed to discuss the two pleas taken by the defendant, it is necessary to find out the circumstances under which the plaintiff's suit was dismissed, and to decide whether it was dismissed on the merits or in default. It is contended by learned counsel for the applicant that the suit was dismissed on the merits, whereas learned counsel for the defendant says that the suit was dismissed in default and the proper remedy for the plaintiff was to apply for restoration. The plaintiff was present on 25th August 1933, the date fixed for the first final hearing in the case and the provisions of O. 9 by themselves would not apply; those provisions by themselves do not apply to a case in which the plaintiff or defendant has already appeared, but has failed to appear to an adjourned hearing of the case. For such a case the procedure is laid down in O. 17 which deals with adjournments. This was the view taken by the Calcutta High Court in 1914 Cal 360 (1), and I am in agreement with this view. I have now got to see whether any rule of O. 17 applies to the facts of the present case. O. 17, R. 1 provides that the Court may grant time to the parties or to any of them, if sufficient cause is shown and it also provides that the Court may from time to time adjourn the hearing on the suit. It follows from this that O. 17, R. 1 applies both to adjournments made at the instance of a party and to adjournments by the Court of its own motion. In O. 17, R. 2 certain additions have been made by this Court. The main provision is to the effect that:

"if on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. 9 or make such other order as it thinks fit."

The explanation added by this Court is that:

"No party shall be deemed to have failed to appear, if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application."

In the present case, the plaintiff cannot be deemed to have failed to appear because he was represented in Court by a pleader, though engaged only for the purpose of making the application

1. Enatulla Basunia v. Jiban Mohan Roy, 1914 Cal 360=23 I C 769=41 Cal 956.

for the adjournment of the case. The dismissal cannot therefore be said to be under O. 17, R. 2. The question is if O. 17, R. 3 applies. That rule with its additions made by this Court says that:

"Where any party to a suit to whom time has been granted fails, without reasonable excuse, to produce his evidence . . . . . the Court may, whether such party is present or not, proceed to decide the suit on the merits."

This rule gives an option to the Court to decide the suit on the merits. In the present case time was undoubtedly granted to the plaintiff to produce his evidence on 19th October 1933, and it is reasonable to say that the adjourned date of 10th October 1933 should also be considered as the date for which time was granted to the plaintiff to produce his evidence. The plaintiff failed to produce his evidence and the Court was entitled to decide the suit on the merits. No evidence having been produced by the plaintiff, the Court had no option, but to dismiss the suit, if it wanted to decide it on the merits. In this rule there is no provision that a suit can be decided on the merits only if the evidence or a substantial portion of the evidence of the party failing to appear has been recorded such as there is by virtue of the addition made by this Court in R. 2. One indication of the fact that the suit was not dismissed in default appears from the fact that the Court does not say in so many words that it was dismissed in default and this is usual in the majority of cases when a Court dismisses a suit in default; another indication is in the fact that full costs were allowed to the defendant, though as a matter of practice, ordinarily, where a suit is dismissed in default, only half costs are allowed to the opposite party. A third indication might be found in the fact that the Court says that a very serious allegation was contained in the defendant's application (18-C), dated 10th October 1933. If the dismissal of the suit be not deemed to be on the merits, it is difficult to refer it to any other provision in the Civil Procedure Code. The view that I have taken is in accordance with the view taken by this Court in 1933 All 41 (2).

I have therefore come to the conclusion that the plaintiff's suit was dismissed by the Small Cause Court Judge on the merits and the only remedy available to the plaintiff was to apply in revision to this Court and not to the Court below for restoration. I have now got to see whether there are any merits in this revision. It is clear that although the suit must be deemed to have been dismissed on the merits, yet the evidence on behalf of the plaintiff was not tendered in the Court below and the reason of such failure was the refusal by that Court to adjourn the hearing of the case on 10th October 1933. As stated before, the plaintiff's counsel urged that the plaintiff was not present on account of illness and his witness was not present on account of urgent business. Although the application was not supported by an affidavit, yet an indication of the fact that the witness would not be able to attend on the next day was given to the Court on 9th October 1933 and the Court might well have seen its way to adjourn the case. I am all the more inclined to take this view on the question of adjournment because of the serious allegations that were made by the defendant. If they are correct, then the plaintiff has been guilty not only of producing a false document, but the entire proceedings in this case from start to finish have been taken not by the nominal plaintiff, but by somebody else, namely, Phool Chand. I think these allegations ought to be enquired into by the Court below. The result is that I allow this application, set aside the decree of the Court below and send back the case to the Small Cause Court Judge with directions to re-admit the suit to its original number and dispose it according to law after giving an opportunity to the parties to produce their evidence.

K.S. *Application allowed.*

2. Man Mohan Das v. Krishna Kant 1933 All 41 =144 I C 141.

A. I. R. 1935 Allahabad 212

BAJPAI, J.

Mehdi Hasan—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 168 of 1934, Decided on 1st November 1934, against order of First Sub-Judge, Saharanpur, D/- 10th January 1934.

Criminal P. C. (1898), Ss. 476 and 476-B — Munsif directing after preliminary inquiry under S. 476 that complaint shall be lodged before District Magistrate — Such direction is not decree — Power of District Judge to transfer appeal from such order is governed by Criminal Procedure Code and not by Civil enactment — District Judge transferring such case to

Subordinate Judge — Latter held could not hear appeals and that District Judge himself should dispose of it.

Where after an inquiry under S. 476, Criminal P. C., the Munsif diretcs that a complaint should be lodged before the District Magistrate, the direction of the Munsif for the filing of the complaint is not a decree. And where an appeal is filed to the District Judge from such direction the power of the District Judge to transfer the case is governed by the Criminal Procedure Code itself and not by any civil enactment and the Criminal Procedure Code does not provide for any transfer in a matter like this. Hence where a District Judge has transferred the case to be disposed of by the Subordinate Judge :

The Subordinate Judge is not empowered to hear the appeal and the District Judge himself should dispose of it. [P 213 C 2]

Shiva Prasad Sinha and *Miss L. W. Clarke*—for Applicant.

D. Sanyal for *Muhammed Ismail*—for the Crown.

Order.—The learned Munsif of Deoband after holding a preliminary enquiry under S. 476, Criminal P. C.. directed that:

"a complaint shall be lodged before the District Magistrate of Saharanpur under S. 195 (1) (b) and (c) read with S. 476, Criminal P. C., against Mehdi Hasan to stand his trial under S. 193 read with S. 198 and S. 471, I. P. C."

An appeal against this was filed by Mehdi Hasan under S. 476B, Criminal P. C., in the Court of the District Judge, Saharanpur. The Court of the Munsif is subordinate to the Court of the District Judge because appeals ordinarily lie from the appealable decrees of the Munsif to the Court of a District Judge; and so far everything was regular. The learned District Judge transferred the appeal to the Court of the Subordinate Judge who with some modifications has confirmed the direction of the learned Munsif.

Mehdi Hasan has applied in revision to this Court under S. 115, Civil P. C. His first contention is that the learned Subordinate Judge was not competent to dispose of the appeal. It is said that under S. 476B the withdrawal of the complaint made by the learned Munsif could be directed only by a Court to whom the learned Munsif was subordinate. Within the meaning of S. 195, Sub-S. 3 the Court of the Munsif is subordinate only to that Court to which appeals from the Munsif's decisions ordinarily lie, and that such a Court is the Court of the District Judge, as provided by S. 21, Sub-S. 2, Bengal, Agra, and Assam Civil Courts Act. It is however contended by the learned Government advocate that the appeal was filed in the Court of the District Judge of Saharanpur, and the said officer had jurisdiction under S. 24, Civil P. C., to transfer the appeal to a Court subordinate to itself. S. 24, Civil P. C., says that a District Court may, at any stage, transfer an appeal pending before it for disposal to any Court subordinate to it and competent to try or dispose of the same. The words "competent to try or dispose of the same" are important; and the question is whether the Subordinate Judge was competent to try or dispose of the appeal; and it must be conceded that if the provisions of the Criminal Procedure Code alone are looked at, the learned Subordinate Judge was not competent to try or dispose of the appeal. Reliance was then placed upon S. 22, Bengal, Agra and Assam Civil Courts Act, which says that a District Judge may transfer to any Subordinate Judge under his administrative control any appeals, pending before him from the decrees or orders of the Munsifs. It is clear that the direction of the Munsif for the filing of the complaint was not a decree; and it is open to some doubt whether it could be called even an order of the Munsif in the sense in which that word is used in S. 22 of the aforesaid Act. In a case like this we should look, for the power of transfer, not in any civil enactment but in the Criminal Procedure Code itself, and that Code does not provide for any transfer in a matter like this, I am supported in this view by the cases of 39 Cal 774 (1) and (1918) All 326 (2).

Several other points were discussed before me, and it was specially argued that Mehdi Hasan was not a party to a proceeding pending in the Court of the learned Munsif, and therefore a complaint under S. 471, Penal Code, could not be filed against him. It was also said that he could not be said to be guilty of an offence under S. 193, Penal Code. S. 198, Penal Code, was not discussed before me because the learned Subordinate Judge who heard the appeal of Mehdi Hassan revoked the complaint so far as S. 198, Penal Code, was con-

1. Ram Charan Chanda v. Taripulla, (1912) 39 Cal 774=13 I C 1007=13 Cr L J 191.
2. Emperor v. Badri Prasad, 1918 All 326=42 I C 914=19 Cr L J 2=40 All 35.

cerned; but in view of the action which I propose to take in this revision it would be necessary for the learned District Judge of Saharanpur to consider the propriety of the direction made by the learned Munsif of Deoband which was to the effect that a complaint shall be lodged against Mehdi Hasan under S. 193 read with S. 198 and S. 471, Penal Code. In connection with the last offence I may invite the attention of the learned District Judge to the Full Bench decision of this Court in 1931 All 443 (3).

For the reason that the learned Subordinate Judge was not empowered to hear the appeal, I allow the application, set aside the order of the learned Subordinate Judge and send back the case to the District Judge of Saharanpur with directions that he would readmit the appeal of Mehdi Hasan on his own file and dispose of it himself. Parties to bear their own costs.

K.S. *Order accordingly.*

3. Emperor v. Kushal Pal Singh, 1931 All 443= 1931 Cr C 715=134 I C 225=32 Cr L J 1105= 53 All 804 (SB).

A. I. R. 1935 Allahabad 214

BAJPAI, J.

Beni—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 198 of 1934, Decided on 25th October 1934, from order of Addl. Sess. Judge, Philibit, D/- 5th January 1934.

(a) Civil P. C. (1908), O. 21, Rr. 24 and 44 — Process signed by amin but not bearing seal of Court—Attachment is illegal— Hence removal of such property is not offence — Penal Code (1860), S. 379.

No property can be declared to be attached unless first the order of attachment has been issued and secondly in execution of that order the other things prescribed by the rules in the Code have been done. The Code prescribes under O. 21, R. 24 for processes to be signed by the Judge or such officer as the Court may appoint in this behalf and for the processes to be sealed with the seal of the Court. Hence where a process is signed by only the amin and does not bear the seal of the Court, the attachment is illegal and the property does not pass from the possession of the judgment debtor into the possession of the Court and a removal of such property does not constitute any offence : 7 *All* 506 ; 1919 *Pat* 404 and 1926 *Pat* 237, *Rel on.* [P 215 C 1, 2]

(b) Penal Code (1860), S. 379 — Removal under assertion of bona fide title is not dishonest or fraudulent.

If a person in assertion of a bona fide title accruing before the attachment removes the crops, he cannot be said to be acting dishonestly or fraudulently. [P 216 C 1]

G. S. Pathak—for Applicant.

Man Singh for *S. B. Johari*—for the Crown.

Order.—This case was heard by me on 6th August 1934, when I directed that the amin of the Civil Court should be examined and his evidence tested carefully by the execution record of case No. 67 of 1933, of the Court of the Judge, Small Causes at Pilibhit. The amin was examined and cross-examined and his evidence has been certified to this Court along with a note by the Judge. The facts of the case might be stated briefly once more. On 24th March 1933, the amin of the Civil Court went to attach certain crops belonging to Bhaggi in execution of a decree obtained by Jagmohan Lal. It is said that the crops were attached and entrusted to a custodian. Some days afterwards, that is, on 2nd April 1933, Beni, the applicant before me, removed the crops in spite of a remonstrance by the sapurdar. Upon these facts Beni was convicted of an offence under S. 379, Penal Code, and sentenced to pay a fine of Rs. 50.

The contention of the applicant before me as well as before the Courts below was that the attachment was illegal and consequently there could be no theft if the applicant removed the crops. Reliance was placed on 1931 All 142 (1), in which Niamatullah, J., held that where attachment of moveable crops is made merely by beat of drum and the procedure prescribed by O. 21, R. 44, Civil P. C., is not followed, the produce cannot be deemed to have passed from the possession of the judgment-debtor into the possession of the Court, and if therefore the crops are removed with the consent of the judgment-debtor the person removing the crops cannot be said to be guilty of theft. The argument of the applicant is that the procedure prescribed by O. 21, R. 44, Civil P. C., was not followed in the present case. As there was some controversy on this point when the case was heard by me on the last occasion and as the evidence of the amin was not full, I considered it desirable to have the amin examined afresh. He now says that he received one warrant of attachment from the Court and he prepared two copies of the warrant himself and affixed one such copy on the land where the crop was grown and another copy on the outer door of the residential house of

1. Ram Sakhal Singh v. Emperor, 1931 All 142= 129 I C 715=1931 Cr C 208=32 Cr L J 437.

the judgment-debtor. He admits that the copies of the warrant of attachment were not sent to him by the Court, but that he himself prepared the copies of the warrants. The learned Judge before whom the amin was examined has appended a note, from which it would appear that, he felt some difficulty in accepting the evidence of the amin. I have similar difficulty myself, but even if it be assumed that the amin is speaking the truth, I agree with the applicant's counsel that the formalities prescribed by O. 21, R. 44, Civil P. C., have not been complied with. There was no warrant for the preparation of the copies by the amin. Under O. 21, R. 24, Civil P. C., every process issued by a Court for the execution of the decree shall bear date the day on which it is issued and shall be signed by the Judge or such Officer as the Court may appoint in this behalf and shall be sealed with the seal of the Court and delivered to the proper officer to be executed. The copies that were prepared by the amin might have borne date the day, on which it was issued, but they were not signed by the Judge and they were not sealed with the seal of the Court. The amin's evidence makes this clear. He says that the warrants were not sent to him by the Court and that he himself prepared the copies of the warrants. It is therefore obvious that the copies were signed by the amin and did not bear the seal of the Court. As pointed out by me in my former order their Lordships of the Privy Council have said that no property can be declared to be attached unless first the order of attachment has been issued and secondly in execution of that order the other things prescribed by the rules in the Code have been done. The Code prescribes under O. 21, R. 24, for the processes to be signed by the Judge or such officer as the Court may appoint in this behalf and for the processes to be sealed with the seal of the Court. It is doubtful if the amin can be deemed to be an officer appointed by the Court in this behalf and had the power to sign the process. In 7 All 506 (2), their Lordships of the Privy Council intimated that the judgment of the Calcutta High Court was correct. In that case Oldfield, J., had observed that:

"the fact that the order of attachment and notices of sale were not issued under the signature of the Judge but of the Munsarim as though emanating from him constituted serious illegalities of procedure. Orders so issued could properly speaking have no legal effect since S. 222 of Act 8 of 1859 requires that the warrants for execution shall be signed by the Judge, and the Munsarim had no power to sign them having regard to his duties as declared in S. 24, Act 3 of 1873 (Civil Courts Act)."

Straight, J., concurred with this view and held that the language of S. 222 of Act 8 of 1859, is plain and positive and it was impossible to hold that the order directing attachment was not a warrant within the meaning of that section. It is true that their Lordships were discussing the illegality contained in the warrant of attachment and the notices of sale issued by the Court itself and not the illegality in the warrants that had to be attached on the land and on the residential house, but that to my mind makes no difference, because all these warrants are processes that have to be issued by the Court. S. 222 of Act 8 of 1859, is the same as O. 21, R. 44, in several material particulars. In 1919 Pat 404 (3), their Lordships of the Patna High Court held that the injunction contained in O. 21, R. 24, about the sealing of the warrant with the seal of the Court was mandatory and unless it was complied with, the attachment was illegal. It was also held that the attachment being illegal resistance to such attachment could not constitute an offence. In 1926 Pat 237 (4), it was held that if the writ of attachment did not bear the seal of the Court as required by O. 21, R. 24, Civil P. C., the defect was not a mere technical one, because the presence of the seal of the Court giving authority to the writ is an obviously imperative safeguard and if the writ was invalid and resistance was made at the time of the attachment the person resisting would be free from liability as long as no excessive force was used. I have therefore come to the conclusion that the attachment was illegal and that therefore the property did not pass from the possession of the judgment-debtor into the possession of the Court, and it is not the case for the prosecution that the removal of the crops was without the consent of the judgment-debtor.

Indeed in this connexion I have to notice another argument advanced by learned counsel for the applicant. It is said that the applicant had purchased the crops on 23rd February 1933, by means of a sale-deed about a

2. Ram Dayal v. Mahtab Singh, (1885) 7 All 506 (PC).

3. Khadir Bux v. Emperor, 1919 Pat 404=49 I C 171=3 Pat L J 636.

4. Badri Gope v. Emperor, 1926 Pat 237=93 I C 146=27 Cr L J 418=5 Pat 216.

month before the alleged attachment on 24th March 1933. Whether the sale-deed was merely a paper transaction or a valid transfer of title is a different question, but there can be no doubt that the judgment-debtor was a consenting party to the removal of the crops by the applicant. In this connexion however the contention of the applicant is that the Courts below have not gone into the question of title which they had to decide and reliance is placed on the case of 1930 All 329 (5). Sen, J., while construing S. 424, Penal Code, observed that the crucial question was whether the alleged removal of property was dishonest or fraudulent and therefore if persons claiming title to a property under attachment in execution of a decree on another remove the same, the matter whether such property belonged to the accused or not has to be determined by the Criminal Court before deciding upon conviction. The same crucial question for determination arises under S. 379, Penal Code, as well. There can be no doubt that the Courts below have not decided on the question of the validity of the sale-deed produced by the applicant, but have contented themselves by saying that the applicant knew of the attachment when he removed the crops and he should have desisted from such removal the moment he came to know of the attachment and if he felt aggrieved, he should have gone to the executing Court to file objections there. The District Magistrate undoubtedly is somewhat suspicious about the sale-deed, but he too has not recorded any definite finding on the point inasmuch as he was of the opinion that the matter was not of any importance because if the accused had really got these crops he should have filed objections in the Civil Court in the course of the execution proceedings and had no right to take the law into his own hands. This really misses the crucial point, which is that if a person in assertion of a bona fide title accruing before the attachment removes the crops he cannot be said to be acting dishonestly or fraudulently. If therefore I had not agreed with the first contention of the applicant, I would have felt it necessary to ask for a definite finding on this question of title. As it is, I am of the opinion that the attachment was illegal and the accused cannot therefore be said to have committed any offence.

5. Ghasi v. Emperor, 1930 All 329=1930 Cr C 454=124 I C 716=31 Cr L J 711=52 All 214.

For the reasons given above I allow this application, set aside the conviction and the sentence and direct that the fine, if paid be refunded.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 216

BENNET, J.

Baswa—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 817 of 1934, Decided on 5th December 1934, from order of Sess. Judge, Aligarh.

U. P. Municipalities Act (2 of 1916), S. 85 (1) (b)—Sub-section is intended to prevent cessation of work by large number of sweepers or strike — Strike is not reasonable cause.

What the sub-section is intended to prevent is cessation of work by a large number of sweepers or in other words a strike. A strike would not be a reasonable cause. A reasonable cause would include illness or festivities, such as marriage in the family of a sweeper. [P 217 C 1]

Gopi Nath Kunzru—for Applicant.

Asst. Govt. Advocate—for the Crown.

Order.—This is an application in criminal revision on behalf of one Baswa a sweeper in the employment of the Municipal Board of Atrauli in Aligarh District who has been convicted of an offence under S. 85, U. P. Municipalities Act (2 of 1916). The accused gave a notice to the Municipal Board saying:

"I would strike work from 6th August 1934 if certain of my grievances were not redressed by 30th July 1934."

The notice is dated 6th July 1934. The case for the prosecution was that the Board considered the matter at a meeting and stated that the grievances of the sweepers would be considered if they withdrew their notice by 8 a. m., on 3rd August 1934, that the Board after that date began to enlist new sweepers and when the sweepers who had given notices discovered this, they made an application Ex. 2 to the Secretary of the Board in the presence of the Chairman withdrawing their notices. The accused was one of the persons making the application Ex. 2. The recruitment of new sweepers was stopped and the old sweepers were allowed to resume their work which they did. Certain sweepers including the applicant did stop their work on the 6th August, without giving any further notice and they were prosecuted accordingly. The accused alleged that he did not intend to withdraw his notice and that he put his thumb impression on the blank paper

Ex. 2 under the impression that it was his resignation in accordance with the orders of the Board. The lower Courts have not accepted this explanation of the accused. The learned Sessions Judge says:

"After the withdrawal of their formal notices if the appellants felt dissatisfied and wished to stop their work they should have given a fresh notice and should not have stopped work without it. Appellants' stopping work after the application Ex. 2 without fresh notice makes them liable under S. 85, Municipalities Act."

In other words the Courts below have considered that the sweepers have a right to strike if they give notice I do not agree with that view of the provisions of S. 85, Municipalities Act. Learned counsel agrees that sub-S. (1) (a) does not apply because that sub-section refers to resigning or abandoning employment. The accused here stated that his intention was to strike work and this implies that he did not intend to permanently resign or abandon his employment. Learned counsel states that his intention was to come under S. 85, sub-S. (1) (b). This provides that a sweeper employed by a Board who without a reasonable cause of which notice has when possible been given to the Board absents himself from his duty shall be liable upon conviction to imprisonment which may extend to two months. Now, there are two elements in this sub-section, one being a reasonable cause and the other being notice where possible. The Courts below have concentrated on the element of notice where possible. I do not think that this is the most important provision of the sub-section. I consider that the provision in regard to reasonable cause is more important as the sub-section states that the reasonable cause must always be present. The provision is intended to have a certain effect and it is intended to prevent some action on the part of sweepers. Why is it that sweepers are singled out for this particular provision ? Sub-S. (2) shows that the provisions of sub-S. (1) may also be applied by the Commissioner to:

"any other specified class of servants employed by a board whose functions intimately concern the public health or safety."

This indicates the reason why sweepers are subject to these special provisions that it is because their functions intimately concern the public health or safety. Now, it is clear that the cessation of work by a single sweeper of a Municipal Board would not have much effect on the public health or safety, as there would be no difficulty in getting some other sweeper to do his work for a temporary period. Obviously what the sub-section is intended to prevent is cessation of work by a large number of sweepers or in other words a strike. Sweepers are in a position to enforce their demands by a strike, as this would render matters very difficult for a Municipal Board, as owing to the strike the conservancy system would fail. I consider that the sub-section is specially intended to prevent a strike and I consider that the sub-section intends to lay down that a strike would not be a reasonable cause. By a reasonable cause I understand the subsection would include illness or festivities, such as marriage in the family of a sweeper. On this view I hold that the accused acted without reasonable cause and therefore his plea that he had not withdrawn his notice would be of no avail. The accused therefore was rightly convicted by the lower Courts under S. 85, U. P. Municipalities Act. The sentence of two months imprisonment under the circumstances of the case by the Magistrate or one month by the Sessions Court appears to me to be execessive and I should have considered that the present case would have been met sufficiently by fine, but I understand that the sentence has now been carried out and to inflict a fine would be to enhance it, I accordingly dismiss this application in criminal revision.

K.S. *Application dismissed.*

* A. I. R. 1935 Allahabad 217

SULAIMAN, C. J. AND GANGA NATH, J.

Sia Ram and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 622 of 1934, Decided on 26th October 1934, from order of Sess. Judge, Bulandshahr, D/- 14th June 1934.

*** (a) Criminal P. C. (1898), S. 342—S. 342 applies both to summons and warrant cases.**

Section 342 applies both to summons and warrant cases. As it is only fair to an accused person that he should be questioned generally on the case for the purpose of enabling him to explain any circumstances, appearing in the prosecution evidence against him, it is reasonable to hold that S. 342 applies to all cases. [P 218 C 2]

(b) Criminal P. C. (1898), S. 342 — Summary trial— Mere fact that statement of accused has not been recorded is not fatal.

The mere fact that the statement of the accused has not been recorded by the Magistrate in a summary trial would not show either that the

accused was never questioned at all or that the omission to record his statement is fatal.
[P 219 C 1]

(c) Criminal P. C. (1898), S. 263 — Magistrate should record not only plea of accused but also his examination though not in full.

It is the duty of the Magistrate to record not only the plea of the accused but also his examination, if any. The words 'if any' do not imply that it is optional to the Magistrate to examine ths accused or not, but merely imply that where the accussd has made a statement, particulars of his examination would be noted. But that is not the same thing as recording his examination in full. [P 219 C 1]

(d) Criminal P. C. (1898), Ss. 342 and 537 — Non-compliance with S. 342 — Defect is mere irregularity not fatal to trial unless accused has been prejudiced.

The defect of non-compliance with the provisions of S. 342 is a mere irregularity which is not fatal to the trial unless the accused has been prejudiced. [P 219 C 1]

S. N. Seth—for Applicant.

B. S. Darbari and *Prabhat Kumar* — for Opposite Party.

Asst. Govt. Advocate—for the Crown.

Sulaiman, C. J.—This is a reference by the Sessions Judge of Bulandshahr, against an order of a Magistrate convicting the accused under S. 379, Penal Code, and sentencing them to a fine of Rs. 50 each. So far as this case is concerned the note made by the Magistrate under the heading "plea of accused and his examination, if any," was "accused all plead not guilty." There were no further particulars of any statement that the accused might have made. The learned Sessions Judge has therefore inferred that the accused were not at all questioned generally as is required by S. 342, Criminal P. C. The learned Sessions Judge came to the conclusion that non-compliance with S. 342, Criminal P. C., which was applicable to the summary trial, was a fatal defect.

There has been some difference of opinion as to whether the latter provision of S. 342 (1) applied to summons cases just as it applied to warrant cases. With the exception of the Madras and Rangoon High Courts it appears that all the other High Courts, namely, of Calcutta, Bombay, Lahore and Patna as well as Allahabad have been of the opinion that S. 342 applies to summons cases just as well as to warrant cases. The contention that the words "before he is called on for his defence" occurring in S. 342 do not occur in Ss. 242, 243, 244 and 245, Chap. 20, does not appear to have much force because the exact words have not been repeated even in S. 289 though the words used therein are somewhat similar. No doubt there is provision in Chap. 20 for questioning and examining the accused, but that does not imply that S. 342 is wholly inapplicable. The last mentioned section occurs in Chap. 24 which has the heading "general provisions as to inquiries and trials." There is therefore no reason to presume that the provisions in this chapter are inapplicable to summons cases. S. 364 provides that when an accused is examined the whole of his examination including every question put to him and every answer given by him shall be recorded in full. But sub-S. 4 of that section lays down that nothing in this section shall be deemed to apply to the examination of an accused person under S. 263 which applies to a summary trial. It is therefore obvious that even in the case of a summary trial, and much more so in a summons case, the examination of an accused is necessary although the recording of the whole of such examination is dispensed with in the case of summary trials.

It may well be that there is much to be said in support of either view, but the preponderance of opinion has been in favour of the view that S. 342 applies both to summons and warrant cases. In 1926 All 358 (1), Daniels, J., held that S. 342 has always been held to be applicable to summons cases as well as to warrant cases, and the learned Judge applied the provisions of that section to the summons case out of which the reference before him had arisen. There are several other cases in which the same opinion has been expressed, but they may be distinguished on the ground that they refer to warrant cases: see, 1923 All 81 (2), 1928 All 266 (3) and 1928 All 222 (4). As it is only fair to an accused person that he should be questioned generally on the case for the purpose of enabling him to explain any circumstances appearing in the prosecution evidence against him, it is reasonable to hold that S. 342 applies to all cases.

Section 244 merely requires that the Magistrate should hear an accused and take all such evidence as he produces in his defence; and so hearing the accused may not be exactly questioning him generally on the case in order to

1. Khacho Mal v. Emperor, 1926 All 358=93 I C 69=27 Cr L J 405.
2. Bechu Chaube v. Emperor, 1923 All 81=71 I C 115=24 Cr L J 67=45 All 124.
3. Murat Singh v. Emperor, 1928 All 266=107 I C 592=29 Cr L J 265.
4. Emperor v. Jhabbar Mal, 1928 All 222=115 I C 872.

enable him to explain any circumstances appearing against him. In this view of the matter we are of opinion that the view expressed in this Court should not be departed from when it is supported by the opinion expressed in so many other High Courts. We accordingly hold that the provisions of S. 342 apply to summons cases as well. The position as regards summary trials is in our opinion simpler. S. 342 does not itself require that the answers given by the accused to the questions put to him should be reduced to writing. But for warrant and summons cases S. 364 requires that the whole of the examination of an accused person should be so recorded in the form of questions and answers. As already pointed out this recording of the statement is expressly dispensed with in the case of summary trials. It would therefore follow that the mere fact that the statement of the accused has not been recorded by the Magistrate in a summary trial would not show either that the accused was never questioned at all or that the omission to record his statement is fatal.

The procedure prescribed for summons cases applies under S. 262 to summary trials as well. S. 263 which applies to summary trials requires that the Magistrate shall enter certain particulars including the plea of the accused and his examination (if any). It therefore follows that it is the duty of the Magistrate to record not only the plea of the accused, but also his examination, if any. The words "if any" do not imply that it is optional to the Magistrate to examine the accused or not, but merely imply that where the accused has made a statement, particulars of his examination should be noted. But that is not the same thing as recording his examination in full.

In this particular case, we cannot be the first place be absolutely certain that the accused were never questioned at all, particularly as we find that in the connected case which was decided on the same date an abstract of their statements was actually recorded, but the fact remains that particulars of the examination, if any had taken place, were not recorded by the Magistrate, but only the plea of not guilty was noted. But such a defect is at the most a mere irregularity which can be cured under S. 537, Criminal P. C., unless the defect has in fact occasioned a failure of justice. It has been held in the cases decided by this Court quoted above, that the defect of non-compliance with the provisions of S. 342 is a mere irregularity which is not fatal to the trial unless the accused has been prejudiced.

In the case before us the question was whether the accused had cut down certain trees belonging to the complainant who was the zamindar. After the complainant's evidence had been closed the accused, after pleading that they were not guilty, produced evidence to show that the trees had not been cut down by the accused, but were actually cut down by the zamindar himself. This evidence has not been believed. There was no suggestion in the cross-examination of the witnesses for the prosecution nor in the defence evidence that the trees belonged to the accused themselves or even to any other party. The learned Magistrate expressly noted in his judgment that it was not contested on behalf of the accused that the trees belonged to the zamindar. We are therefore unable to agree with the learned Sessions Judge that there was a possibility of the accused denying the ownership of the trees if they had been specifically questioned about the matter. We must therefore hold that the accused have in no way been prejudiced by either the omission to question them generally on the case after the prosecution evidence had been closed or by the omission to record the particulars of their examination.

The learned Sessions Judge is clearly wrong in thinking that a sentence of fine only was illegal. We however agree with him that the sentence of fine of Rs. 50 on each of the four accused for the offence of cutting down two babul trees worth Rs. 10 is rather severe. We accordingly accept this reference in part and upholding the convictions of all the accused reduce the fines imposed upon them to Rs. 15 each; in default of payment of the fines they will undergo two weeks' rigorous imprisonment each. Out of the total amount so realized Rs. 10 will be paid to the complainant as compensation.

K.S. *Reference partly accepted.*

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SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Kehar Singh—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 345 of 1934, Decided on 16th August 1934, from order of Sess. Judge, Meerut.

U. P. Prevention of Adulteration Act (1912), S. 15 — Hearing of case within less than seven days from date of service of summons is irregularity — If no prejudice is caused to accused defect is cured by Criminal P. C., S. 537.

Omission to state the name of the prosecutor or the particulars of the offence in the summons or a delay in the filing of the complaint or the hearing of the case within less than seven days days from the date of the service of the summons, would certainly be an irregularity, but that alone is not sufficient to make the conviction illegal. These provisions are subject to the general provisions of S. 537, Crimlnal P. C. The mere fact that certain particulars are not mentioned in a summons, would not in every case be prejudicial to the accused when at the trial he is aware of such particulars. On the other hand, the hearing of a case within less than seven days from the date of the service may in most cases be prejudicial to him and he may not be able to defend himself at such short notice. But where the accused has not made any grievance of it either before the Magistrate or in the grounds of revision, he is not prejudiced in any way and the irregularity is cured by S. 537 : 1929 *All* 157 ; 1930 *All* 595 and 1931 *All* 705, *Ref.* [P 220 C 2]

Asst. Govt. Advocate—for the Crown.

Judgment.—This is a reference by the Sessions Judge of Meerut recommending that the conviction of the accused under S. 4, U. P. Prevention of Adulteration Act (6 of 1912), be set aside. It appears that the learned Magistrate on 17th December 1933, fixed 3rd January 1934, as the date for the hearing of the case and ordered summons to issue. The summons, however was not served till 31st December 1933. The case was heard on 3rd January 1934, and the accused made no protest as to the shortness of the time which he had to meet the prosecution case. The trial ended and the accused was convicted. On his behalf his counsel never suggested to the trying Magistrate that the accused had been prejudiced by the case having been taken up at such short notice. He went up in revision to the learned Sessions Judge and took no fewer than 12 grounds but did not suggest that the accused had been prejudiced by the date having been fixed rather early. There was no point taken that he had been prejudiced by any omission or irregularity in the summons which was served upon him.

Section 15, sub-S. (1), provides that no summons shall issue for the attendance of any accused person unless the same is applied for within thirty days from the date on which the order has been made. But S. 15, sub-S. (2) contains a mandatory provision that every summons shall specify the parcticulars of the offence charged and the name of the prosecutor; and further provides that the day fixed for the hearing of the case shall not be less than seven days from the day on which the summons is served upon the accused. The reference is based on two rulings of this Court. In 1930 All 595 (1), Dalal, J., considered that the omission to mention the charge in the summons was highly prejudicial to the accused and on that ground he set aside the conviction. In 1931 All 705 (2), Pullan, J., followed the ruling in 1930 All 595 (1), and held that the failure to state in the summons the particulars of the offence charged was fatal to the prosecution and set aside the conviction. On the other hand, in 1929 All 157 (3), Dalal, J., declined to interfere, although the complaint had not been filed within the time prescribed under S. 15, sub-S. (1).

Although the provisions of S. 15 are mandatory and ought to be followed by Magistrates, the question is whether, if there is some non-compliance, the conviction is illegal and should be set aside. Now, omission to state the name of the prosecutor or the particulars of the offence in the summons or a delay in the filing of the complaint or the hearing of the case within less than seven days from the date of the service of the summons, would certainly be an irregularity, but that alone is not sufficient to make the conviction illegal. These provisions are subject to the general provisions of S. 537, Criminal P. C., under which no error, omission or irregularity in the summons can justify the setting aside of a finding or sentence or the order passed by a Court of competent jurisdiction on appeal or in revision, unless such omission, error or irregularity has in fact occasioned a failure of ob justice. We would therefore think that the mere fact that certain particulars are not mentioned in a summons, would not in every case be prejudicial to the accused when at the trial he is aware of such particulars. On the other hand, the hearing of a case within less than seven days from the date of the service may in most cases be prejudicial to him and he may not be able to defend himself at such short notice.

But in this particular case the accused never appears to have made a

1. Bansari Das v. Emperor, 1930 All 595=1930 Cr C 817=125 I C 503=31 Cr L J 866.
2. Bohra Raghubar Dayal v. Emperor, 1931 All 705=1931 Cr C 1041=133 I C 418=32 Cr L J 1031.
3. Emperor v. Ram Chand, 1929 All 157=114 I C 870=30 Cr L J 369=50 All 853.

grievance of it. When the case was called on by the Magistrate on 3rd January 1934, there was no protest on his behalf that the summons had been served only a few days earlier. When he went up in revision before the Sessions Judge, in none of the 12 grounds of revision he took was there any suggestion that he had been prejudiced. Had he been prejudiced, he would certainly have raised a ground to that effect. In these circumstances, we accept the finding of the learned Sessions Judge that the accused was not prejudiced in any way. The irregularity therefore is cured by S. 537, Criminal P. C. The conviction and sentence passed on the accused, therefore stand. Let the record be returned.

K.S. *Order ccordingly.*

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Full Bench

SULAIMAN, C. J. THOM AND RACHHPAL SINGH, JJ.

Ram Nath and *another*—Defendants—Appellants.

v.

Chiranji Lal and *another* — Plaintiffs Defendant—Respondents.

Second Appeal No. 947 of 1932, Decided on 3rd October 1934, from decree of Addl. Sub-Judge, Muttra, D/- 31st May 1932.

**** (a) Hindu Law—Joint family—Debts on mortgage contracted byfather to finance new business—Sons are not liable, unless transaction is for benefit of family and to benefit of estate or is supported by legal necessity — Fact that it is required for new business is not sufficient to avoid son's liability.**

Where the business to finance which money has been borrowed by mortgage is a new business, the sons are not liable for the payment of the loan contracted by the father for this business, unless the transaction was for the benefit of the family and to the benefit of the estate or it was supported by legal necessity. The question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family, is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the cass, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family : 1932 *P C* 182 ; 1928 *All* 454, *Expl.* ; 1932 *P C* 182, *held did not Overrule* 1928 *All* 454 : *Case law discussed.*

[P 224 C 1, 2 ; P 227 C 1]

**** (b) Contract Act (1872), S. 61—No appropriation by either creditor or debtor — Payment should be applied in discharge of debt in order of time and if all are of same date, in discharge of each debt proportionately—Debtor and creditor.**

The Court should in the absence of any appropriation by either the debtor or the creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such, and if they are all of the same date, in discharge of each of such debts proportionately.

[P 228 C 2]

(c) Hindu Law—Debts—Manager of ancestral joint family trading business — Loans borrowed for business are binding upon entire joint family including minor members—Creditor is not bound to inquire into finances of business.

Per *Rachhpal Singh, J.*—A manager of an ancestral joint family trading business has full authority to take loans and make alienations to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members The creditor is not bound to inquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction : *Case law referred.* [P 232 C 1]

(d) Hindu Law — Joint family — Business started by Manager — There is no presumption that it is to be treated as ancestral property—It depends on facts of each case.

Per *Rachhpal Singh, J.*—There can be no presumption that a business started by a manager or a coparcener is to be treated as ancestral property. This is a point which is to be decided on the facts of each case. There may be cases in which the manager of a joint Hindu family starts a new business with the aid of joint family funds. Then there may be cases in which a coparcener starting a business may blend it with the joint family property. In both these cases the business will be treated as ancestral property.[P 233 C 1]

(e) Hindu Law—Joint family — Accumulations of income of ancestral property or property purchased or acquired out of or with assistance of ancestral property are ancestral property.

Per *Rachhpal Singh, J.* — Accumulations of income of ancestral property, property purchased or acquired out of the income or with the assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds are ancestral property.

[P 233 C 1]

(f) Hindu Law—Joint family — Every new business started by manager need not be new business which is not ancestral — Test is to see whether assets or income of joint family ancestral fund have been utilized.

Per *Rachhpal Singh, J.* — It is not correct to say that every new business started by the manager of a joint Hindu family carrying on an ancestral trading business is a new business

which can never be ancestral. The real test for deciding whether a business is a new business wholly unconnected with the joint family ancestral business, or is an extension of that business is to determine the source which supplied the money with which the new business was started. If the assets or income of the joint family ancestral funds are utilized for opening a new branch, then, the new branch will form part of the old business. On the other hand, if the business is started by a manager without any aid from the ancestral family assets, then, it will be a new business. In that new business, the other members will have no right nor will any liability attach to them in respect of it. But merely because a business has been extended it cannot be inferred that the extension was a new business started by the manager separately.

[P 233 C 2]

Ram Nama Prasad, *Ambika Prasad Dube* and *Kanhaiya Lal* — for Appellants.

B. Malik—for Respondents.

Sulaiman, C. J.—A suit was brought on the basis of a mortgage deed dated 9th December 1918 executed by the deceased father of the defendants-appellants in favour of the deceased predecessor of the plaintiffs, whose executors the latter are. In the mortgage deed it was recited that money was required for the payment of a certain antecedent debt and for the purposes of two shops located at Muttra and Delhi respectively. On 28th June 1922 a sum of Rs. 3,000 was paid by the mortgagor to the mortgagee without specifying any part of the mortgage debt to which it was to be appropriated. It is now found that the shop in Muttra was a lace shop and was an ancestral business; but that the shop at Delhi was a cloth shop and was not ancestral, though it was a family business. There is no finding as to how long this shop had been in existence before the mortgage deed was executed, but there is a finding that it had been in existence for a number of years. The defence inter alia was that there was no legal necessity for the loan. Both the Courts below have decreed the claim.

The second appeal came up for hearing before a Division Bench of this Court, which has referred two questions to the Full Bench for consideration. These may be formulated as follows: (1) Whether where the business to finance which money has been borrowed is a family business and the loan is for the benefit of the family, the sons are liable for the repayment of the loan contracted by the father; and (2) whether the payment of Rupees 3,000 should be considered, to be repayment partly of the debt incurred for the benefit of the ancestral property and partly of the debt for advancing the Delhi business and appropriated accordingly.

In earlier cases of this Court a wider meaning was attached to the expression "benefit to the estate." For instance in 1920 All 11 (1), Sir Promoda Charan Banerji, an eminent Judge of this Court, in delivering the judgment held that the mortgage debt was binding because it was for the benefit of the estate and the family, although that could not be a case of pressing necessity. This view was followed in several cases. On the other hand, there were some later cases in which a narrower view was taken that the alienation should be only for the purpose of saving the estate from some threatened injury. There was also some conflict of opinion as to the extent to which the members of a joint Hindu family are bound by alienations made by the father as manager in connection with the requirements of a business run by him.

In 1928 All 454 (2), a Full Bench of this Court came to the conclusion that in order to sustain an alienation of joint family property made by the managing member of the family the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time. Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a "defensive character." The previous cases were reviewed at some length and principal reliance was placed on the rule laid down by their Lordships of the Privy Council in 6 M I A 393 (3), that:

"The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

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1. Tula Ram v, Tulshi Ram, 1920 All 11=60 I C 3=42 All 559.
2. Jagat Narain v. Mathura Das, 1928 All 454=102 I C 66=50 All 969 (FB).
3. Hanuman Prasad Panday v. Mt. Babooee Munraj Koonwaree, (1854-57) 6 M I A 393=18 W R 81n=2 Suther 29=1 Sar 552 (PC).

The authority of the case of 1917 P C 61 (4) was also relied upon and the following passage from p. 443 (of 39 All. was quoted:

"In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction."

Another passage from p. 444 (of 39 All) also may be quoted:

"Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of the an antecedent debt."

It was held by the Full Bench that the benefit to the estate was something distinct and different from pressing necessity.

After this pronouncement, in many cases of this Court it was held that even where pressure of legal necessity is not established, a transaction may be upheld on the ground that it was for the benefit of the estate and the family which an ordinary prudent manager would enter into, e. g., 1931 All 253 (5) and 1931 All 743 (6).

In 1932 P C 182 (7), their Lordships of the Privy Council then made it perfectly clear that money borrowed by the father as manager of a joint Hindu family for the purpose of a business which was not ancestral was not borrowed for legal necessity and a mortgage granted as security for such a loan was not binding on the minor members of the joint family, as it was invalid. In that case a business of taking contracts from P. W. D. (apparently a business of a sporadic character in which fresh risk would be incurred as each new contract was taken) had been started by two persons as managers of the family and it was not their ancestral business. As the business had been started by two members as managers, it might possibly have been started with joint funds, but it is not quite clear whether the bank had suggested that even if the business had not been an ancestral business, it had become joint family property by being blended with other joint properties. One thing however is perfectly clear that on behalf of the bank it was not contended that the particular transaction had been for the benefit of the joint family and the family estate and the claim does not seem to have been defended on any such ground. Their Lordships, applying the principle laid down in 1922 P C 237 (8), held that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him and that a new business is not within the purview of the verses 27 to 29 of Ch. 1 of the Mitakshara. In that case the bank had failed to prove that it had made reasonable and bona fide enquiries as to the ancestral character of the business which had led it to believe that the business was ancestral, even though in point of fact it had not been so. Accordingly the amount raised by the managers for the purposes of the new business was not considered to create a charge on the joint family property.

This authoritative pronouncement of their Lordships of the Privy Council was the subject of interpretation by another Full Bench of this Court in 1932 All 632 (9). The majority of the Judges constituting the Bench held that the pronouncement of their Lordships of the Privy Council finally settled the question that money required for the purposes of a non-ancestral business is not sufficient in itself to justify alienation of family property and that the money for a new business started even by the father as manager of the family involving, as it does risk and liability on the minor members of the family, cannot justify an alienation. The majority however took the view that although the requirement of a new business was not in itself sufficient to justify alienation, their Lordships' ruling did not overrule the decision of the Full Bench of 1928 All 454 (2). It was accordingly held that where the transaction was not speculative but was in the best interests of the family and for its benefit which an ordinary prudent manager would have made, it would be open to a Court to hold that the transaction is binding on the other members of the family though the loan

4. Sahu Ramcharandra v. Bhup Singh, 1917 P C 61=39 I C 280=44 I A 126=39 All 437 (PC).
5. Raj Kumar v. Mohan Lal, 1931 All 252=131 I C 872.
6. Mahesh Prasad v. Jagannath Chowbe, 1931 All 743=133 I C 412.
7. Benares Bank Ltd. v. Har Narain, 1932 P C 182=137 I C 781=59 I A 300=54 All 564 (PC).
8. Sanyasi Charan v. Krishnadhan Banerji, 1922 P C 237=67 I C 124=49 I A 108=49 Cal 560 (PC).
9. Amraj Singh v. Shambhu Singh, 1932 All 632 =140 I C 509 (FB).

was secured by an alienation of the family property. It was pointed out in that case that in 1932 P C 182 (7) it had never been suggested on behalf of the bank that the business had been started for the benefit of the family or that it had been necessary for its support and maintenance or was necessary to save the family from starvation or ruin, and that accordingly their Lordships' pronouncement did not necessarily imply that such considerations were altogether irrelevant. The question as to whether that particular transaction was necessary for the family or was for the benefit of the family or the family estate was a question of fact depending on evidence and could not be pressed in appeal, if it had not been raised at the trial.

The view that the Full Bench ruling in 1928 All 454 (2) has not been overruled by their Lordships of the Privy Council when delivering the judgment in 1932 P C 182 (7). It is further strengthened by the circumstance that although the case of 1928 All 403 (10) was cited by counsel before their Lordships, as appears from the report on p. 301 (in 59 I A) this Full Bench ruling which had partially overruled the view expressed in 1928 All 403 (10) was not cited before their Lordships at all. It seems clear that if any question had arisen as to there being a benefit to the family or the estate, it is most likely that the Full Bench ruling also would have been referred to.

It seems to me that the recent pronouncement of their Lordships of the Privy Council in 1934 P C 192 (11) also does not even indirectly over-rule the Full Bench ruling. Their Lordships have laid down that where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner; in such a case the family as a unit does not become the partner but only such of its members as in fact enter into a contractual relation with the stranger.

It has always been a settled law that money borrowed for the purposes of an ancestral family business is per se a good justification for alienation of family property. In such a case the presumption is that the carrying on of the ancestral business is necessary and no further enquiry on the part of the creditor is required. As a result of their Lordships' procouncement, it is now finally settled that the mere fact that money has been required for a business newly started by a manager or the father is not in itself sufficient to justify an alienation of the family property. But it has never so far been held that the need of a newly started business taints the transaction with illegality so much that even if there be other circumstances they would be of no avail in validating the transaction. It seems to me that the question whether a particular transaction, even though the money was required for the purposes of a new business, was for legal necessity or for the benefit of the estate in the family is a somewhat distinct question. Where the new business is the separate property of individual members of a joint family, it is quite obvious that money required for its purposes can never be for the benefit of the family or of the family estate at all. In such an event an alienation of the family property would be wholly unjustified. On the other hand, if the business, though not ancestral, had previously become the joint family business, then there may be circumstances under which money required for such business may either be for legal necessity or for the benefit of the family and the family estate.

The interest of the members of the family in a business is property just as the rights in any other kind of property. It has been laid down by their Lordships of the Privy Council in many cases that separate property of a member of a family can by blending become joint family property and that for such an effect to be produced it is not necessary that the consent of all the other members of the family, some of whom may be minors and therefore incapable of giving consent, must be obtained as a condition precedent. See: 29 All 244 (12), 1917 P C 12 (13), 1917 P C 128 (14) and 1923 P C 57 (15).

10. Inspector Singh v. Kharak Singh, 1928 All 403=112 I C 881=50 All 776.
11. P. K. P. S. Pichappa Chettiar v. Chokalingam Pillai, 1934 P C 192=150 I C 802 (PC).
12. Lal Bahadur v. Kanhaiya Lal, (1907) 29 All 244=34 I A 65 (PC).
13. Suraj Narain v. Ratan Lal, 1917 P C 12=40 I C 988=44 I A 201=40 All 159=20 O C 211 (PC).
14. Radha Kant v. Nazma Begam, 1917 P C 128 =45 I C 806=45 Cal 733 (PC).
15. Rajani Kant Pal v. Jaga Mohan Pal, 1923 P C 57=73 I C 252=50 I A 173=50 Cal 439 (PC).

In 16 A L J 281 (16) (at p. 294) their Lordships of the Privy Council remarked as follows:

"The question whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question of fact to be determined on the evidence."

This undoubtedly implies that even an apparently new business carried on by a member of a family may be a joint family property. In 1927 P C 121 (17) their Lordships of the Privy Council explained that a joint family business is a business carried on with joint family funds for the benefit of the joint family and the properties of the joint family, both moveable and immovable including the shares of minor members of the family, are liable for the debts incurred in carrying on the business. But in that case, as the minor plaintiffs had apparently succeeded to the business, it might be said that so far as they were concerned, it was an ancestral business, though possibly not so in the case of some of the other members.

In the case of a joint family business where it is necessary for its proper conduct that money should be borrowed from time to time, it is within the authority of the karta to borrow money for the purposes of the family business: See 1934 P C 4 (18).

The cases in Bengal are generally under the Dayabhaga law, which confers power on each co-parcener to transfer his share. In the Madras Presidency also the interest of the mortgagor is regarded as being validly transferred. In the Punjab, cases are governed mostly by the Customary law. In the Bombay Presidency also, cases under the Mitakshara law are rare. It is only in these Provinces that the question assumes an acute form inasmuch as hundreds of cases are decided every month by the subordinate Courts in which the question of the authority of the father as manager to raise money for a joint family business as distinct from an ancestral business and his separate business, is almost invariably raised.

Although the alienation of joint family property merely for the purposes of a newly started business is not justifiable, there is really no prohibition against a manager of a joint family in respect of starting a new business. Indeed, it is the commonest thing in this Province to start such new businesses. It may be started with the joint family funds or with separate funds and may possibly at the outset be the separate property of the manager, but if other kinds of properties can, by the conduct of the parties and by the blending of their income with the income from the joint properties, become joint property, there seems to be no good reason for holding that the interest of a particular member of a family in a business or a mill or a factory can never become joint property by being thrown into the common stock. A business started by a father might have been run for decades and the members of the family may in fact be taking part in its conduct and the family may even be maintained solely with its income, and joint funds might have been utilised for its purposes from time to time. In such an event it may be impossible to hold that the business still remains the separate property of the manager who started it originally and can never form the subject of partition between him and the other members. Such a view would amount to holding that a manager can appropriate joint funds and start a business of his own which he can keep separate and over which he can always possess full disposing power with the right to alienate or gift it to anyone he likes, without his right being questioned by the other members of the family, and can also prevent it from being brought into the common stock at the time of a partition. It would become impossible for a manager to invest any surplus joint fund, that there may be, in stocks or shares in any concern, or the other members can take all the gross assets, without undertaking the liabilities.

If there were an absolute prohibition against the starting of a new business or newly taking shares in an existing business, the family may have to be tied down to the ancestral business only, which may cease to be profitable, and therefore so long as there is some minor member of the family alive, it would be impossible to divert the activities of the family to any other line. As sons and grandsons are in being, there may almost always

16. Metharam Ramrakhiomal v. Rewa Chand Ramrakhiomal, 1917 P C 105=44 I C 269=45 I A 41=45 Cal 666=16 A L J 281 (PC).
17. Niamat Rai v. Din Dayal, 1927 P C 121=101 I C 373=54 I A 211=8 Lah 597 (PC).
18. Abdul Majid Khan v. Sharaswati Bai, 1934 P C 4=147 I C 1=61 I A 90=30 N L R 60 (PC).

be some minor member of the entire family existing and accordingly it may for many generations become impossible to start a new business. But as laid down by their Lordships of the Privy Council, alienation for money required for such a new business is not justified merely because it is a business started by the manager. The want of authority really is as regards the alienation of family property for the purposes of a new business, and not that there is any absolute prohibition against the starting of a new business.

It is contended that the expression "for the sake of the family" occurring in the Mitakshara is ejusdem generis with what precedes it, and must be confined to the case of "compelling necessity only." Now the text of Brahaspati quoted in the Mitakshara was not confined to the father or manager only, but would apply to any coparcener described as "a single individual." Taking the text literally, it would authorise a junior member to alienate property for the purposes behind the back of the manager. The learned counsel for the appellant concedes that the judicial interpretation put on the text in some cases has not been to follow the words literally and give to a junior member any such authority. The expression "for the sake of the family" occurring in this text has been judicially interpreted to have a wider meaning than mere pressure of necessity. Taken literally it is more comprehensive than even "benefit to the estate." The expression is wide in scope, and even if it has been too widely interpreted, there are many other matters in the Hindu law wherein a long course of decisions have established propositions perhaps not in strict accordance with the Hindu texts if taken literally. For instance, a distinction has been drawn between a voluntary alienation by the father which may be impugned on the ground of want of necessity and an involuntary auction sale to a third party which can be impugned only on the ground of the debt being tainted with illegality or immorality; or again, the non-liability of Hindu sons for the payment of their father's debts which are incurred after separation; as also alienation in lieu of an antecedent debt. Reliance is next placed on the commentary on this text by the author of the Mitakshara and it is urged that the illustrations given therein are exhaustive, and therefore exclude the plea of benefit of the family as distinct from compelling necessity. But illustrations are seldom intended to be exhaustive, e. g., 12 M I A 448 (19), where the enumeration of bandhus in the Mitakshara was held to be illustrative and not exhaustive). The statement of the law in 6 M I A 393 (3) was based on a liberal interpretation of the words "kutumbarthe" (for the sake of the family) and although that was a case of a manager of a minor, the law has always been understood to apply and has been invariably applied to managers of joint families.

That the words "for the sake of the family," have a wider meaning than mere compelling of a necessity would also appear from the following consideration: It is now well settled on the authority of the ruling of their Lordships of the Privy Council that money required by a manager for an ancestral business is justified and alienation in lieu of it is binding on the other members. There is no text of the Mitakshara which specifically refers to the needs of an ancestral business. Accordingly its justification rests entirely on the same verses 27 to 29 of Ch. 1. There can be numerous occasions where there may be no compelling necessity to raise money for an ancestral business. There may be plenty of funds in hand and yet the manager may borrow more money for the business, or it may be that he may feel it beneficial to enlarge the business though not unduly. In such circumstances it may be most difficult to hold that there existed a compelling necessity which acted as a pressure and which was tantamount to legal necessity. Borrowing on such occasions can only be justified on the supposition that the transaction was for the benefit of the family inasmuch as it was carried out in connection with the family business which a prudent owner would continue. To hold therefore that the words "for the sake of the family" have not a wider scope would be almost destroying the very basis of the rulings under which money required for an ancestral business is considered to be fully justified.

The view that "benefit" is something different from "compelling necessity" finds some support from the remarks of their Lordships in 1934 P C 192 (11). While considering the argument that the defendant's liability to the extent to which the family benefited,

19. Girdhari Lall Roy v. Bengal Government, (1867) 12 M I A 448 (PC).

their Lordships did not simply reject the contention, but thought it fit to examine the evidence and came to the conclusion that the evidence was very meagre and that there was no evidence as to the extent of such benefit.

It seems to follow that the question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family, is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family.

The second question is how the payment of Rs. 3,000 towards the mortgage debt is to be appropriated. The contention on behalf of the defendants is that the whole of it should go towards the discharge of that part of the debt which was binding on the mortgaged property and that no portion of it should be set off against the other part for which the family property was not liable. On the other hand, it is contended on behalf of the plaintiffs that if the whole of this sum is not to go towards the payment of the unsecured portion of the debt, then there should at least be an apportionment.

So far as the English Law is concerned, it seems to be well settled that a creditor is entitled to make an appropriation even during a pending action: see the case of (1905) 1 K B 715 (20). It was held by a Bench of this Court in 1915 All 378 (21), that an appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money. If neither of them makes the appropriation the law appropriates the payment to the earliest debt. The facts of that case were somewhat different, and it was the debtor who was insisting that the payment should go towards the earliest debt. But this view has been expressly dissented from in the other High Courts, and the various cases are summarised in a judgment of the Calcutta High Court in 1934 Cal 40 (22).

Reading Ss. 59, 60 and 61 together it is clear that so far as the right of the debtor to make the appropriation under S. 59 is concerned, it can be exercised only when a debtor makes the payment with the express or implied intimation that the payment is to be applied to the discharge of a particular debt. It would follow that this intimation, express or implied, must be made at the time when the payment is made. On the other hand, under S. 60 it is only when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied that the creditor may apply it at his discretion to any lawful debt. This discretion obviously is to be exercised if the debtor has omitted to give an intimation and where there are no other circumstances. It seems to me that the creditor need not exercise this right at once, but he can at his discretion exercise it even later. There is nothing in the section particularly as a past perfect tense "has omitted" has been used, to indicate that the creditor loses this right if he does not exercise it at the very time when the payment is received. In many cases it may be impossible to make the appropriation there and then, for instance, when the payment is made at a time when the amounts due under the various heads are not known and the account books are not easily accessible. Now, when neither the debtor nor the creditor has made any appropriation, then under S. 61 it is a duty of the Court to apply the payment in discharge of the debts in order of time, and if the debts are of equal standing, in discharge of each proportionately.

It is contended on behalf of the defendants that S. 61 in terms cannot apply to this case because here there are not more than one debt, but there was one debt only. But although the loan was one, the purposes for which the amounts were taken were differ-

20. Seymour v. Pickett, (1905) 1 K B 715=74 L J K B 413=92 L T 519.

21. Kundan Lal v. Jagannath, 1915 All 378=30 I C 92=37 All 649.

22. Kunjamohan Shaha Poddar v. Karunakanta Sen, 1934 Cal 40=149 I C 262=60 Cal 1265.

ent. Even though the section may not in terms apply to the present case, there can be no doubt that the principle underlying that section must apply. This principle has been applied by their Lordships of the Privy Council to the appropriation by the Income-tax Commissioner of certain payments towards the interest which accrued on the amount due, although the principal and interest would strictly speaking constitute only one debt: vide 1933 P C 108 (23). It is also clear from that case that the Income-tax Commissioner could not possibly have made the appropriation immediately the amount was paid. It was only when the accounts for the year were made up that credit was given for the sum and the interest due was reduced.

In the present case, although on the one hand this money appears to have been raised by a sale of a part of the mortgaged property, which was ancestral, there is nothing to show that the creditor was informed of the sources at the time when the payment was made. Again one part of the debt was due from the mortgagor personally and another part from him in his representative capacity as manager of the family. Therefore, it might well have been argued that the creditor was entitled to appropriate the payment towards the discharge of the debt due personally from the person who made the payment rather than the debt due from him in his representative capacity. Again one part of the debt was so to say an unsecured debt; whereas the other was a secured debt. The period of limitation for the unsecured debt would have expired in about two years time; whereas the period of limitation for the other debt would not have expired till after about eight years. The mortgagee did not in fact bring any suit for recovery of the unsecured debt before the expiry of the prescribed period. This also might well have been made the basis of an argument that the creditor would be justified in making the appropriation towards the unsecured debt in preference to the secured debt.

But this position was not taken up in the Courts below, and the learned advocate for the plaintiffs before the Division Bench confined his argument to the proportionate appropriation of Rs. 3,000 towards the two parts of the mortgage debt. It is therefore unnecessary to consider the larger question whether there would be any presumption as to the way in which the mortgagee should be deemed to have made the appropriation in the eye of the law. On the principle underlying the provisions of S. 61 it seems that the Court should in the absence of any appropriation by either the debtor or the creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such, and if they are all of the same date, in discharge of each of such debts proportionately.

The learned counsel for the defendants-appellants has relied strongly on 18 Cal. 302 (24). But in that case no question of appropriation really arose, the main question being whether there should be a deduction on account of the fact that part of the rents of the estate had been received by the agent of the plaintiff. Apparently there was along with the mortgage another transaction of lease and the plaintiff's principal man of business had received on account of the arrears of rent a sum of Rs. 10,000. Their Lordships held that this sum should be deducted from the amount claimed by the mortgagee on account of the payment of the Government revenue and maintenance allowance to the widow in the account and that the balance could be recovered. I do not think that that case in any way helps the appellants.

In my opinion therefore the sum of Rs. 3,000 which was paid by the mortgagor should be split up into two portions of Rs. 2,000 which should be assumed to have gone to discharge a part of the secured debt, and a sum of Rs. 1,000 which should be deemed to have gone towards the discharge of the unsecured portion of the debt.

Thom, J.—I concur. Had the decision in 1928 All 454 (2) stood alone, there could have been no question that the mortgage executed by the manager of the joint family was binding upon the minor members of the family. It was contended however that this decision has been by implication over-ruled by the Privy Council in their decision in 1932 P C 182 (7). In that case however the question of whether the money was borrowed for the benefit of the family does not appear to have been raised. The plea that the money was borrowed for the benefit of the family was not taken in

23. Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj of Darbhanga, 1933 P C 108=142 I C 437=60 I A 146=12 Pat 318 (PC).

24. Budha Mal v. Bhagwan Das, (1891) 18 Cal 302=17 I A 392=5 Sar 632 (PC).

the pleadings and no evidence was led upon the point. The matter therefore was not considered by the Privy Council.

The decision in 1928 All 454 (2) followed the decision of the Privy Council in 6 M I A 393 (3). That decision is clear authority for the proposition laid down in 1928 All 454 (2).

The decision in that case is by a Full Bench of this Court. In my judgment in the Benares Bank case the Privy Council never intended to lay down the general proposition that a loan taken by the manager of a joint Hindu family for the purpose of starting a new business could never be binding upon the minor members of the family. There is ample authority, not only in the original texts but in the decisions of the Privy Council and of this Court, for the proposition that where the starting of a new business is a prudent step taken by the manager of the family for the benefit of the family a loan taken for this purpose or for the carrying on of the new business is a valid loan and is binding upon the minor members of the family. Indeed it would be most unfortunate if the law were otherwise. In the present economic and social state of the development of this country it must often be absolutely necessary in the interests of the joint Hindu family and for the purpose of conserving the estate of that family not only to discontinue an old ancestral business but to embark upon a new business, and for that purpose to negotiate loans.

I agree that the sum of Rs. 3,000 repaid should be in this case appropriated proportionately to the discharge of the secured and the unsecured debt. The point raised in this branch of the case is not in terms covered by S. 61, Contract Act, but in my judgment the principle underlying that section should be applied. Learned counsel for the plaintiffs has not contended, as in my view he could reasonably have contended, that the sum repaid by the borrower should be applied in the first instance to the discharge of the unsecured debt. He has contented himself with the claim that the sum of Rs. 3,000 should be applied proportionately to the discharge of both the secured and unsecured debt. We therefore do not decide the general question as to whether where no appropriation is made either by the borrower or the lender sums repaid should be applied in the first instance to the discharge of that part of a debt which may be unsecured.

Rachhpal Singh, J.—I agree. My Lord the Chief Justice has considered the principal question involved in this case in his elaborate and exhaustive judgment and I am in entire agreement with him in holding that the view taken in the Full Bench ruling in 1928 All 454 (2) has not been overruled by the ruling of their Lordships in 1932 P C 182 (7).

In 1932 All 632 (9) the question which has been re-agitated before us had come up for consideration before a Full Bench. The majority view was that the 1932 P C 182 (7) had not overruled the Full Bench case reported in 1928 All 454 (2).

In a recent ruling of their Lordships of the Privy Council 1934 P C 192 (11), there are observations which support the view taken by the Full Bench in 1928 All 454 (2). These observations go to show that where a creditor seeks to enforce his claim against a minor member of a joint family in respect of money due from the manager of the family, the question as to whether or not the loan benefited the joint family will be the deciding factor in the case.

A perusal of the ruling of their Lordships of the Privy Council in 1932 P C 182 (7), shows that there were three points on which their Lordships gave their decision. These points were: (1) It was contended that a new business, which had been started by two managers of the joint family, was ancestral and therefore, the minor members of the family were liable for the debt due. Their Lordships, after a consideration of the evidence in that case, came to the conclusion that the business in that case was not ancestral. (2) Another point taken by the appellants in that case was that a business started by the father as manager, even if new must be regarded as ancestral. Their Lordships rejected this contention. (3) Another point urged was that even if the business was not ancestral, the transaction was binding because the appellants had made reasonable and bona fide enquiries which led them to believe that the business was ancestral, and that there was necessity for raising the money for the purpose of the business. Their Lordships, on the evidence produced in that case came to the conclusion that the appellants had failed to prove that they had made

reasonable enquiries as to the character of the business.

These are the only three points decided by their Lordships of the Privy Council. I am clearly of opinion that the question, as to whether or not the transaction was for the benefit of the family, was never decided in 1932 P C 182 (7). As remarked by King, J., in 1932 All 632 (9), (at p. 908), in 1932 P C 182 (7):

"It was not even argued and presumably therefore it was not even arguable upon the facts that it was a prudent transaction, or for the benefit of the estate."

It appears to me that there is no justification for the contention that the Full Bench case 1928 All 454 (2), has been overruled by implication as a result of the decision of their Lordships in 1932 P C 182 (7).

In my opinion, the real question actually decided by their Lordships in 1932 P C 182 (7) is that a Hindu father, acting as a manager of the joint family, cannot make an alienation which might bind the minor members, when money is advanced to him for the purpose of starting a new business and which business is non-ancestral. The ruling of their Lordships will have no application to a case where the father, acting as manager, borrows money by alienating family property, for the purpose of financing a business which is ancestral property and which has been in existence as family business antecedent to the date on which the alienation is made.

Before proceeding further I wish to point out that there is a clear distinction between transactions made by a manager of a joint Hindu family which does not carry on any trading business and the transaction entered into by the manager of joint Hindu family carrying on an ancestral trading business. Where a manager of a joint Hindu family, which does not carry on any trade, takes a loan or makes an alienation, the creditor has to prove that the transaction was either for family necessity or for the benefit of the family. But on the other hand, where a joint family is carrying on an ancestral business as traders, then, the creditor has only to prove that the money was lent or alienation made for the purpose of carrying on the ancestral business. It is not necessary for him to prove further that the transaction was made for the benefit of the family.

One of the earliest cases on the point is 1 B H C R App. 51 (25). It was held there that ancestral trade descends like other Hindu property upon the members of an undivided family. It was further held that:

"In carrying on such a trade infant members of the family will be bound by the acts of the manager which are necessarily incidental to and flowing out of the carrying on of that trade and that the manager can pledge the property and credit of the family for the ordinary purpose of that trade, and third persons dealing bona fide with such manager are not bound to investigate the status of the family, minor members being bound by the necessary acts of the manager."

This proposition of law has been quoted by Sir D. Mulla in his Hindu Law, Edn. 7, p. 282. He has however in his book substituted the words "mortgage or sell" for the word "pledge" used in the above cited ruling. I find myself in agreement with the following observations made in 1 B H C R App. 51 (25):

"The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest and the recognition of a trade, as inheritable property, renders it necessary for the general benefit of the family that the protection, which the Hindu law generally extends to the interest of a minor, should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case."

The next case to which I wish to refer is 34 Bom 72 (26), Chandavarkar, J., in his judgment expressed the following opinion:

"The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family."

The law on the subject is discussed with much learning in this ruling by Chandavarkar, J. The reason for vesting the manager of a joint family ancestral trading firm is stated by him to be this:

"Under the Hindu law a joint family which carries on a trade handed down from its ancestors becomes a trading family; trade being one of its Kulachar it attracts to itself all the necessary incidents of trade."

25. Ramlal Thakursidas v. Lakhshmichand, (1862-65) 1 B H C R App 51.
26. Raghunathji Tarachand v. Bank of Bombay, (1910) 34 Bom 72=2 I C 173.

The learned Judge cites several texts of Hindu Law in support of his view. At one place in his judgment the learned Judge observes:

"The reason of this must be that it is merchants alone who know best what the rules of their profession, adopted in the interest of trade, are. The implication is that such rules must be followed in the interest of trade. Nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its Kulachara or family business merely because it occupies also the status of a joint family."

In 1918 Mad 708 (27), Sadasiva Aiyar, J., held that the ordinary presumption in the case of a trading caste or family is that the entire family credit and all the joint family properties are embarked in the business even as regards the minor members. It appears to me that when a joint family carries on an ancestral business it gives out to the world that the manager of the family has the power to carry on the business on its behalf. If this were not so, then, it will be difficult for the manager to carry on the trade as other people would not have dealings with it. In my opinion, it is not open to minors in such a family to say that the transactions made by the manager in the ordinary course of business are not binding on them. The reason is that the business is carried on on the credit of the family property. The family property is held by the profits earned in the business and it would therefore be unjust to hold that members who were being maintained by the profits made out of the business should not be liable for the debts incurred for the carrying on of that very business.

I wish to emphasise, even at the risk of repetition, that there is a difference between transactions to which a manager of a joint Hindu family which has no ancestral trading business is a party and transactions made by the manager of a joint Hindu family which is doing ancestral trade business. The reason is obvious. When a creditor lends money to or accepts an alienation made by a member of a joint Hindu family, he is aware or ought to be aware that the manager is dealing with the property owned by several coparceners. He is supposed to know that under the Hindu Law, the karta of the family can borrow money or make alienations only where there is a family necessity or where money is required for the benefit of the estate. If he lends money to the karta of the family without satisfying himself whether there is a necessity for the loan, he does so at his own risk. If it is found that the loan taken by the karta of the joint family was not for the benefit of the joint family or for family necessity, then, he must lose. But different considerations will prevail when the manager of an ancestral joint family business, acting as manager of the business, enters into a transaction with a third party. Here, the income of the trade is the only source which maintains the joint family. When the joint family carries on an ancestral business it gives out to the world that it will carry on business exactly on the same terms as any other firm. In the words of Chandavarkar, J., 34 Bom 72 (26):

"The implication is that such rules must be followed in the interest of trade and nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its Kulachara or family business merely because it occupies also the status of a joint family."

The manager in the case of a joint ancestral trading business, has an implied authority to contract debts for its purposes, and the creditor is not bound to enquire into the purpose of the debt in order to bind the whole family. It will be impossible for a joint family doing ancestral trading business to carry on the business, if its manager is not to have authority to contract debts for the purpose of the business the reason being that that power is necessary for the very existence of the family. In such a case all that a creditor has to prove is that the family was doing ancestral trading business and that the money was required for the purpose of that business.

There may be cases in which an ancestral joint family business which at one time was yielding a handsome income which maintained the entire family in comfort might have to be run at a loss. It may be necessary for the manager to take a loan for establishing the business, but the effort may prove to be futile. In such a case it will be wrong to hold that the other members of the joint family would not be bound by the loan taken by the manager. If the business had become profitable once again, all the members of the family would have been benefited by it. It would not be right to hold that as the attempt to improve it had failed so the other members of the joint family were not liable for the loan contracted by the ma-

27. Malaiperumal Chettiar v. Arunachalla Chettiar, 1918 Mad 706=41 I C 224.

nager. A recent ruling of their Lordships of the Privy Council reported in 1927 P C 121 (17) may be referred to in this connection. Their Lordships held that in an ancestral joint family business which is carried on for the benefit of the joint family, the entire property of the joint family is liable for the debts incurred by the manager in carrying on the business. It was further held that where a joint family business had resulted in a loss, it was for the manager to decide whether it would be better to raise more money to put into the business, or to close it down, and a lender or purchaser was not bound to enquire into or prove the reasonableness or soundness of the manager's decision and action. Another case on the point is 1931 P C 136 (28). A very recent case on the point is reported in 1934 P C 4 (18).

On a consideration of all the cases cited above, it will appear that a manager of an ancestral joint family trading business has full authority to take loans and make alienations to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. The creditor is not bound to enquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction.

In the case before us, it appears that the joint family carried on two businesses. One at Muttra and the other at Delhi. It has been found that the Muttra business was ancestral. If the creditor can establish that money was advanced to the manager for the benefit of the ancestral joint family business at Muttra, then, in my opinion the mortgage made by the manager will certainly bind the minor members of the joint family. I would go further and hold that the transaction will be binding without the proof of "benefit to the estate" provided that the creditor can prove that the loan was taken by the manager of the joint family business for the proper purpose of financing the ancestral joint family business. To a case of this description the ruling of their Lordships of the Privy Council will have no application.

28. Ramakrishna Muraji v. Ratan Chand, 1931 P C 136=132 I C 613=58 I A 173=53 All 190 (PC).

As regards the business at Delhi the lower appeilate Court has not given any finding whether this business was ancestral. All that we know is that this business was not inherited by the joint family as an ancestral business. It appears that it was started by the father of the minors some years before the date on which the mortgage in question was created by him and a part of the loan taken was transferred by the mortgagor to the accounts of this Delhi business. If this business was new business started by the manager of the joint family, then the ruling in 1932 P C 182 (7) would apply and a loan taken for financing a new business will not bind the minor members of the joint family. Before the Bench hearing this appeal can decide the question as to whether or no the loan taken for the purpose of this Delhi business is binding on the minors, it will be necessary to determine whether this was a new business started by the manager or whether it was an ancestral business. The decision of this question will depend on the evidence which the parties might have produced or may be permitted to be produced in the case. It was argued before us on the authority of 1932 P. C 182 (7) that every business started by a manager of joint Hindu family which does not descend by inheritance as ancestral business, should be deemed to be a new business which can never be ancestral. I find myself unable to agree with this contention. The learned counsel for the appellant relied on the following observations made by their Lordships of the Privy Council in 1932 P C 182 (7):

"It was urged on behalf of the Bank that this business was ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand, it was contended that the business was the personal business of Jagannath and the family had no interest in it. Their Lordships have examined the evidence, and they consider that the business was started by Jagannath and Raghunath as managers of the family. The business therefore cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debts."

It was on the strength of these observations that it was contended that this was a rule of universal application to the effect that a new business started by a manager of a joint Hindu family can never become ancestral property of the joint family. As I have already stated I find myself unable to agree with this contention. The above observations of their Lordships only

mean this that there can be no presumption that a business started by a manager of the joint Hindu family becomes ancestral property. This proposition of law is well settled. There can be no presumption that a business started by a manager or a coparcener is to be treated as ancestral property. This is a point which is to be decided on the facts of each case. It is very necessary to bear in mind that the case of 1932 P C 182 (7) was one in which the joint family had not been carrying on any ancestral trading business. On the other hand, it was a case, in my opinion, of a joint family in which there was no ancestral business. It is further important to note that in 1932 P C 182 (7), there was no plea taken by the Bank that new business had become ancestral because it had been acquired with the aid of the joint family funds. In my opinion 1932 P C 182 (7) is an authority for one proposition only and that is that a loan taken by a manager of a joint Hindu family for the purpose of starting a new business will not bind the other members of the joint family. There may be cases in which the manager of a joint Hindu family starts a new business with the aid of joint family funds. Then there may be cases in which a co-parcener starting a business may blend it with the joint family property. In both these cases the business will be treated as ancestral property.

As I have already remarked there had been no plea in 1932 P C 182 (7) that the new business started by the managers had been financed by the joint family income or had been treated by the co-parcener as a joint family business; therefore, their Lordships were not considering this aspect of the case. It appears to me that the law on this point is well settled. Accumulations of income of ancestral property, property purchased or acquired out of the income or with the assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds are ancestral property: Mulla's Hindu Law, p. 246, Edn. 7.

In the case before us, if it be found that the Delhi business was started by the manager out of the income of the ancestral family business at Muttra then the Delhi business, according to Hindu Law, would be considered to be ancestral family business of the joint family. A loan taken for the purpose of financing the Delhi brance would be binding on the minors if the creditor is able to establish that the loan was taken for the purpose of the business. It is not correct to say that every new business started by the manager of a joint Hindu family carrying on an ancestral trading business is a new business which can never be ancestral. There are in this country any number of trading families who have an ancestral business which has branches at various places. Take the following example: A joint family is carrying on an ancestral trading business at Allahabad. Its members decide to open a branch at Nainital, because they consider that if a branch is opened at Nainital, it will yield a good profits. Stocks for the Nainital branch are purchased out of the assets held by the joint family business at Allahabad. Can it be said that the business started at Nainital is not ancestral family business? I think not.

The real test for deciding whether a business is a new business wholly unconnected with the joint family ancestral business, or is an extension of that business is to determine the source which supplied the money with which the new business was started. If the assets or income of the joint family ancestral funds are utilized for opening a new branch, then, the new branch will form part of the old business. On the other hand, if the business is started by a manager without any aid from the ancestral family assets, then, it will be a new business. In that new business the other members will have no right nor will any liability attach to them in respect of it. But merely because a business has been extended it cannot be inferred that the extension was a new business started by the manager separately. In 1932 P C 182 (7) their Lordships have referred to one of their previous rulings, 1922 P C 237 (8). In that case their Lordships held that the karta of a joint family cannot impose on a minor member of it the risk and liability of a new business started by himself and the other adult members. In that case it was found that the money had been borrowed exclusively for the purpose of the orphanage business. Their Lordships further found that this new business was neither ancestral nor an extension of the ancestral business. These observations clearly go to show that the decision in the case would have been different if their Lordships had found that the money had been

borrowed for the purpose of ancestral business or for the purpose of an extension of the ancestral business. They add further that there can be an extension of the ancestral business. I am therefore of opinion that the 1932 P C 182 (7) would not be applicable to a case in which money had been borrowed or alienation made by the manager of an ancestral joint family business for the proper purpose of financing that ancestral joint family business. The question as to whether in a particular case a business newly started or old is an ancestral family business will depend on the evidence produced in each case. I have discussed this aspect of the case at some length though for the purpose of answering the reference made to the Full Bench it was not altogether necessary to do so. My reason is that I wish to make it clear that the 1932 P C 182 (7) will have no application to the case before us, in case it is found that the alienation was made by the manager for the purpose of the ancestral business carried on by the joint family. On the other hand, if the business for which the money was borrowed is a new and non-ancestral business started by the father, then, the sons are not liable for the payment of the loan contracted by the father unless it be established that the transaction was for the benefit of the family and estate or was for legal necessity.

As regards the second point about appropriation I agree with the view taken by the learned Chief Justice. For the reasons given above I agree with My Lord the Chief Justice that the two questions referred to the Full Bench should be answered as proposed by him.

By the Court.—Our answers to the questions referred to us are as follows:

(1) Where the business to finance which money has been borrowed is a new business, the sons are not liable for the payment of the loan contracted by the father for this business, unless the transaction was for the benefit of the family and to the benefit of the estate or it was supported by legal necessity. (2) The payment of Rs. 3,000 should be considered to be repayment of the debt incurred for the benefit of the ancestral property and partly for advancing the Delhi business and appropriated accordingly.

K.S. *Reference answered.*

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SULAIMAN, C. J. AND KING, J.

Puran Mal and *another*—Plaintiffs—Appellants.

v.

Shiva Lal and *another*—Defendants—Respondents.

Letters Patent Appeal No. 61 of 1932, Decided on 19th April 1932, from order of Niamatullah, J, D/- 26th July 1932.

Transfer of Property Act (1882), S. 41 — S. 41 does not apply to auction purchasers.

The transfer spoken of in S. 41 must be a voluntary transfer which is affected by an act of the ostensible owner. Hence it is not applicable to auction purchaser: 1929 *All* 800, *Foll.*

[P 235 C 2]

S. N. Seth—for Appellants.

Panna Lal—for Respondents.

Sulaiman, C. J.—This is a plaintiffs' appeal under the Letters Patent from a judgment of a learned Judge of this Court reversing the decree of the lower appellate Court.

It appears that one Inayat Khan and his three brothers were entitled to 5/6 share in a village, the remaining 1/6th belonged to a lady. Instead of mortgaging his 1/4 out of the 5/6, Inayat Khan made a mortgage of 1/4 share in the village to the present plaintiffs. This came to about 17 bighas odd and the remaining 1/4 of 1/6 came to about 2 bighas. Subsequently a sale-deed was taken from the lady in the names of the sons of Inayat Khan and their wives whose names were entered in the revenue papers. The defendants, in execution of a money decree against the sons and their wives, got 1/4 of 1/6 share belonging to the lady attached and put up for sale, and they purchased it themselves. Now, the plaintiffs have brought this suit for sale on the basis of their mortgage-deed and wish to enforce the security against the extra share, namely, 1/4 of 1/6 which had been included in the mortgage, but which at that time did not belong to Inayat Khan. In the plaint there was no reference to S. 43, T. P. Act, and accordingly there was no issue on this point, but the point appears to have been pressed before the trial Court which went into the question. The point was again considered by the lower appellate Court and the lower appellate Court came to the conclusion that the plaintiffs were entitled to enforce their equitable right under S. 43 against the defendants auction-purchasers. On appeal a learned Judge of

this Court felt that the question of S. 43 being a mixed question of law and fact ought to be investigated. He accordingly sent down two issues to the Court below for determination with liberty to the parties to produce fresh evidence. The findings returned by the lower appellate Court were to the effect that Inayat Khan was the real owner and that his sons and their wives were mere benamidars and that the plaintiffs were entitled to enforce their rights against the defendants.

The learned Judge of this Court, on the basis of these findings, came to the conclusion that in spite of them the suit should fail as regards this extra share. The basis of this decision is that the word "transferee" in the proviso to S. 43 is wide enough to cover an auction-purchaser and that therefore the present defendants who purchased the property for consideration and in good faith and without notice of this equitable charge are protected. He further expressed the opinion that the defendants, having purchased the supposed interests of the benamidars who were the ostensible owners of the property with the implied consent of Inayat Khan, are entitled to protection on account of Inayat Khan's conduct. In appeal it is urged before us that neither S. 41 nor the proviso to S. 43 can apply to an auction-purchaser.

It is significant to point out that the preamble to the Transfer of Property Act, suggests that it was to define and amend certain parts of the law relating to transfer of property by act of parties that the Transfer of Property Act was passed. S. 2 (d) also indicates that nothing in the Act is to affect any transfer by operation of law, or by, or in execution of, a decree or order of a Court of competent jurisdiction save as provided by S. 57 and Chap. 4 of the Act. Both Ss. 41 and 43 are based on the principle of estoppel where, on a representation made by one party and acted upon by another, the rights of the latter are prejudiced so as to enable him to the benefit of the principle of estoppel as against the other. It may therefore be very doubtful whether the word "transferees" in the proviso to S. 43 would expressly cover an auction-purchaser. But we think that in this particular case it is not necessary to express any final opinion on this point.

The defendants are auction-purchasers of the right, title and interest of Inayat Khan's sons and their wives. They are not people who have taken a voluntary transfer from the ostensible owners. Indeed they made the purchase without the consent, and it may well be, against the will of their judgment-debtors. Inayat Khan no doubt had put his sons and their wives in possession and was holding them out to be ostensible owneres to the world. But the defendants have not acquired rights by virtue of any act directly done by these ostensible owners, but have acquired the property under an involuntary or compulsory sale and therefore prima facie against the will or at any rate without the consent of these ostensible owners.

Section 41, T. P. Act, applies to a case where the true owner allows his benamidar to remain in possession of the property as an ostensible owner and to deal with it as full owner. Where such ostensible owner "transfers" property to a person who takes it in good faith after having taken reasonable care to ascertain that the transferor had power to make the transfer, the transaction binds the true owner. But obviously the transfer spoken of in S. 41 must be a voluntary transfer which is affected by an act of the ostensible owner. On this point there is a direct authority of this Court, namely, 1929 All 800 (1), which does not appear to have been brought to the notice of the learned Judge of this Court. The learned Judges were of opinion that in view of the language of S. 41 it would not be applicable to auction-purchasers.

It is also equally clear that the Bench did not think that any general principle underlying S. 41 would be applicable to auction-purchasers. Indeed it is difficult to see how such a principle would be applicable, because auction-purchasers are not expected to take any reasonable care to ascertain that the judgment-debtor has any power to make the transfer. They merely purchase the right, title and interest if any of the judgment-debtor which are put up for sale and take a certain amount of risk in bidding for the property.

We are therefore of opinion that even if either the proviso to S. 43 or any principle underlying that section were applicable to an auction-purchaser like the defendants-respondents, that principle is of no avail to them because they have not taken the property from Inayat Khan himself, but purchased at auction the rights and interest of his

1. Mangat Lal v. Ghasi Khan, 1929 All 800=118 I C 718.

sons and wives, who were his benamidars and who are now found to have no title. They are not entitled to the protection afforded by S. 41, T. P. Act, nor by any principle on which that section is based. We must therefore allow this appeal and setting aside the decree of the learned Judge of this Court restore that of the lower appellate Court. In view of the fact that the plea of S. 43 was not raised in the plaint, but relied upon by the plaintiffs, and an issue had to be remanded and fresh evidence recorded, we direct that the parties do bear their own costs of both the hearings in this Court.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 236

KENDALL, J.

Jagannath—Defendant—Appellant.

v.

Inderpal Singh and *another*—Plaintiff and Defendants—Respondents.

First Appeal No. 36 of 1934, and First Appeal from Order No. 37 of 1934, Decided on 2nd October 1934, from order of Sub-Judge, Pilibhit, D/- 19th December 1934.

(a) Pre-emption — Right is recognized by Mahomedan law—By local usage incidents are modified—In absence of proof of such modification, custom will be as under Mahomedan law.

The right of pre-emption is one that has been recognized by the Mahomedan law, and originally was limited to that law. Subsequently it was adopted by the Hindus, and became modified in different places by local usage. Thus in different villages the custom of pre-emption began to vary and the incidents of it differed from place to place. In towns the right recognized by the Mahomedan law has not become modified by local custom. In the absence of proof of modification, if a custom of pre-emption is proved to exist, the custom must be in accordance with Mahomedan law. [P 237 C 1]

(b) Pre-emption—Right of pre-emption is definite enough to form proof of custom—Custom, Proof of.

A right of pre-emption in accordance with the usage of the country is clear and definite enough to form proof of a custom : 9 *All* 513, *Rel on.* [P 237 C 2]

(c) Pre-emption—Custom proved—Onus of proving its discontinuance is on party denying its existence—Mere transfers in favour of strangers are not sufficient to disprove existence of custom.

Where a custom is proved to exist, that custom must be held to continue and the onus to prove discontinuance of that custom lies upon the party denying its existence. The fact that in a number of instances transfer had taken place in favour of strangers, without a right of pre-emption being claimed is not sufficient to disprove the existence of a custom or to prove that a custom which has been proved has fallen into disuse : 1931 *All* 547 and 1924 *All* 791, *Rel on.* [P 238 C 2]

N. Upadhiya—for Appellant.

B. Malik and *B. Mukerji*—for Respondents.

Judgment.—This is an appeal against an order of the Subordinate Judge of Pilibhit allowing an appeal from a decree and order of the trial Court remanding the case for decision on the remaining issues. The order covers two suits for the pre-emption of two different properties in the town of Pilibhit. The parties to the suit are Hindus. The plaintiff-respondent claimed that there was a custom of pre-emption in the Kasba of Pilibhit, and based his suit on that custom. It was denied by the defendant-appellant that any such custom existed. The trial Court found that the custom had been proved, but that it had fallen into disuse. The lower appellate Court while agreeing that the custom had been proved, disagreed with the decision that it had fallen into disuse, and therefore required the trial Court to proceed to come to a finding on the remaining issues. It has been argued on behalf of the appellant that the decisions of both the Courts below that the custom of pre-emption had been proved are wrong, inasmuch as the entry in the wajib-ul-arz, on which the decisions are largely based, is so vague as to be unintelligible or at any rate unenforceable. The words used in the wajib-ul-arz of 1868 for the Kasba of Pilibhit are as follows:

" Rules as to the right of pre-emption. There is a custom of pre-emption in accordance with the usage of the country and the Shastras. (*Dastur saafa bamujib rewaj-i-mulk wa Shastra ke.*"

It as argued that the words "bamujib rewaj-i-mulk" in themselves are too vague to enbody a custom ,and further that an ambiguity is introduced by the addition of the words "wa Shastra ke," inasmuch as the right of pre-emption is one that was originally unknown to the early Hindu law; so that the reference to Shastras, whether the meaning of that term be Hindu law or, as Mr. Upadhiya would have it, a much wider one, makes the entry entirely meaningless. It is perfectly true that in a number of cases a plaintiff has failed to establish a right of pre-emption because the entry in the wajib-ul-arz on which he relied has been found to be not sufficiently definite or clear to establish his right. The specific cases to which I have been referred are as

follows: 1914 All 52 (1), in which a Bench of this Court held that the record in the wajib-ul-arz as to the custom of pre-emption is not the custom. It is a mere record of custom, and if its langauge is ambiguous, it may when unsupported by other evidence be insufficient either to prove the custom as a whole or any particular incident of that custom. This was a case in which the custom of pre-emption was admitted, so that there was no issue as to whether the custom of pre-emption existed, though the incidents of that custom were disputed. It related to zemindary property, and herein a distinction must be made between zemindary property and property in towns.

It is admitted that the right of pre-emption is one that has been recognized by the Mahomedan law, and originally was limited to that law. Subsequently it was adopted by the Hindus, and became modified in different places by local usage. Thus in different villarges the custom of pre-emption began to vary and the incidents of it differed from place to place. In towns however so far as my experience goes and as far as is shown by the cases to which my attention has been directed, the right recognized by the Mahomedan law has not become modified by local custom. In 1914 All 52 (1), the question that was raised related to the incidents of the custom, the plaintiff was concerned to prove that he came under a particular category, and it was held that he had not been able to prove this because the wording of the wajib-ul-arz was ambiguous. In 1915 All 423 (2), it was similarly held that it was necessary for the plaintiff to prove a custom under which he had a right. It was not sufficient to prove the existence of some custom of pre-emption, but the existence of a custom under which the plaintiff came into one of the categories of pre-emptors. This again related to zamindary property. In 1918 All 376 (3), to which I have also been referred, the wajib-ul-arz did not record a custom at all, and in 1923 All 513 (4), there was no wajib-ul-arz in evidence. The last case of this kind to which I have been referred was that of 1924 All 541 (5), in which the property was zamindary property, and the ambiguity in the language of the wajib-ul-arz related to the incidents of the custom and not to the existence of the custom itself.

In the present case it is evident from the words that I have quoted above that the entry in the wajib-ul-arz does not give any incidents and does not describe any categories into which pre-emptors are to be divided. It merely records the fact that a custom of pre-emption exists. It is however argued that the words themselves create an ambiguity as to the nature of the custom. In 5 All 110 (6), it was held by a Bench of this Court that where the custom of pre-emption exists it must be presumed to be founded on, and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown; that the Court may as between Hindus, administer a modification of law as to the circumstances under which the right may be claimed, if it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption (p. 113):

"It may therefore be safely laid down that in all cases in which the right of pre-emption is claimed the Courts in administering equity will, by analogy follow the rules of the Mahomedan law of pre-emption even in cases where the right is not claimed under that law, but under local usage or custom. The rules of customary pre-emption no doubt depend upon the custom itself, but where such custom is silent upon any particular point, the rule of the Mahomedan law of pre-emption upon that point must by analogy, be taken to be the rule of decision."

In 9 All 513 (7), it was held that in the absence of evidence of any special custom different from, or not co-extensive with, the Mahomedan law of pre-emption that law must be applied to the case. The words in the wajib-ul-arz of a village gave a right of pre-emption "according to the usage of the country." This is an expression very similar to that in the present case with the exception of the words "wa Shastra ke." In fact this last decision is good authority for holding that a right of pre-emption in accordance with the usage of the country is clear and definite enough to form proof of a custom. Similar opinions as to the general principle have been expressed more re-

1. Jahangira v. Amir Singh, 1914 All 52=23 I C 245.
2. Muhammad Mahbub Ali Khan v. Raghubar Dayal, 1915 All 423=30 I C 947=38 All 27.
3. Muhammad Razi-ud-Din v. Raghubar Prasad, 1918 All 376=46 I C 82.
4. Ram Chand v. Goswami Ram Puri, 1923 All 513=74 I C 379=45 All 501.
5. Nageshar Prasad v. Ram Harakh Pande, 1924 All 541=79 I C 417=46 All 370.
6. Zamir Husain v. Daulat Ram, (1882) 5 All 110 =1882 A W N 199.
7. Ram Prasad v. Abdul Karim, (1887) 9 All 513 =1887 A W N 146.

cently by this Court in the cases of 28 All 60 (8) and 28 All 590 (9).

The only question therefore is whether the words "wa Shastra ke" introduce such an element of ambiguity or confusion into the record that the whole of the entry must be discarded as being too vague to form the definition of a custom. Neither the trial Court nor the lower appellate Court has really found any difficulty in interpreting the expression. It is of course possible that the object of these three additional words was to show that the ordinary rule of Mahomedan law was to be modified by some local custom, Hindu or otherwise, such as is frequently to be found in the wajib-ul-arzes of zamindary villages. If this were so, it might be argued that the words do not show in what way the modification is to be understood. The words "wa Shastra ke" however do not convey any reference to local custom, nor has any attempt been made either on behalf of the appellant or the respondent to explain what they may mean. The state of the law being as I have described above, it appears to me that unless the appellant could show that the ordinary rule of Mahomedan law as to be modified by these words, that rule must be held to apply in this case and the custom of pre-emption, which it is clearly the intention of the wajib-ul-arz to record must therefore be the custom as understood in Mahomedan law.

It has also been argued on behalf of the appellant in support of the decision of the trial Court that even if a custom originally existed it has fallen into disuse. There was evidence, apart from the entry in the wajib-ul-arz to prove not only that a custom had existed, but that it had continued to be in existence quite recently. That evidence consists of five judgments dated, 1869, 1902, 1930 and two of 1931, in which the custom of pre-emption was claimed and either admitted or else contested and maintained by the Court. Two sale-deeds were also filed, one of which however was returned and is no longer on the record. The remaining one is dated 1880 (Ex. 6), and it contains a recital that the vendee had a right of pre-emption. There were also witnesses on both sides to testify to the existence of the custom and to its non-existence. The latter however were only able to show that in a number of instances transfers had taken place in favour of strangers, without a right of pre-emption being claimed. There is however good authority for holding that this is not sufficient to disprove the existence of a custom or to prove that a custom which has been proved has fallen into disuse. In 1924 All 791 (10), it was held that the assumption that there had been transfers to strangers could not necessarily negative the existence of the custom. It might well be that those sales were not objectionable to the co-sharers or that the purchasers had offered prices so high as to make it impossible for the co-sharers to outbid them. Similarly in 1931 All 547 (11), it was held that where a custom is proved to exist, that custom must be held to continue and the onus to prove discontinuance of that custom lies upon the party denying its existence. It is quite clear to my mind that in the present case the evidence brought to prove that the custom had fallen into disuse is quite inadequate, and that the decision of the lower appellate Court is perfectly correct. The appeal is therefore dismissed with costs.

K.S. *Appeal dismissed.*

8. Jagadam Sahai v. Mahabir Prasad, (1906) 28 All 60=1905 A W N 190=2 A L J 482.
9. Chakauri Devi v. Sundari Devi, (1906) 28 All 590=3 A L J 338=1905 A W N 144.
10. Bhawani Singh v. Makhan Lal, 1924 All 791.
11. Chunni v. Rafiunnisha Begam, 1931 All 547 =132 I C 804.

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BENNET, J.

Mizajilal—Applicant.

v.

Seth Lachhmi Narain — Opposite Party.

Civil Revn. No. 540 of 1933, Decided on 23rd October 1934.

Civil P. C. (1908), S. 11—Objection to execution application dismissed for default of appearance of judgment-debtor—It does not operate as res judicata against him to prevent him from making same objection again—Execution.

Principle of res judicata applies only when there has been a decision on merits of the point. Where an objection to an execution application is dismissed in default of the appearance of the judgment-debtor, that order does not operate as res judicata against him in a subsequent application to the same effect by the same applicant: 1929 *Bom* 217 and 1931 *All* 99, *Rel. on.* [P 239 C 1]

M. L. Chaturvedi—for Applicant.

Order.—This is an application in civil revision in which the only point pressed is that an objection of a judgment-debtor in execution proceedings which had been dismissed for default does not operate as res judicata against the judgment-debtor to prevent him from making the same objection again. The

facts are that there was a Small Cause Court decree passed by the Court of Lakhimpur which was transferred for execution to the Court of the Munsif of Farrukhabad on the regular side. In the Lakhimpur Court on 16th January 1930, the judgment-debtor made an objection that he was prepared to fix a pump in the plaintiff's house before the period fixed had expired and that the decree-holder refused to allow him to carry out this portion of the decree. The same objection was made by the judgment-debtor on 13th August 1930, in the Court of the Munsif Farrukhabad. The Courts have gone into the merits of this objection and have held that the objection is correct, but the lower appellate Court has held that the objection is barred by the principle of res judicata.

Learned counsel for the judgment-debtor applicant relies on a ruling which is 1929 Bom 217 (1). In that case it was held where an application is dismissed in default of the appearance of the applicant that order does not operate as res judicata against a subsequent application to the same effect by the same applicant. This was also in execution proceedings. The case is very similar to the present case. There is also a ruling of a Bench of this Court in 1931 All 99 (2). It was held that the rule of res judicata applies to subsequent proceedings in the same suit only when the point has been raised and decided. Following these rulings, as there has been no decision on the merits of the point, the rule of res judicata does not apply and accordingly, I allow this civil revision and allow the objection of the judgment-debtor and dismiss the application of the plaintiff for execution with costs in all Courts. The stay order is discharged.

K.S. *Revision allowed.*

1. Lakshmi Anant v. Ravji Bhikaji, 1929 Bom 217=118 I C 700.
2. Raghukul Tilak v. Pitam Singh, 1931 All 99=130 I C 198=52 All 901.

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KING AND RACHHPAL SINGH, JJ.

Sri Nathji and *others*— Defendants—Appellants.

v.

Mt. Panna Kunwar—Plaintiff — Respondent.

First Appeal No. 309 of 1930, Decided on 5th December 1933, from decision of Addl. Sub-Judge, Muttra, D/- 11th March 1930.

(a) Limitation Act (1908), Art. 132 — Plaintiff asking only for money decree — Art. 132 does not apply.

Where the plaintiff asks for a money decree only Art. 132 would not apply to the case. This article would apply only where the claim is to realize the money by a sale of the property upon which it is charged. [P 240 C 1]

(b) Limitation Act (1908), Art. 123 — Suit for recovery of legacy from person in possession of estate and bound to pay same is governed by Art. 123.

A case for the recovery of a legacy from persons who are in possession of the estate and who are legally bound to pay the same, is governed by Art. 123 : *Case law reviewed.* [P 241 C 1]

S. N. Sen and *G. S. Pathak*—for Appellant.

Harnandan Prasad—for Respondent.

Rachhpal Singh, J.—This is a defendants' appeal arising out of a suit to recover a sum of money. The facts which have given rise to this litigation between the parties may briefly be stated as follows: Mt. Panna Kunwar the plaintiff-respondent is the daughter of one Pandit Baldeo Narain Singh who died on 11th January 1912. He was the owner and in possession of considerable property. On 5th January 1912B. Baldeo Narain Singh executed a will in favour of one Keshab Deo alias Kabli Singh, his nephew. Under the terms of the aforesaid will he directed Keshab Deo to pay a sum of Rs. 500 yearly to Mt. Panna Kunwar and her son. On the death of Pandit Baldeo Narain Singh a dispute arose between the plaintiff on the one side and Keshab Deo on the other as regards the estate left by the deceased. The plaintiff Mt. Panna Kunwar instituted a suit to recover possession over the entire estate left by the deceased on 11th July 1915 on the allegations that she was the sole heiress of her father and that the will set up by the defendant was a forgery. The suit was decreed by the first Court, but that decree was reversed by the High Court which decision was finally upheld by their Lordships of the Privy Council on 16th December 1925. On 10th December 1928 Mt. Panna Kunwar, plaintiff-respondent, instituted a suit to recover the arrears of maintenance from 5th January 1912 till the date of the suit together with interest thereon. She claimed a sum of Rs. 8,000 on account of principal and Rs. 4,547-8-0 for interest. the total amount claimed being Rs. 12,547-8-0. It appears that B. Keshab Deo, alias Kabli Singh, had died before the date of the suit. He had on 23rd August 1922, during the pendency of the ap-

peal in the suit which the plaintiff had instituted for possession over the estate of her father, executed a will under which he left his entire estate which he had got under the will of Pandit Baldeo Narain Singh in favour of Thakur Sri Nathji an idol. The other defendants in the case before us are trustees of the temple in whose favour Keshab Deo had made a will.

The defendants resisted the claim and alleged inter alia that the suit was not within limitation, that it was barred by the rule of res judicata and was not maintainable and that the plaintiff was not entitled to recover interest; all these pleas have been decided against the defendants and it has been held by the learned Subordinate Judge that the claim is within limitation and that the plaintiff is entitled to recover the amount for which she sued. The present appeal has been preferred against the decree made by the learned Subordinate Judge.

The plea that the suit of the plaintiff was barred under S. 11, Civil P. C., was abandoned in this Court.

Only two pleas have been urged in this appeal before us; one is that of limitation and the other relates to interest.

We proceed to consider the plea of limitation first. The learned Subordinate Judge has held that either Art. 132 or Art. 123, Sch. 1, Limitation Act, is applicable. We are of opinion that Art. 132 is not applicable to the case before us. That Article applies to a case where the plaintiff seeks to enforce payment of money by enforcing his charge upon an immovable property. In the case which we are hearing, the respondent did not ask for the enforcement of any charge but simply asked for a money decree against the defendants. The learned counsel for the respondent had to concede that Art. 132, Limitation Act, could not be made applicable to the case before us in view of the fact that the plaintiff in her plaint did not seek to enforce her charge against the immovable property in possession of the appellants. He however made an application on behalf of the respondent during the hearing of the appeal asking for permission to amend the plaint by adding a relief for enforcing a charge against the immovable property which is liable for the payment of the maintenance of the plaintiff-respondent. That application was rejected by us for the reasons recorded in our order. As the plaintiff asked for a money decree only it must be held that Art. 132, Limitation Act would not apply to the case. This article would apply only where the claim is to realise the money by a sale of the property upon which it is charged.

The next question for our consideration is whether Art. 123, Limitation Act, is applicable. Art. 123 enacts that in a suit for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate, the period of limitation is 12 years from the time when the legacy or share becomes payable or deliverable. The contention which has been raised by the learned counsel for the appellants is that the suit of the respondent is governed by Art. 120 and not by Art. 123. This question came up for consideration in a case before a Full Bench of the Madras High Court in 1922 Mad 457 (1). There the Court held that a suit of this description would be governed by Art. 123. The learned Chief Justice Schwabe, C. J., dealing with the question made the following observations on this point which are to be found at p. 205 (of 46 Mad):

"But it is contended that this article only applies to actions against executors and administrators and that neither the defendants nor their fathers were either. But, in my judgment, this article applies to any one in possession of the estate and bound to pay the legacies."

Coutts-Trotter, J., at p. 209 dealing with this question remarked:

"I agree further with my Lord in thinking that Art. 123 applies to such a case as the present even where the person sued is not an executor but a person who is, in fact, in possession of the estate in circumstances which render him accountable in equity to those having claims upon the estate."

Kumaraswami Sastri, J., at p. 246 in the same ruling remarked as follows:

"Whatever doubts there may be as regards cases of intestacy, I do not see any reason for holding that a suit for a legacy or for a share of a residue bequeathed by a testator can fall under Art. 123 only if it is against an executor and not if it is against one in possession of assets which are liable for payment of the legacies. The wording of Art. 123 is general. It refers to a suit for a legacy or for a share of a residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the article words which are not there, namely, that the suit should be for a legacy or for a

1. Parthasarathy v. Venkatadri, 1922 Mad 457= 70 I C 659=46 Mad 190 (FB).

share of a residue against an executor or administrator."

In the case before us, the suit of the respondent is one against persons who admit that the estate in their possession is liable for the legacy. The very fact that the defendants-appellants concede their liability for the payment of the maintenance for six years prior to the date of the suit goes to show that they are persons who admit their liability for the maintenance claimed by the respondents. It may be remarked that the Full Bench case of the Madras High Court mentioned above went in appeal before their Lordships of the Privy Council and the judgment in appeal is to be found in 1925 P C 105 (2) in which the decision of the Full Bench was affirmed. The learned counsel for the appellants has however contended that the case reported in 1932 P C 81 (3) which is a Privy Council case supports his contention. In that case, at p. 252, their Lordships of the Privy Council made the following observations:

"Before the Board it was for the first time suggested that the suit in reality falls under Art. 123, which applies to a suit 'for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.' The period of limitation in such a case is 12 years from the date 'when the legacy or share became payable or deliverable.' "

A perusal of that ruling will show that in fact it does not support the contention of the appellants. The argument raised before their Lordships of the Privy Council was based on the assumption that the owner of the property must be deemed to have died intestate and that what the appellants were claiming was a distributive share in the estate. It was on this assumption that the contention was put forward that to a case of that nature Art. 123, Limitation Act, would be applicable. Their Lordships of the Privy Council were of opinion that this contention was not well founded, because in a long series of rulings of various High Courts in India it had been settled that in a case between several co-heirs of an intestate, the Article applicable would be 144 and not 123. It will be seen that most of the cases referred to by their Lordships in that judgment were cases between co-heirs and the question which had to be considered in those cases was whether the period of limitation under Art. 123 should be applied or the cases should be governed by Art. 144. The Courts were of opinion that if Art. 123, Limitation Act, was made applicable, then it would be in conflict with the rule of law under which the possession of one co-heir is to be deemed as possession of the other co-heirs. It was under those circumstances that their Lordships of the Privy Council held that in suits between co-heirs, the article of limitation applicable would be Art. 144 and not Art. 123. The decision reported in 1932 P C 81 (3) has no application to a case in which the plaintiff claims a legacy and that is why we find that there is no mention of the Madras Full Bench ruling in it. In a case reported in 1929 Bom. 141 (4), it was held by a Bench of two learned Judges that:

"The word 'distribution' has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. Art. 144 and not Art. 123 therefore applies to a suit to recover a share by a Mahomedan heir from a person in management of the property."

In dealing with this point the following observations were made:

"On the first question as to whether Art. 123 applies, we think that Art. 123 is restricted to suits where a share is sought to be recovered as such from a person who legally represents the estate of the deceased either as executor, administrator or otherwise, and who is bound by law as such representative to pay or deliver the share. The appellants rely on the decision in 1918 Bom 54 (5), and particularly on the remarks of Macleod, J., at pp. 860 and 861 and the ruling of the Privy Council in 1916 P C 145 (6) and the decision of the Madras High Court in 1922 Mad 457 (1). In the subsequent decisions of this Court in 1920 Bom 26 (7) and 1921 Bom 56 (8), Sir Norman Macleod was of opinion that Art. 144 would apply where a suit is brought by a Mahomedan sharer to recover his share of the immovable property from the person in possession of such property. Fawcett, J., in 1921 Bom 56 (8) expressed the view that the decision of the Privy Council in 1916 P C 145 (6), which related to the right of succession of the eldest son under the Burmese Buddhist law to be asserted not within a certain limited period of time but within the period of limitation, did not really decide the point as to whether Art. 123, Lim. Act, applied to a case of a Mahomedan suing to recover his share, from a person in possession or management of the property, and preferred to

2. Venkatadri v. Parthasarathi, 1925 P C 105=87 I C 324=52 I A 214=48 Mad 312 (PC).
3. Ghulam Mohammad v. Ghulam Husain, 1932 P C 81=136 I C 454=59 I A 74=54 All 93 (PC).
4. Bai Jivi v. Bai Bibanboo, 1929 Bom 141=118 I C 785.
5. Shirinbai v. Ratanbai, 1918 Bom 54=51 I C 209=43 Bom 845.
6. Maung Tun Tha v. Ma Thit, 1916 P C 145=38 I C 809=44 I A 42=44 Cal 379 (PC).
7. Kallangowda v. Bibishaya, 1920 Bom 26=58 I C 42=44 Bom 943.
8. Nur Din v. Bu Umrao, 1921 Bom 56=59 I C 780=45 Bom 519.

follow the earlier Privy Council decision in 21 Cal 157 (9) and held that the word 'distribution' has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. The Madras case of 1922 Mad 457 (1) and 1925 P C 105 (2) refers to a suit to recover a legacy, and to such a suit Art. 122 would clearly apply. The view of the Madras High Court in the earlier Full Bench decision in 34 Mad 511 (10) was followed by this Court in S. A. No. 108 of 1916 (11) and is consistent with the decision of this Court in 14 Bom 236 (12). The same view was taken by the Calcutta High Court in 1924 Cal 142 (13). The decision in 1921 Bom 56 (8) was followed by this Court in Cross Appeal No. 276 of 1925 (14). We think therefore that we should follow the decision in 1921 Bom 56 (8) and hold that Art. 123 would not apply to a suit such as the present to recover a share by a Mahomedan heir from a person in management of the property. It would therefore follow that Art. 144 would apply."

It may be pointed out that in the case of 1932 P C 81 (3) it was held by their Lordships of the Privy Council that Art. 123 applied not only to suits against executors or administrators, but also in suits against persons legally charged with the distribution of the estate. We are therefore of opinion that the case before us which is one for the recovery of a legacy by the respondent from persons who are in possession of the estate and who are legally bound to pay the same, is governed by Art. 123, Limitation Act.

The plaintiff's suit for the recovery of maintenance for a period of 12 years would be within limitation. The plaintiff however has sued to recover maintenance for a much longer period, that is, from 5th January 1912. The contention of the plaintiff which has found favour with the learned Subordinate Judge is that there was an acknowledgment of liability by Keshab Deo in the will which he had executed in favour of the idol Thakur Srinathji which would bring her claim for maintenance for the prior period also within limitation. Reliance is placed in support of this contention on a statement made by Keshab Deo in the will executed by him on 23rd August 1912 and which is printed at pp. 49 and 50. This statement runs as follows:

"Under the will made by him, my younger maternal uncle wished that Rs. 500 a year should be paid to his daughter, Mt. Panna Kunwar, during her lifetime, but she did not accept it, and, at the instigation of my adversaries, entered into litigation with me. If she wants to take it now, it shall, after deducting the expenses which I have defrayed in the case against her, be paid to her for three years preceding the date of payment and also in future annually till so long as she is alive (although on account of the improper litigation and also for the reason that she did not abide by will, and gave it out to be false, she is not entitled to it according to law and justice"

It was contended by the respondent that this statement amounted to an acknowledgment of liability in respect of the maintenance which was due before that date. We are of opinion that this contention cannot be accepted, and the statement referred to above would not in our opinion attract the consequences of S. 19, Limitation Act. After reciting the fact that a maintenance has been fixed for the plaintiff, Keshab Deo, goes on to say that if she wanted to take it now, it shall, after deducting the expenses which he had defrayed in the case against her, be paid to her for three years preceding the date of the suit, and also in future annually. He does not admit his liability for the payment of past maintenance. All that he says is that if she agrees to certain conditions, then the maintenance for three years before the date on which he made the will would be paid to her. He does not admit any legal liability on his part, but says that as a matter of grace it might be paid to her. Under these circumstances we do not agree with the view taken by the Court below on this point.

The next question for our consideration is whether the plaintiff-respondent should have been awarded any interest at all on the amount claimed by her. We are clearly of opinion that no interest should have been awarded to the plaintiff till 25th August 1927. After the execution of the will by her father, the plaintiff declined to accept its genuineness. On the other hand, she instituted a suit challenging the validity of the will. When she adopted that attitude, it could not be expected that the defendants would make any payment to her for her maintenance, nor was it likely under those circumstances that she would have accepted even if she had been offered

9. Mahomed Riasat Ali v. Hasin Banu, (1894) 21 Cal 157=20 I A 155 (PC).
10. Khadersa Haji Bappu v. Ayissa Ummah, (1911) 34 Mad 511=6 I C 50 (FB).
11. Maktumawa v. Allama, Second Appeal No. 108 of 1916 decided on 25th February 1919 by Scott, C. J.
12. Keshav Jagannath v. Narayan Sakharam, (1890) 14 Bom 236.
13. Ahidannesa Bibi v. Isuf Ali Khan, 1924 Cal 142=74 I C 1010=50 Cal 610.
14. Fatemiya v. Sardarkhan, Cross Appeal No. 276 of 1925 decided on 31st January 1928 by Patkar and Baker, JJ.

the same. It appears that in 1927 a notice was sent by the defendants to the plaintiff asking her to pay the costs incurred by them in the litigation which was started by her. The plaintiff in reply to that notice sent a letter printed at p. 55 and which is dated 25th August 1927 in which she said:

"That I would request you to ask your clients the decree-holders, to deduct their proper dues from the aforesaid sum and remit the balance to me per money order."

This statement may be taken to be a request for the payment of maintenance which was due to the plaintiff at that time; and, as no payment was made after this demand, it would be quite reasonable to allow the plaintiff interest under the provisions of Act 32 of 1839 (Indian Interest Act). Under these circumstances we are of opinion that the plaintiff should get simple interest at the rate of 6 per cent. per annum.

The result of our finding is that the plaintiff is entitled to a decree for a sum of Rs. 6,000 for 12 years' maintenance. She will also get interest in the manner which will be indicated in our order.

For the reasons given above, we allow this appeal, and modify the decree of the Court below, and grant the plaintiff a decree for Rs. 6,000. On the amount which was due to the plaintiff on 26th August 1927, she will get interest at the rate of 6 per cent. per annum, from that date. She will further get interest on the subsequent instalments at the above-mentioned rate, as they fall due. For the purpose of reckoning interest, we direct that it will be taken that each instalment of Rs. 500 is payable, each year, on 10th December, and that the first instalment, for the first year, would be deemed to be payable on 10th December 1917, and the last, on 10th December 1928. The parties will pay and receive their costs in both the Courts, in accordance with their success and failure. The decree money will be realised from the assets of Baldeo Narain Singh, in the hands of the defendants. Out of the decretal amount realised, the court-fee, which the plaintiff had to pay in the Court below, will be realised as first charge by the Government.

K.S. *Appeal allowed.*

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SULAIMAN, C. J. AND GANGA NATH, J.

Nawal Kishore and *others* — Decree-holders—Appellants.

v.

Buttu Mal and *another* — Auction-purchaser and Judgment-debtor — Respondents.

First Appeal No. 147 of 1933, Decided on 24th October 1934, from order of Sub-Judge, Agra, D/- 26th April 1933.

Civil P. C. (1908). O. 21, Rr. 85 and 86 — Discretion referred to in R. 86 is confined to forfeiture of deposit and not to re-sale of property.

Order 21, R. 85 requires that the full amount of the purchase-money shall be paid by the purchaser into Court before the Court closes on the 15th day from the sale of the property. R. 86 also requires that in default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit after defraying the expenditure, be forfeited to Government and the property shall be resold. When the default is made in depositing the balance of the amount as required by R. 85, the Court ought to order the re-sale of the property. The discretion under R. 86 is confined to the forfeiture and not to the re-sale of the property : 95 *I C* 46=1926 *All* 509, *held Overruled by S. A. No.* 1393 *of* 1928. [P 244 C 1]

M. L. Chaturvedi—for Appellants.

R. K. S. Toshniwal—for Respondents.

Judgment.—This is a decree-holders' appeal from an order confirming the sale. The property was sold at an auction on 9th October 1930, for Rs. 2,325, and was purchased by the respondent, Buttu Mal. The auction-purchaser deposited 25 per cent as required by O. 21, R. 84, immediately, but he did not deposit the balance of the purchase money within 15 days as required by R. 85. Possibly the reason was that an application was filed on behalf of the judgment-debtor immediately to have the sale set aside. This application remained pending for a long time and was ultimately disposed of on 18th November 1932. Previous to this date the decree-holder obtained the permission of the Court on 18th July 1931, to deposit the balance in Court and he deposited the remaining three-fourths on 27th July 1931.

The decree-holder however applied that the deposit had not been made in accordance with R. 85 and that the property should be re-sold. The learned Subordinate Judge first allowed the application ex parte, but later on the application of the auction-purchaser dismissed the decree-holder's application and confirmed the sale. He relied on an observation made in 1926 All

509 (1). It is contended before us that the Subordinate Judge had no jurisdiction to extend the time and that when the default was made in depositing the balance of the amount as required by R. 85, the Court ought to have ordered the re-sale of the property, and that the only discretion is as regards the forfeiture of the deposit of 25 per cent. This contention is obviously well founded. R. 85 requires that the full amount of the purchase money shall be paid by the purchaser into Court before the Court closes on the 15th day from the sale of the property. R. 86 also requires that in default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit after defraying the expenditure, be forfeited to Government and the property shall be re-sold.

In 1926 All 509 (1), no appeal lay to the High Court and there was no ground for interference in revision. It might not therefore have been necessary to decide the question whether the Court below had erred in accepting the deposit beyond time, but the observation to that effect was certainly wrong and not warranted by the language of O. 21, R. 86. This case must be deemed to have been overruled by implication of a Division Bench ruling of this Court in Ex. S. A. No. 1393 of 1928 (2), in which it was clearly held that the discretion was confined to the forfeiture and not to the re-sale of the property. We accordingly allow this appeal and setting aside the sale of 9th October 1930, direct that proceed- be taken for re-sale. The appellants will have the costs from auction-purchaser, Buttu Mal in both Courts. The appellants are not entitled to refund of court-fees already paid.

K.S. *Appeal allowed.*

1. Basawan Dube v. Anpurna Kunwar, 1926 All 509=95 I C 46.
2. Lala Lachman Narain v. Chattar Singh, Ex. S. A. No. 1393 of 1928 decided on 18th April 1929.

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SULAIMAN, C. J. AND RACHHPAL SINGH, J.

Shyam Narain Misir and *another*—Plaintiffs—Appplants.

v.

Mangal Prasad Misir and *others*—Defendants—Respondents.

Letters Patent Appeal No. 27 of 1933, Decided on 12th September 1934, against decree of Niamat Ullah, J., D/- 28th July 1933.

Transfer of Property Act (1882), Ss. 41, 43 and 6 (a)—Heir professing to transfer property itself and not merely right of succession and acquiring such property subsequently—S. 43 and not S. 41 applies—Illustration to S. 43 is not repugnant to S. 6 (a).

Section 43 applies even to cases of heirs who profess to transfer the property itself and not only their right of succession. It is impossible to hold that the illustration to S. 43 is repugnant to the provisions of S. 6 and is really wrong. Every attempt should be made to reconcile the provisions of S. 43 together with the illustration with the provision of S. 6. S. 6 does not prohibit emphatically the transfer of a chance of an heir, not does it make it absolutely illegal so as to vitiate the entire contract. It merely lays down that property of any kind may be transferred, but the chance of an heir cannot be transferred. This is no more than saying that a transfer of a mere chance of an heir is void in law and is of no effect. S 6 (a) would therefore apply to cases where professedly there is a transfer of a mere spes successionis, the parties knowing that the transferor has no more right than that of a mere expectant heir. But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorized to transfer it and the property transferred is not a mere chance of succession but immovable property itself, and the transferee acts upon such erroneous representation, then if the transferor happens later before the contract of transfer comes to an end, to acquire an interest in that property, no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer. The illustration to S 43 is directly applicable to such a case. Of course, the protection is not afforded for a transaction which wears the garb of a transfer, but only to such a transfer as has been taken by the transferee acting upon an erroneous representation made to him that his tranferor had authority to transfer the property itself: *Case law reviewed.* [P 246 C 1, 2]

Haribans Sahai - for Appellants.

Shiva Prasad Sinha — for Respondents

Judgment.—This is a plaintiffs' appeal arising out of a suit for redemption of a usufructuary mortgage of 1879. The plaintiffs claim to be the representatives of the mortgagor under a sale-deed, dated 13th September 1927, executed by Ram Narayan son of Mt. Bhagwanti, who was the daughter of Mt. Budna the mortgagor. The defendants, who are the representatives of the mortgagees, pleaded that the plaintiffs had no right of redemption left inasmuch as they had acquired proprietary title under the sale-deeds of 2nd August 1910, and 4th January 1927, executed by Ram Narayan previous to that in favour of the plaintiffs.

It appears that on the death of Mt. Budna, she was succeeded by two or three daughters, one of whom Mt. Bhagwanti died in 1904, another daughter having died earlier. On the death of Mt. Bhagwanti, the name of Ram Narayan was entered against a half-share in the estate, while the name of the other daughter, Mt. Akashi continued to remain recorded against the other half. In 1910, Ram Narayan sold that half-share in the property which was in his possession. Mt. Akashi was then alive and died much later in 1926. On her death, Ram Narayan executed a second sale-deed on 4th September 1927, in which he acknowledged the validity of the previous sale-deed of 1910 and also transferred the remaining half-share to the same vendees. It was after this that the plaintiffs took the sale-deed from Ram Narayan. The lower appellate Court has held that the defendants vendees are perfectly protected and the plaintiffs as representatives of Ram Narayan are estopped from going behind the previous two transactions. On appeal a learned Judge of this Court has affirmed that decree, holding that S. 41 as well as S. 43, T. P. Act, are a bar to the claim so far as the half-share sold in 1910 is concerned. As regards the remaining half-share, the validity of the sale-deed of 1927 has to be accepted.

The learned advocate for the plaintiffs urges before us that S. 43, T. P. Act, cannot apply to a case where a person, who is a mere contingent reversioner, purports to transfer the property and then subsequently succeeds to it. The argument is that such an interpretation of S. 43 would be in conflict with S. 6 (a) under which the chance of an heir-apparent succeeding to an estate cannot be transferred. He relies strongly on 1929 Oudh 185 (1), and the case of 1933 Mad 795(2). These cases certainly support his contention; but they proceed on the authority of certain earlier cases which can be easily distinguished. The case of 31 Bom 165 (3), was one where the transferor had agreed to relinquish and release all her right, title and interest, present or future, by way of inheritance or otherwise in certain properties; S. 6 (a) was clearly applicable and S. 43 could have no application.

Similarly the case of 1916 Mad 579 (4), was a case of a contract by an expectant reversionary heir to an estate to sell the same if and when it devolved upon him. It was, of course, held that such a contract could not be specifically enforced. On the other hand, in 1915 Mad 972 (5). Ayling and Tyabji, JJ., distinctly held that where the transferor represents himself to be an absolute owner of the property transferred, when he is not, and on a date subsequent to the transfer, acquires title to such property by inheritance, the transfer is not a transfer of spes successions and invalid under S. 6 (a), T. P. Act, but is one under S. 43 of the Act and is enforceable against the transferor. A distinction was drawn between the transfer of a mere right of succession and the transfer of the property professing to be full owner. This case is directly against the appellants.

But another Division Bench of the Madras High Court has distinctly dissented from this case without referring the question to a larger Bench. In 1933 Mad 795 (2), it was considered that the mortgages, executed by a person who, although he professed to be the full owner, was in reality a mere reversioner, could not be governed by S. 43 at all. It was thought that to apply S. 43 would be to contravene the provisions of S. 6 (a). The learned Judges relied on the case of 1916 Mad 579 (4), although as it has been pointed out, that was a case of a promise to transfer the fruits of the expectations. The learned Judges felt compelled to go to the length of holding that the illustration to S. 43 which directly applies to the case of an heir, is repugnant to the provisions of S. 6 (a) and is therefore wrong. The other cases relied upon also are cases either of mere contracts or of transfers of a mere chance of succession. An Allahabad case holding the contrary view was not followed on the ground that S. 6 (a) had not been considered there.

It also appears that a Division Bench of the Lucknow Chief Court in 1929 Oudh 185 (1), have apparently expressed the same view. There also it has been considered that the transfer of property by a person, who is in reality not the owner, is really the transfer of a chance of succession, and is therefore void under S. 6, T. P. Act. We do

1. Bindeshwari Singh v. Har Narain Singh, 1929 Oudh 185=127 I C 20=4 Luck 622.
2. Official Assignee of Madras v. Sampath Naidu, 1933 Mad 795=145 I C 965.
3. Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin, (1907) 31 Bom 165=8 Bom L R 781.
4. Sri Jagannada Raju v. Sri Rajah Prasada Row, 1916 Mad 579=29 I C 241=39 Mad 554.
5. K. Nabi Sab v. Murukuti Papiah, 1915 Mad 972=29 I C 439.

not think that the Full Bench case of the Madras High Court 1918 Mad 123 (6), necessarily decides this point in favour of the appellants. In that case the alienation was prohibited by statute, and it could therefore not be given a retrospective effect by virtue of S. 47, T. P. Act. Possibly on the same ground an earlier case of the Madras High Court in 30 Mad 255 (7), may also be distinguished.

On the other hand, in several cases of this Court it has been laid down that S. 43 applies even to cases of heirs who profess to transfer the property itself and not only their right of succession. We may mention the cases of 33 All 382 (8), 1929 All 589 (9) and 1930 All 115 (10). The inapplicability of S. 6 to such a case was not discussed at length, because obviously the section was considered to be irrelevant. The learned Judicial Commissioner of the Nagpur Court in 1931 Nag 51 (11), reviewed many cases on this point and came to the same conclusion as this Court. It seems to us that when there were clear cases under the unamended Transfer of Property Act, applying S. 43 to the cases of heirs, and there was a specific illustration to S. 43 which was in point, and the Legislature has not thought fit to delete the illustration in the Amended Act, it is impossible to hold that the illustration is repugnant to the provisions of S. 6 and is really wrong. Every attempt should be made to reconcile the provisions of S. 43 together with the illustration with the provisions of S. 6. Such a reconciliation is, in our opinion, patent enough. S. 6 does not prohibit emphatically the transfer of a chance of an heir; nor does it make it absolutely illegal so as to vitiate the entire contract. It merely lays down that the property of any kind may be transferred, but the chance of an heir cannot be transferred. This is no more than saying that a transfer of a mere chance of an heir is void in law and is of no effect. S. 6 (a) would therefore apply to cases where professedly there is a transfer of a mere spes successionis, the parties knowing that the transferor has no more right than that of a mere expectant heir. The result, of course, would be the same where the parties knowing the full facts fraudulently clothe the transaction in the garb of an out and out sale of the property, and there is no erroneous representation made by the transferor to the transferee as to his ownership.

But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorized to transfer it and the property transferred is not a mere chance of succession, but immovable property itself, and the transferee acts upon such erroneous representation, then if the transferor happen later, before the contract of transfer comes to an end, to acquire an interest in that property no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer. The illustration to S. 43 is, in our opinion directly applicable to such a case. Under it if a Hindu son who has separated from his father and the joint property is divided on partition so that the son no longer owns a particular property which has been allotted to the father, but transfers the same professing to own it, then if while the contract of sale has not been rescinded the heir succeeds to the estate of his father on his death, the transferee may require the son to deliver such property to him. This is a case of an heir, who had at the time a mere chance of a succession to the estate of his father in case he survived him, transferring the property itself and not his chance of succession. Under the illustration he is bound to restore the property to the transferee if before the contract is rescinded he succeeds to such property.

Of course, the protection is not afforded for a transaction which wears the garb of a transfer, but only to such a transfer as has been taken by the transferee acting upon an erroneous representation made to him that his transferor had authority to transfer the property itself vide 1926 All 102 (12). We accordingly agree with the view expressed by Niamat Ullah, J., in disagreement with the Lucknow Chief Court, that S. 43 would be applicable.

6. Sannamma v. Radhabhayi, 1918 Mad 123=43 I C 935=41 Mad 418 (F B).
7. Ramasami Naik v. Ramasami Chetty, (1907) 30 Mad 255=17 M L J 201.
8. Sarju Prasad v. Bindeshri Baksh Pal, (1911) 33 All 382=9 I C 298.
9. Sunder Lal v. Ghissa, 1929 All 589=118 I C 705.
10. Eshaq Lal v. Dulla, 1930 All 115=122 I C 177.
11. Bismilla v. Mannlal Chabildas, 1931 Nag 51 =130 I C 822=27 N L R 199.
12. Mularaj v. Indar Singh, 1926 All 102=92 I C 471=48 All 150.

We however think that S. 41, T. P. Act, cannot be of any avail to the defendants. Under that section when a person who is the ostensible owner of a property with the consent express or implied of the true owner transfers the same for consideration, the owner is bound by the transfer under certain circumstances. Here if we regard the daughter, Mt. Akashi. as the true owner and Ram Narayan as the ostensible owner, then Mt. Akashi would have been bound by the transfer; but she is now dead and the question of a limited owner being bound by the transfer no longer arises. S. 41 cannot be invoked against the plaintiffs themselves, simply because they had previously made the transfer. It is S. 43 which is the appropriate section.

The lower appellate Court has recorded a distinct finding that the vendees acted in perfect good faith. We have got to accept this finding in second appeal, however incomplete it may be. Putting it at its very lowest, this finding must mean that the defendants vendees were not aware that their vendor had no authority to sell the property. Whether they were aware of any other circumstances has not been made clear by the lower appellate Court; but we must assume that they were not aware that their vendor had not any authority to transfer the property. Now, from the sale-deed it is quite clear that Ram Narayan professed to transfer all his zamindari rights in the property over which he was in possession and did not mean to retain any interest. He provided that the vendees would generation after generation remain in proprietary possession of the property sold; and towards the end of the document he in particular stated that from the date of the sale-deed the vendees should like the vendor remain in proprietary possession and occupation of the property sold and that "now the vendees are the permanent owners of the property sold. I and my heirs have nothing to do therewith."

The earlier portion of the sale-deed in question was not drafted in a way which would make a clear admission of the full ownership of the executant. At the same time there is no clear recital in it which would suggest that he was not the absolute owner. He has certainly said that he sold the property absolutely and that the vendees would remain in proprietary possession of the property like himself generation after generation and that they had become the absolute owners of the property. We think that these recitals are sufficient to warrant the conclusion that there was an erroneous representation made to the vendees that the executant had full power to make them absolute and complete owners. In this view of the matter we are of opinion that the defendants are entitled at their option, as the transaction has not been rescinded, to make the transfer operate on the interest which Ram Narayan has acquired since. It is not necessary to consider how far his confirmation of this sale-deed and his acknowledgment of its validity as contained in his subsequent sale-deed of 1927 is binding upon him. As a mere question of ratification the point could not be argued that a transfer which was void could be made valid by a mere subsequent ratification. On the other hand, if there was a fresh contract between the parties, one of the terms of which was that the previous void transfer should be accepted, it may well operate as estoppel. In the view which we have taken of the consequences of the representations made in the earlier sale-deed, it is not necessary to express any final opinion as to the inference to be drawn from the second sale-deed.

The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

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* A. I. R. 1935 Allahabad 247

SULAIMAN, C. J. AND RACHHPAL SINGH, J

Jahan Singh—Plaintiff—Appellant.

v.

Dr. Hardat Singh and *another* — Defendants—Respondents.

Second Appeal No. 1352 of 1932, Decided on 1st August 1934, from decision of Addl. Dist. Judge, Meerut, D/- 22nd June 1932.

*** (a) Hindu Law—Debts — Father— Joint family property sold in execution of decree—Auction purchaser need not prove legal necessity for debt — Sons can set aside sale only if they prove illegality or immorality whether debt is secured or unsecured one and whether delivery of possession has taken place or not.**

A transferee from the manager of a joint Hindu family is bound to show legal necessity for the transfer before he can bind the family. Where however property has passed out of the joint Hindu family under an execution sale, it is no longer incumbent on the purchaser to prove legal necessity and the sons cannot set aside the sale without showing illegality or immorality. But there is no distinction between a secured and an unsecured debt so far as auction-purchasers are concerned, but there is a distinc-

tion between a stranger purchaser and a mortgagee purchaser, namely, that in the case of a stranger the sons must further show that he had notice that the debt was tainted with illegality or immorality, whereas in the case of the mortgagee, constructive notice is presumed. Further whether delivery of possession has taken place or not, so long as the property has passed to the auction-purchasers by virtue of the sale and its confirmation, they are entitled to protect themselves unless it is established that they had notice. And in order to show that the debt had been incurred for immoral or illegal purposes, it is incumbent on the sons not only to show that the father was of an immoral character or that he was in need of money for gambling transactions, but that the money raised was actually applied for such purposes so as to become tainted: *Case law discussed.*

[P 248 C 2; P 250 C 1,2; P 251 C 1]

(b) Precedents—Obiter dicta are not binding though entitled to great weight.

Although obiter dicta are entitled to great weight, they are not binding upon Courts.

[P 250 C 1]

(c) Contract Act (1872), S. 30—Satta transaction need not be gambling transaction if either of parties intends to make delivery of goods in case of breach of contract.

A satta transaction need not be a gambling transaction if either of the parties intends to make delivery of the goods in case of breach of contract. It can be a gambling transaction only if it is the common intention of both the parties that in no event would delivery take place and that only differences would be settled between them.

[P 251 C 1]

Shiva Prasad Sinha and *Shah Zamir Alam*—for Appellant.

N. P. Asthana—for Respondents.

Sulaiman, C. J.—This is an appeal by the son of a Hindu mortgagor for a declaration that a mortgage-deed on the basis of which a decree had been obtained by the mortgagee and the mortgaged property had been sold was not binding on the family because there was no legal necessity for the transaction. The decree was obtained on 15th September 1927, and the property was sold on 21st March 1930, and the sale was confirmed later on. But before possession of the property could be delivered to the auction-purchaser, who was the mortgagee decree-holder himself, the present suit was instituted. It was before the filing of the written statement that possession also was formally taken by the auction-purchaser.

Both the Courts below have dismissed the claim. The trial Court found on the issue relating to legal necessity that the transaction was for legal necessity. The lower appellate Court however has not gone into this question, but has thrown out the suit on the simple ground that the son had failed to prove that the debt had been tainted with immorality or illegality. The main points urged in appeal before us on behalf of the plaintiff are: (1) that the son must show immorality or illegality, and (2) that possession not having been delivered to the auction-purchaser at the time of the suit, he was not protected, particularly as he was the mortgagee himself. There is not the least doubt that a transferee from the manager of a joint Hindu family is bound to show legal necessity for the transfer before he can bind the family. On the other hand, it has been held that where property has passed out of the joint Hindu family under an execution sale, it is no longer incumbent on the purchaser to prove legal necessity and that the sons cannot set aside the sale without showing illegality or immorality. A direct case in point is that of 1925 All 180 (1), decided by Mukerji, J., and myself where we held that on a suit brought by the sons for a declaration that the mortgage and the auction-sale were not binding upon them upon the ground that the mortgage was not executed for legal necessity, the plaintiffs could not succeed without showing that the debt of the father was one tainted with immorality, and that there was no distinction in such cases between a debt secured by a mortgage and an unsecured debt.

The learned advocate for the appellant however contends before us that there are certain observations in the judgment of two learned Judges in 1928 All 596 (2), which either over-rule this case or shake its authority. There is no doubt that there are some observations which suggest a contrary conclusion, while the third member of the Bench adhered to the view previously expressed. 5 Cal 148 (3), was a case where a suit had been brought on behalf of the minor sons to set aside a sale in execution of a decree obtained upon a mortgage executed by their father of certain immovable property belonging to a joint family governed by the Mitakshara law. The property was sold at auction on 28th July 1870, and the suit was instituted within a month of that date, namely, 27th August 1870. It is not clear that the sale had been actually confirmed nor does it appear that possession had been delivered to the auction-purchaser during that short time. Their Lordships approved of the

1. Gajadhar Pande v. Jadubir Pande, 1925 All 180=85 I C 31=47 All 122.
2. Jagadish Prasad v. Hoshyar Singh, 1928 All 596=115 I C 775=51 All 136 (F B).
3. Suraj Bansi Koer v. Sheo Pershad Singh, (1880) 5 Cal 148=6 I A 88=4 Sar 1 (P C).

previous pronouncement in 1 I A 321 (4), viz.:

"A purchaser under an execution is not bound to go further back than to say that there was a decree against the father; and that the property was property liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has bona fide purchased the estate under the execution and bona fide paid a valuable consideration for the property, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution and to recover back the estate as joint ancestral property."

Their Lordships then summarised the law in the following terms:

"Where joint ancestral property has passed out of joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted, and secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

In that case, although the auction-purchasers had taken the property at sale in execution of a mortgage decree, they were held to be protected because immorality or illegality had not been shown. They were considered to be on the same footing as a purchaser in lieu of an antecedent debt of the father. 15 Cal 717 (5), was a case where also a suit had been brought on behalf of the infant children of the mortgagors to recover possession of the property which had been sold in execution of a mortgage decree obtained by the mortgagee under a bond under which the property had been charged as security for the amount claimed. Their Lordships held that as it was not a case of a joint family consisting of brothers only, but it was one consisting of father and children, the sons were liable to pay debts of their father unless incurred for immoral or illegal purposes. Their Lordships quoted with approval the previous pronouncements in the two earlier cases. In 13 Cal 21 (6), their Lordships of the Privy Council again held that the principle was well established that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality. Their Lordships then concluded:

"Where sons claim against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him it is necessary for the sons to prove that the debt was contracted for an immoral purpose and it is not necessary for the creditors to show that there was a proper inquiry or to prove that money was borrowed in a case of necessity."

A distinction between a private alienation and an auction-sale can be easily pointed out. In the case of a private alienation the transferee has plenty of opportunity to make inquires and satisfy himself as to the necessity for the debt. In the case of an auction-sale there is hardly any such opportunity. Furthermore, if a father can voluntarily transfer property in order to pay off his antecedent debt, the Court may also compel him to do the same by means of a compulsory sale. After the sale has taken place under the authority of the Court, the matter passes beyond the stage of a mere private contract or private transfer, and therefore different considerations apply. The case of 1917 P C 61 (7), was somewhat differently understood in India. Accordingly their Lordships had to review the position so far as alienations were concerned, in 1928 All 596 (2). The second proposition laid down by their Lordships in this case was in the following terms:

"If he is the father and the reversionaries are the sons he may, by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt."

On the strength of observations made by Mukerji and Boys, JJ., in the Full Bench case of 1928 All 596 (2), it is contended that this proposition is confined to the case of a debt other than a mortgage debt and that by necessary inference it implies that there is no such principle when the auction-sale takes place in execution of a mortgage decree. If the point had arisen for consideration in the Full Bench case we would have been bound to follow the opinion of the majority or to refer the case once again to a Full Bench. But in the Full Bench case the suit was instituted by the sons soon after the mortgage decree had been obtained and before any auction-sale took place. The Lucknow Court had held that even where only a decree has been obtained the sons must show immorality or illegality. All the Judges con-

4. Muddun Thakur v. Kantoo Lal, (1875) 1 I A 321=22 W R 56=3 Sar 380 (P C).
5. Bhagabut Pershad Singh v. Girja Koer, (1888) 15 Cal 717=15 I A 99=5 Sar 186 (P C).
6. Nanomi Babuasin v. Modun Mohun, (1886) 13 Cal 21=13 I A 1=4 Sar 682 (P C).
7. Sahu Ram Chunder v. Bhup Singh, 1917 P C 61=39 I C 280=44 I A 126=39 All 437 (P C).

stituting the Full Bench held that this was not so and that the transferee must show legal necessity if the auction-sale has not taken place. All other observations made as to what would be the position if an auction-sale has taken place were no more than obiter dicta and therefore although they are entitled to great weight they are not, binding upon us. As a matter of fact, as the point did not arise in the Full Bench case it cannot be said that the decision in 1925 All 180 (1), has been directly over-ruled. Sir Dinshaw Mulla in his Priciples of Hindu Law has discussed the various authorities at considerable length in para. 296 and has rightly pointed out that there is no distinction between a secured and an unsecured debt so far as auction-purchasers are concerned, but that there is a distinction between a stranger purchaser and a mortgagee purchaser, namely, that in the case of a stranger the sons must further show that he had notice that the debt was tainted with illegality or immorality whereas in the case of the mortgagee, constructive notice is presumed.

It seems to me that their Lordships of the Privy Council in 1924 P C 50 (8), were summarising the propositions of law which followed from the authorities quoted by their Lordships. The case of 15 Cal 717 (5), which was that of an auction-purchaser in execution of a mortgage decree was one of the cases quoted by their Lordships with approval. It therefore appears to me impossible to infer that their Lordships intended to over-rule their own previous decisions and intended to lay down that an auction-purchaser in execution of a mortgage decree must further establish, whether he is a stranger or the mortgagee himself, that the mortgage debt had been taken for legal necessity. In the case before their Lordships the mortgagee had only obtained a decree for sale and had not proceeded to get the property sold and the sons' suit was for the avoidance of the mortgage decree and not for the setting aside of any Court sale. It is therefore still more unlikely that their Lordsnips would over-rule the previous decisions on the question of auction-sales when that point was not directly raised in 1924 P C 50 (8). I am therefore of opinion that the case decided in 1925 All 180 (1), is in accordance with the rule of law laid down by their Lordships of the Privy Council in 5 Cal 148 (3) and 15 Cal 717 (5), and must be followed.

The next point urged is that inasmuch as delivery of possession had not taken place when the suit was instituted, that principle does not apply. The contention is that so long as possession has not been delivered the property has not passed out of the family. Now, their Lordships have laid down that purchasers at an auction-sale, who are strangers, are not bound to make inquiry beyond what appears on the face of the proceedings and that therefore the sons must show that they had notice that the debts had been contracted for immoral or illegal purposes. So far as strangers are concerned, it makes no difference whether only the sale has taken place and has been confirmed or whether delivery of possession of property also has been made to them. The protection given to them is based on the principle that they are not bound to make inquiry beyond what appears on the face of the proceeding and that therefore if they had no notice of the illegality or immorality tainting the debt they are protected. It is therefore impossible to draw a distinction that the strangers would not be protected if, although the sale has been confirmed, delivery of possession has not been made when the sons' suit is instituted. It would follow that whether delivery of possession has taken place or not, so long as the property has passed to the auction-purchasers by virtue of the sale and its confirmation, they are entitled to protect themselves unless it is established that they had notice.

If therefore in the case of auction-purchasers who are strangers no distinction can be drawn when possession has not been delivered, it would follow that on the same principle there should be no distinction in the case of an auction-purchaser who is not a stranger to the suit. Similarly, there can be no distinction whether the auction-sale has taken place in execution of a simple money debt or in the case of a mortgage debt. Their Lordships when laying down the proposition of law did not say:

"When joint ancestral property has passed out of possession of a joint family"

but said:

"When such property has passed out of joint family under a sale in execution of a decree."

That, in my opinion, implies that when the property has become vested in the auction-purchaser on confirma-

8. Brij Narain Rai v. Mangla Prasad Rai, 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

tion of sale the principle laid down by their Lordships is applicable. As regards the debt, whether the debt had been incurred for immoral or illegal purposes the findings of both the Courts below are against the appellant. It was incumbent on the son not only to show that the father was of an immoral character or that he was in need of money for gambling transactions, but that the money raised was actually applied for such purposes so as to become tainted. All that the plaintiff's father said in this case was that he had borrowed this money for certain satta transactions. Now, a satta transaction need not be a gambling transaction if either of the parties intends to make delivery of the goods in case of breach of contract. It can be a gambling transaction only if it is the common intention of both the parties that in no event would delivery take place and that only differences would be settled between them. The father's evidence falls short of saying this. It must accordingly be held that the finding of the lower appellate Court is binding upon us. I would therefore dismiss the appeal.

Rachhpal Singh, J.—I agree. I think that the proposition is well settled that where a father has contracted a debt for his own personal benefit, the creditor may obtain a money decree against the father alone, and may enforce the decree by attachment and sale of the entire co-parcenary property including the sons' interest therein. The sons may not be parties to the suit, but nevertheless they are bound by the sale by reason of their pious duty to pay their father's debt. They can recover their share in the property only in case they are able to establish that the debt was contracted by the father for immoral or illegal purposes. As explained by Sir D. Mulla in his Hindu Law, p. 346 (1932 Edition), the fundamental principle is where joint family property is sold in execution of a decree, though obtained against the father alone, and for a debt contracted by him for his own personal benefit, the sons cannot claim to recover their share of the property unless they show that the debt was contracted by the father for an immoral or illegal purpose. This proposition of law has not been disputed before us by the learned counsel for the appellant. He has however contended that it will not be applicable to a case where the joint ancestral property has been sold in an execution of a mortgage decree against the father. I find myself unable to agree with this contention. In my opinion, the above rule also covers the case where in execution of a mortgage decree against the father the family property is sold. The sons can only avoid the sale if they are able to show that there was no debt due by their father or that the mortgage debt was incurred by the father for immoral or illegal purpose. The ground of their liability in both the cases is, as pointed out by Sir D. F. Mulla in his Hindu Law, p. 365, the same and it is that the sons must show some ground which would free them from liability as sons in a joint Hindu family to pay their father's debt, namely, the non-existence of the debt or its immoral character.

The question came up for consideration before this Court in 1925 All 180 (1). In that case the father of a joint Hindu family had executed a mortgage of some of the joint ancestral property, not to pay off any antecedent debt nor for the purpose of immorality. The mortgagee sued on his mortgage and obtained a decree and brought the mortgage property to sale. The sons were not parties to the suit. The property was sold at a Court sale. Thereafter the sons instituted a suit for a declaration that the mortgage and the sale were not binding upon them. A Bench of two learned Judges of this Court, of which one of us (my Lord the Chief Justice) was a party, held that in a suit by the sons for a declaration that the mortgage and the auction-sale were not binding upon them upon the ground that the mortgage was not executed for legal necessity, the plaintiffs could not succeed without showing that the debt of the father was tainted with immorality and that there was no distinction in such cases between a debt secured by a mortgage and an unsecured debt. The contention which has been raised before us was put forward in that case. In repelling it, Sulaiman, C. J., remarked:

"The learned vakil for the appellants however contends before us that the word debt' there [in R. 2 laid down by their Lordships of the Privy Council in 1924 P C 50 (8)] only means a simple money debt and not a mortgage debt, and relies on the wording of the proposition No. 5, where it is stated that there is no rule that the result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead. In our opinion this argument cannot be accepted. Their Lordships in proposition No. 5 were clearly referring to all the previous contingencies and had therefore to use both the expressions."

Mukerji, J., agreed with the view mentioned above and expressed the following opinion:

"It will follow from these two propositions, which are undoubtedly correct, that where a debt is incurred on the security of the family property, and to realize the debt the property is sold the result is the same as if the family property has been sold in execution of a simple money decree obtained against the father for a debt purely personal to himself. Such being the case, we can easily see why their Lordships of the Privy Council did not make any mention of a case where property is sold out of the family in execution of a mortgage decree obtained against the father alone. If they were of opinion that the word 'debt' in proposition No. 2 did not include both a simple and a secured debt, they would certainly have said something. . . ."

This case was decided in 1925. The next case in which this question was considered is 1928 All 86 (9). In this case Iqbal Ahmad, J., made certain observations which are in conflict with the view expressed in 1925 All 180 (1). At p. 557 (of 50 All), Iqbal Ahmad, J., observed:

"But in view of the observations of their Lordships in 1924 P C 50 (8), I have no hesitation in holding that their Lordships never intended to decide, or to lay down as a general proposition of universal application, that after the passing of a decree for sale the members of the joint family who were no parties to the suit for the sale of the family property cannot challenge that decree without proving that the debt secured by the mortgage was contracted for immoral purposes."

At the same page he also remarked:

"The second proposition of law laid down at p. 104 (of 50 All) appears to me to be restricted to the case of a simple money debt incurred by and a simple money decree obtained against the father and has no reference to a decree for sale, and that proposition is based upon the obligation of Hindu sons to pay debts due from their father."

It appears to me, if I may say so with great respect, that these observations were obiter dicta and were not necessary for the decision of the case in which they were made. In that case, a son after the mortgagee had obtained a decree, but before it had been executed, sued to have the decree set aside upon the ground that the property concerned was ancestral and that there was no legal necessity for incurring the debt to secure which the mortgage had been executed. He did not allege that the debt was tainted with immorality. On the other hand, 1925 All 180 (1), was a case, in which a sale had taken place in execution of a mortgage decree and the sons had sued to set aside that sale and it was held that the sale could not be set aside, after the property had passed out of the family, unless the sons could show that the debt in respect of which the mortgage decree was passed, was tainted with immorality. A perusal of the case reported as 1928 All 86 (9), would show that the proposition of law laid down in 1925 All 180 (1), was not disputed by the parties. At p. 547 (of 50 All) of 1928 All 86 (9), we find the following observations:

"It is admitted on the other hand that if a decree has been obtained upon a mortgage by the mortgagee, or upon a simple money debt by a creditor, and as the result of either of these decrees the ancestral property has by sale passed into the hands of a third party, the absent son, or a minor son, who was not represented, cannot recover the property in the hands of a third person without alleging that the debt for which it was incurred was tainted with immorality, or, in other words, without showing that the pious obligation of a Hindu son to discharge his father's debt does not apply to this transaction, because there is no pious obligation to pay debts tainted with immorality."

In view of this position which was accepted by the son in that case, there can be no doubt that the observations of Iqbal Ahmad, J., were mere obiter dicta. The next case in which the question was considered is 1928 All 596 (2), which is a Full Bench case in which dissenting views were expressed. Sulaiman, C. J., expressed the opinion that the word "debt" used in the proposition No. 2 in 1924 P C 50 (8), was comprehensive enough to include both a mortgage debt and a simple money debt. Mukerji and Boys, JJ., expressed a contrary view and held that R. 2 in 1924 P C 50 (8), was confined to cases of simple money debts only and did not include a secured debt.

In my opinion the view taken by a Bench of two learned Judges of this Court in 1925 All 280 (1), is still good law and must therefore prevail. It appears to me that the authority of that case has not been shaken by the observations made by Mukerji and Boys, JJ., in the Full Bench ruling reported as 1928 All 596 (2). The reason is that I consider that the opinions expressed by the learned Judges as to whether or no the case of a secured debt came within R. 2, in 1924 P C 50 (8), were also obiter dicta and are therefore not binding on us. The facts of the case reported as 1928 All 596 (2), were these: A father of a joint family had created a mortgage of ancestral property. The creditor sued the father alone and obtained a mortgage decree. Before the sale could take place, the sons instituted a suit for a declaration that the mortgage was not

9. Lal Singh v. Jagraj Singh, 1928 All 86=107 I C 693=50 All 506.

binding upon them. The only question for consideration was whether in that case the mortgagee decree-holder could proceed with the sale without establishing that the mortgage debt was contracted without family necessity. The point was decided against the mortgagee and it was held that before the sale takes place, the mortgagee must, in order to bind the sons who were not parties to the suit in which a decree had been obtained, prove that the debt was binding upon the sons. It was not necessary for the purpose of disposing of that case to go into the question as to whether or not a secured debt came within the purview of R. 2 in 1924 P C 50 (8). The reason why the learned Judges who decided the above-mentioned Full Bench case went into this question is that they were not in agreement with the view expressed in 1924 Oudh 394 (10), to the effect that after a mortgage decree had been obtained against a Hindu father, his sons could avoid the decree only by showing that the debt was not binding upon them. The view of this Court is that before a sale takes place in such a case, it is the mortgagee who has to show that the debt is binding on the sons. But once a sale has taken place, the rights of third parties come in and then different considerations prevail.

Speaking for myself, and with the utmost respect for the contrary view taken by some of the learned Judges, I can see no reason for holding that their Lordships of the Privy Council in 1924 P C 50 (8), intended to lay down that R. 2, was restricted to unsecured debts. It may be pointed out that in 5 Cal 148 (3), (see p. 170), their Lordships of the Privy Council affirmed the propositions that where the joint ancestral property has passed out of a joint family, under a sale in execution of a decree for the father's debt, sons cannot recover the property unless they show that the debts were contracted for immoral purposes.

It may be pointed out that the case of 5 Cal 148 (3), was one in which the property had passed out of the joint family in execution of a mortgage decree against the father. Had their Lordships intended that R. 2, in 1924 P C 50 (8), case was to be restricted to the case of an unsecured debt we would have expected them to make some observations about the view expressed by them in 5 Cal 148 (3). It appears on a perusal of the ruling in 1924 P C 50 (8), that their Lordships found the law on the subject of what binds the estate when the manager of the joint family is father and the reversioners are the sons, to be illogical. They further found that certain questions, rightly or wrongly, had been decided in a particular manner and they considered it undesirable to disturb the view which had prevailed for a long time. In this state of affairs, they laid down certain rules for the guidance of the Courts in India. The first rule lays down that a managing co-parcener of a joint undivided estate cannot alienate or burden the estate qua manager except for purpose of necessity. The second rule is that where the managing co-parcener is the father and the reversioners are sons he may, by incurring debt, so long as it is not for purposes immoral, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt.

The third rule is that if he purports to burden the estate by mortgage, then, unless the mortgage is to discharge antecedent debt, it would not bind the estate. The fourth rule is that antecedent means antecedent in fact as well as in time. The fifth rule is that there is no rule that this result is affected by the question whether the father, who contracted or burdens the estate is alive or dead. All these rules are independent of each other and were laid down with a view to set at rest conflicting decisions as regards those points. The first rule was made because their Lordships wanted to lay down that a managing co-parcener of an estate had no power to alienate or burden the estate qua manager except for necessity. The third rule was laid down because there was conflict as regards the question whether it was within the competence of a manager to mortgage the joint property to discharge antecedent debt. The fourth rule was laid down because there were conflicting decisions on the question as to what was the meaning of "antecedent debt." The fifth rule was made because there was conflict whether the pious obligation of a son to pay his father's debts existed during his lifetime or after his death. The second rule is one which was laid down to govern cases where the estate was liable to be taken in execution proceedings under a decree in payment of a debt incurred by a father for a purpose neither immoral nor illegal. It

10. Gouri Shankar v. Jang Bahadur Singh, 1924 Oudh 394=79 I C 1008=27 O C 124.

would, in my opinion, govern all the cases in which the family estate has been attached and sold in execution proceedings under a decree against the father whether the debt be secured or unsecured.

The case assumes a different aspect, after the family estate has been sold in execution of a decree against a father, whether it be a simple money decree or a mortgage decree, because the rights of third party intervene. Their Lordships of the Privy Council in 5 Cal 148 (3), quoted with approval the following view taken by them in 1 I A 321 (4):

"A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving decree, or having given it, in putting up the property for sale under execution upon it. It had already been shown that if a decree was a proper one, the interest of the sons as well as the interest of the father in the property, although it was ancestral, was liable for the payments of their father's debt. The purchaser under execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against the father that the property was property liable to satisfy the decree, if the decree had given properly against them; and he having enquired into that, and bona fide purchased the estate under the execution and bona fide paid a valuable consideration for it, the plaintiffs are not entitled to come in and to set aside all that has been done under the decree and execution and to recover back the estate from the defendant."

An auction-purchaser purchases property and pays full value for it. After the auction-sale the property passes out of the family and the auction purchaser becomes its owner. He has no interest at all in the question as to whether the sale was made in pursuance of a decree for payment of a secured or unsecured debt. He is entitled to keep the property which he has purchased and it is for the person who seeks to get it back from the purchaser to show that he has a right to get it back. The auction-purchaser in the first instance, it appears to me, is under no liability to show that the property of the judgment-debtor could be sold. If the sons of the judgment-debtor seek to deprive the auction-purchaser of the property which he has purchased and for which he has paid, then they must show that they have a right to get it back. This they can only do by showing that no debt was due from their father or that the debt in payment of which the property was sold was immoral and illegal and therefore the family estate could not be sold in execution of a decree against their father.

For the reasons given above I am of opinion that the appeal must be dismissed.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 254

RACHHPAL SINGH, J.

Waheed Hasan and *others*—Plaintiffs—Applicants.

v.

Abdul Rahman and *others*—Defendants—Opposite Parties.

Civil Revn. No. 94 of 1934, Decided on 4th December 1934, from order of 2nd Addl. Sub-Judge, Cawnpore, D/- 22nd September 1933.

Mussalman Wakf Act (1923), S. 10 — Application for taking action under S. 10—District Court has no power to go into question as to whether or no properties are wakf properties.

There is nothing in the Mussalman Wakf Act of 1923 to show that any power has been conferred on the District Court to go into the question as to whether or no the properties, about which applications are made, are wakf properties. The Act does not confer jurisdiction on the District Court to determine the question as to the existence of wakf or otherwise. The act is applicable only to those cases in which the existence of the wakf is not denied. As soon as a party denies the existence of wakf, the Court referred to in the Mussalman Wakf Act would have no jurisdiction to proceed with the case any further. The only order that can be passed is that the applicant should get the matter settled by instituting a regular suit : 1927 *Pat* 189, *Rel on*; 1930 *All* 81, *Dist.* [P 255 C 1, 2]

Mahmudullah—for Applicants.

Hyder Mehdi and *Srinarain Sahai*—for Opposite Parties.

Order. This is a revision application arising out of an application made by the applicants in the Court of the learned District Judge, asking that action under S. 10 of Act 42 of 1923, be taken against the defendants.

Waheed Hasan filed an application in the Court of the learned District Judge praying that action under S. 10, Musalman Wakf Act of 1923, be taken against the defendants. After filing the application, Waheed Hasan did not enter appearance and the other applicants got their names substituted in his place. The allegations were that the defendants were holding as mutawallis certain wakf properties and that they had not furnished accounts. The learned District Judge, in whose Court the application was made, sent it on for disposal to the learned Additional District Judge. When the case was taken up by him it was found that the

defendants denied that the properties in question were wakf properties. The learned Additional District Judge was of opinion that because the existence of the wakf had been denied he was precluded from proceeding with the matter any further. He was of opinion that he had under the Act no power to make an inquiry as to whether or not the properties in question were wakf properties. He therefore dismissed the application. Against that order the present revision application has been preferred.

After hearing the learned counsel appearing on both sides, I am of opinion that the order passed by the learned Judge of the Court below is correct and should be affirmed. There is nothing in the Musalman Wakf Act of 1923, to show that any power has been conferred on the District Court to go into the question as to whether or no the properties, about which applications are made, are wakf properties. This was the view taken by a learned Judge of the Patna High Court in a case 1927 Pat 189 (1), where it was held that there is no provision in the Act authorizing the Court as defined in that Act to determine as to whether any property which is denied to be a wakf property is wakf within the meaning of the Act. The learned counsel appearing for the applicants has relied on a Bench decision of this Court 1930 All 81 (2), and has contended that certain observations made in that ruling by the learned Judges who decided it support his contention. I find myself unable to agree with this contention. As pointed out by the learned counsel appearing for the respondents, in that case the defendant had actually filed accounts in the Court of the District Judge relating to the property in question in that case, thereby admitting that the property was wakf property and he was the mutawalli of the same. The facts of the case before me are altogether different, and so it cannot be said that the ruling 1930 All 81 (2), is applicable. Here the existence of the wakf is denied and, as I have already remarked, the Act does not confer jurisdiction on the District Court to determine the question as to the existence of wakf or otherwise. To me it appears that the Act is applicable only to those cases in which the existence of the wakf is not denied. As soon as a party denies the existence of wakf, the Court referred to in the Musalman Wakf Act would have no jurisdiction to proceed with the case any further. The only order that can be passed is that the applicants should get the matter settled by instituting a regular suit.

In these circumstances I am of opinion that the order passed by the learned District Judge was correct, and therefore dismiss the application with costs.

K.S. *Application dismissed.*

1. Ali Mohammad v. Collector of Bhagalpur, 1927 Pat 189=101 I C 207.
2. Nasrullah Khan v. Wajid Ali, 1930 All 81=118 I C 717=52 All 167.

A. I. R. 1935 Allahabad 255

GANGA NATH, J.

Sri Kuber Saheb—Plaintiff — Appellant.

v.

Phunnan Rai and *others*—Defendants —Respondents.

Second Appeal No. 727 of 1932, Decided on 29th November 1934, from decision of Sub-Judge, Azamgarh, D/- 10th December 1931.

Civil P. C. (1908), S. 11 — Suit by mahant challenging alienation by predecessor dismissed — Subsequent suit by succeeding mahant is barred in absence of proof of any collusion or fraud—Religious Endowment.

Where a suit by a mahant challenging an alienation of mutt property by his predecessor is dismissed, the decision is binding on the succeeding mahant and a suit by the latter is barred by S. 11 in the absence of proof of collusion or fraud: 2 *I A* 145, *Rel on.* [P 256 C 2]

Shambhu Prasad for *Shiva Prasad Sinha*—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendants for possession over the property described in the plaint and for mesne profits. The plaintiff brought the suit as a mahant and chela of Darshan Das. The plaintiff's allegation was that the property in dispute belonged to the math of which he was the mahant, that it had been unlawfully transferred by mahant Sheo Raj Das and that the transfer made to the defendants respondents were void and illegal. The plaintiff's predecessor Darshan Das brought a suit in respect of the same property against Bikramajit Rai and Gobind Rai, predecessors-in-title of the other defendants on the same allegations on which the appellant has brought this suit. This property along with the other property had been transferred by Sheo Raj Das mahant to Mt. Sobhagi by deeds dated 21st February 1911 and 10th March 1919, and a compromise

dated 28th October 1914. Mt. Sobhagi sold half of the property which is now in dispute to Bikramajit Rai and Gobind Rai since deceased and the other to two other persons. Darshan Das who was mahant and had succeeded to Sheorajdas brought a suit for possession over the whole of the property challenging the sale made by Mt. Sobhagi.

The learned Subordinate Judge in whose Court the suit was brought dismissed the suit finding that Darshan Das was not the chela of Sheo Raj Das and that the property in dispute was not endowed. An appeal was filed by Darshan Das. During the pendency of the appeal Gobind Rai had died. The learned District Judge decreed the appeal reversing the findings of the lower Court. Ultimately in the Letters Patent appeal this Court held that the appeal pending in the Court of the District Judge had abated in respect of half of the property which had been sold to Bikramajit Rai and Gobind Rai. The suit of Darshan Das was decreed in respect of the other half of the property. The result of the abatement of the appeal pending in the District Judge's Court was that Darshan Das' suit against half of the property which was sold to Bikramajit Rai and Gobind Rai and which is now in dispute remained dismissed. On the death of Darshan Das the present plaintiff brought this suit in respect of half of the property in respect of which the former suit of Darshan Das had been dismissed alleging that Darshan Das had colluded and fraudulently got the suit dismissed in respect of the property in dispute. The point of collusion and fraud was not pressed in the trial Court. On the other hand, it was conceded by the appellant that there was no fraud. The trial Court recorded a finding that there, no fraud was practised in the former suit and dismissed the suit holding that it was barred by S. 11, Civil P. C. The plaintiff filed an appeal and the learned Subordinate Judge upholding the decision of the trial Court dismissed the appeal. In this appeal the only question is whether the former decision bars the present suit under S. 11, Civil P. C.

As already stated the ground of fraud taken by the plaintiff in his plaint was dropped in the trial Court and the trial Court recorded a finding that no fraud had been practised. No ground of collusion or negligence was taken by the plaintiff in his grounds of appeal filed in the lower Court. The plea of collusion was also thus dropped by the plaintiff. Negligence was never pleaded by the plaintiff. In the absence of proof of any collusion or fraud the decision of the former suit will be binding on the present plaintiff. In 2 I A 145 (1), the respondents on 27th February 1852, and 25th July 1854, obtained two decrees against the sebait of an idol upon his bonds for the repayment of moneys alleged therein to have been borrowed for the service of the idol and the expenses of the temple. Both decrees directed that the debt should be paid by the sebait personally, or else realized from the profits of the debuttar lands. In a suit by the appellants as sebaits in succession to the judgment-debtor to set aside the said decrees, and to have the debuttar property released from attachment issued in execution thereof, it was held that the decrees, being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, are entitled to the force due to judgments of competent Courts, and are binding on the succeeding sebaits, who form a continuing representation of the idol's property. This case governs the present case on all fours. As already stated no collusion or fraud of the plaintiff in the former suit has been proved. Consequently the decision in the former suit bars the present suit under S. 11, Civil P. C., and is binding on the present plaintiff. There is no force in this appeal. It is therefore ordered that the appeal be dismissed with costs.

Permission for Letters Patent appeal is granted.

K S. *Appeal dismissed.*

1. Prosunno Kumari v. Golab Chand, (1875) 2 I A 145=23 W R 253=3 Sar 102 (P C).

A. I. R. 1935 Allahabad 256

BENNET, J.

Usman Khan—Plaintiff—Applicant.

v.

Sitarakhan — Defendant — Opposite Party.

Civil Revn. No. 239 of 1934, Decided on 28th November 1934, from order of Small Cause Court Judge, Ghazipur, D/- 29th January 1934.

Contract Act (1872), Ss. 23, 25 and 65—Mortgage of occupancy land forbidden by Tenancy Act—It cannot be enforced nor can plaintiff sue for promises of payment of principal and interest in it — But he can recover money advanced under S. 65.

Where the deeds are mortgages of occupancy land which is forbidden by the Tenancy Act

they come under S. 23 as agreements where the consideration or object was forbidden by law The deeds cannot be enforced in any manner, even as simple money bonds and therefore the plaintiff cannot sue for the promises of payment of principal and interest in the bond, nor can he rely on the covenant in the bonds that if possession is not given, then the plaintiff should receive back the money : 1922 *All* 134 and 116 *I C* 17, *Foll.* [P 257 C 1]

But the plaintiff has a right under S. 65 to the return of any money which he has been able to prove that he has advanced to the defendant under these void bonds : 1929 *All* 659, *Dist.* [P 257 C 2]

Jawahar Lal for *M. Walliullah*—for Applicant.

S. N. Verma—for Opposite Party.

Order.—This is an application in civil revision by a plaintiff whose suit has been dismissed by the Small Cause Court. The plaintiff sued for recovery of Rs. 250 principal and interest on the basis of two deeds dated 12th June 1932 for Rs. 100 each. Objection was taken that these deeds were mortgage-deeds of occupancy plots that no possession was delivered and that the mortgages were illegal. The plaintiff asked that the deeds might be treated as ordinary bonds and that a decree should be passed for the amount advanced. The Court held that as the mortgages were illegal, the documents could not be treated as simple bonds and the suit was dismissed. In revision it was asked that the decree should be set aside and the case remanded for disposal on the merits as the lower Court had taken an errroneous view of law. It appears to me that the deeds were mortgages of occupancy land which is forbidden by the Tenancy Act and therefore the deeds come under S. 23, Contract Act, an agreements where the consideration or object was forbidden by law. That section states: "Every agreement of which the object or consideration is unlawful is void." S. 24 states:

"If any part of a single consideration for one or more objects or any one or any part of any one or several considerations for a single object, is unlawful, the agreement is void."

Following the principle laid down in 1922 All 134 (1) and 116 I C 17 (2), I hold that the deeds cannot be enforced in any manner even as simple money bonds and therefore the plaintiff cannot sue for the promises of payment of principal and interest in the bond, nor can the plaintiff rely on the covenant in the bonds that if possession is not given, then the plaintiff should receive back the money received. But learned counsel for the plaintiff has relied on S. 65, Contract Act, which provides:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

He claims that as the bonds are bonds under S. 23 therefore the defendant whom he alleges to have received the two sums of Rs. 100 each under the bonds is bound to restore those amounts to the plaintiff. No reference has been made to S. 65, Contract Act, in either of the two rulings mentioned which deal with similar cases and apparently the plaintiffs in those cases did not rely on that section. Learned counsel for the respondent has not been able to show any reason why that section should not be applied. Accordingly I consider that the plaintiff has a right under S. 65 to the return of any money which he has been able to prove that he has advanced to the defendant under these void bonds. Reference was also made by learned counsel for respondent to 1929 All 659 (3), In that case there was a sale by some members of a joint Hindu family of property and it was held that the sale deed was invalid but the vendees obtained possession of the property from the usufructuary mortgagees. The Court referred to Ss. 65 and 70, Contract Act: "under which when an agreement is discovered to be void, any person who has received any advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he received it."

The Court also found:

"by merely paying off the creditors the defendants cannot claim to retain this property so long as their debts have not been satisfied."

The case was rather different from the present one because in the ruling the plaintiffs claimed that the sale deed was invalid and that they had a right to possession of the property which was in the possession of the defendants. The defendants claimed that they had a right to hold possession until the debts which he had discharged were paid off. In the present case the plaintiff claims that as the sale deed is invalid he should receive from the defendant the money which he paid the defendant by way of loan. The cases therefore are quite differ-

1. Har Prasad Tewari v. Sheo Govind, 1922 All 134=67 I C 793=44 All 486.
2. Sheo Narain v. Raj Kumar Rai, 116 I C 17.
3. Mukat Nath v. Shyam Sundar Lal, 1929 All 659=117 I C 341.

ent and the ruling is no authority for the present case.

Accordingly I allow this revision and set aside the decree of the lower Court and I remand the suit to the Small Cause Court for disposal on the remaining issues. The costs hitherto occurred will be costs on the suit. The plaintiff may recover the court-fee paid in this Court under the provisions of S. 13, Court-fees Act.

K.S. *Revision allowed.*

A.I.R 1935 Allahabad 258

KENDALL AND BAJPAI, JJ.

Gaekwar, Baroda State Railway Baroda—Defendant—Appellant.

v.

Mohammad Habibullah and *others*—Plaintiffs—Respondents.

Privy Council Appeal No. 10 of 1934. Decided on 3rd December 1934, for leave to appeal to His Majesty, in Privy Council, from decree, D/- 22nd December 1933.

Limitation Act (1908), S. 12 (2)—Application for leave to appeal—Application for copy of judgment and decree—Judgment supplied early—Whole time spent in obtaining copy of decree should be excluded.

Where before applying for leave to appeal to Privy Council, the applicant applied for copy of decree and judgment, the copy of the decree was supplied only subsequently, and even though the information required for the application was supplied by the judgment itself.

Held: that the applicant was entitled to exclude the whole of the time from the date when the application was made until the date when the copy of the decree was ready. [P 259 C 1]

P. L. Banerji and *K. D. Malaviya*—for Appellant.

M. L. Chaturvedi—for Respondents.

Kendall, J.—This is an application for leave to appeal to His Majesty in Council, which has been opposed on the ground that it is barred by limitation. The decree against which the appeal has been made was dated 22nd December 1933, and the present application is dated 6th April 1934. The report of the office on it is that it is fifteen days beyond time. Mr. P. L. Banerji, for the appellant, relies on the provisions of Sub-S. (2), S. 12, Limitation Act, and points to the fact that the period between 22nd January 1934, when he applied for a copy of the decree, until 20th April 1934 when the copy of the decree was ready would be excluded in computing the period of limitation. Under Sub-S. (2), S. 12, Limitation Act:

"in computing the period of limitation prescribed for an appeal for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded."

and their Lordships of the Privy Council in 1928 P C 103 (1) have remarked S. 12 makes no reference to the Code of Civil Procedure or to any other Act. It does not say why the time is to be excluded but simply enacts it as a positive direction.

The application is opposed on the ground that this period cannot be excluded because the time was not requisite for obtaining a copy of the decree. The reason given for this argument is that in this case a copy of the decree was not requisite, and that this is shown by the fact that the application for leave to appeal was filed on 6th April, whereas the copy of the decree was not obtained until 20th April. It is pointed out that in the Privy Council judgment to which we have referred their Lordships have remarked:

"If indeed it could be shown that in some particular class of cases there could be no object in obtaining the two documents, an argument might be offered that no time could be requisite for obtaining something not requisite."

As the dates given above show that the application for leave to appeal was filed before the copy was supplied it is argued that the copy of the decree was not requisite, and that the time cannot be excluded.

The paragraph in which the remarks relied on by the respondent occur sets forth an argument that might be used in a particular class of cases and their Lordships proceed to demolish it so far at any rate as the particular case before them is concerned. Mr. Chaturvedi, for the respondent however tried to show that the present case is one in which the circumstances are peculiar and that as a matter of fact the copy of the decree was not requisite. The circumstances, as we have been shown from the record, are that on 22nd January the appellant applied for a copy both of the decree and the judgment. The copy of the judgment was obtained on 10th March, and as it happened, that provided sufficient material for the completion of the application for leave to appeal. When the application for both copies was made however the appellant was actually in need of the information which had to be provided by either the copy of the decree or the copy of the judgment, and therefore

1. Jijibhoy N. Surety v. T. S. Chettyar, 1928 P C 103=109 I C 1=552 1 A 161=6 Rang 302 (PC).

it is impossible to say that on the date when the application for copies was made either of those copies was not requisite. It was only an accident, so to speak, that the necessary information was supplied by the copy of the judgment and not by the copy of the decree. It has been argued by Mr. Chaturvedi that as the information was actually supplied by the copy of the judgment, the copy of the decree cannot have been necessary. However true this may be of the period after 10th March when the copy of the judgment had been obtained, it has no application to the period from 22nd January to 10th March. Even if this lesser period were to be excluded, the application would be within time. We are however of opinion that the wording of Sub-Cl. (2), S. 12 is quite sufficient to enable the appellant to exclude the whole of the time from the date when the application was made until the date when the copy of the decree was ready.

As this point might be taken in appeal, we direct that copies of both the judgment and the decree be filed. For the reasons given above we hold that the application is within time. The valuation of the suit in the Court below being above Rs. 10,000 and the valuation of the proposed appeal to His Majesty in Council being also above Rs. 10,000 and the Courts in India having differed, the case satisfies the requirements of law under S. 110, Civil P. C., and we certify accordingly.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 259

BENNET, J.

Hari Ram—Judgment-debtor — Applicant.

v.

L. Himman Lal — Decree-holder — Opposite Party.

Execution Second Appeal No. 1129 of 1933, Decided on 30th October 1934, from decision of Sub-Judge, Muzaffarnagar, D/- 25th August 1933.

Limitation Act (1908), Art. 182 (7)—Compromise decree — Part of decree amount to be paid within certain time — Balance to be paid in several regular instalments — On failure to pay part of decree amount or two instalments, all money to be paid at once— Default in payment of part of decree amount —But decree-holder not exercising right to apply for whole amount— Subsequent default in two instalments — Application for whole amount but beyond three years from date of default to pay part of decree amount — Right to apply for whole of remaining amount held barred but that he could apply for instalments which have fallen due provided they were in time from date of application.

There was a compromise decree for instalments passed between the parties by which it was agreed that the total amount due was Rs. 1,100, that Rs. 300 would be paid within a month of the compromise decree and that the balance of Rs. 800 was to be paid by instalments of Rs. 25 on the 1st November and 1st May. the first instalment being payable on 1st November 1928. The compromise further provided that in case of failure to pay two instalments, all the money will be paid at once and in case the sum of Rs. 300 is not paid all the money will be paid at once with 1 per cent interest per mensem. There was default in the payment of Rs. 300; but the decree holder did not apply for execution of the whole decree. This amount of Rs. 300 was paid in some instalments and on default of two instalments, the decree-holder applied for execution of the whole of the balance remaining, but the application was filed more than three years from date of default to pay Rs. 300.

Held: that the right of the decree-holder to apply for execution of the decree for the whole of the remaining sum due to him was time-barred, but that of the decretal amount, he had a right to apply for execution of the instalments of Rs. 25 which have fallen due provided that the date of those instalments were within time from the date of the application:

Held further: that payments made out of Court did not operate as step in-aid of execution and would not extend limitation: 1923 *All* 49; 1931 *All* 534; *Rel. on.* and 11 *All* 482, *Dist.*

[P 261 C 1]

B. Mukerji—for Applicant.

Vishwa Mitra—for Opposite Party.

Judgment.—This is an execution second appeal by a judgment-debtor under the following circumstances:

There was a compromise decree for instalments passed on 11th May 1928, between the parties by which it was agreed that the total amount due was Rs. 1,100, that Rs. 300 would be paid within a month of the compromise decree and that the balance of Rs. 800 was to be paid by instalments of Rs. 25 on 1st November and 1st May, the first instalment being payable on 1st November 1928. The compromise further provided that in case of failure to pay two instalments, all the money will be paid at once and in case the Rs. 300 is not paid all the money will be paid at once with 1 per cent, interest per mensem. It will be noted that it was not provided that all the money is to be paid at once in case the Rs. 300 is not paid within a month; that is, the words "within a month" are not repeated but I interpret the decree to mean that the default would arise if the Rs. 300 were not paid in a month. The first matter which took

place in the execution Court was an application of 18th February 1932, by the decree-holder under O. 21, R. 2 certifying that he had received payment of the Rs. 300 in June 1928 and of Rs. 50 on 28th April 1929 in respect of the two instalments of November 1928 and May 1929, and that he had received Rs. 50 on 29th April 1930, in respect of the two instalments of November 1929 and May 1930. The Court of first instance took evidence on the point and it has been held by the Court below that the account books of the decree-holder's munim proved that the Rs. 300 was paid in four items from 25th May, to 12th July 1928. Accordingly the decree-holder was inaccurate in stating in his certificate that the Rs. 300 were paid in June 1928. That sum should have been paid by the 11th June 1928. The finding of fact is that it was not so paid but only part had been paid by that date. There was therefore a default in the payment of the Rs. 300, the default arising on 11th June 1928. The decree-holder therefore had a right on that date to apply for execution of the whole decree for Rupees 800 plus the balance of the Rs. 300 not paid. It was not until 5th September 1932, that the decree-holder made the present application for execution of the whole decree on account of the default in payment of the two later instalments, i. e., the instalment of 1st November 1928, and 1st November 1929. The question arises whether the present application is time-barred wholly or in part. The Courts below have held that S. 20, Limitation Act, will not apply, and the Court of first instance states that the requirements of that section have not been complied with. The Court did not correctly state the requirements as it said the section required that the payments should appear in the hand-writing of the judgment-debtor and be signed by him. The word used in the Act is "or" and not "and." The payments were in the books of the decree-holder written by his munim and the certified copies produced in Court do not show any signature of the judgment-debtor. It was not contended for the decree-holder that the requirements of S. 20 were satisfied. Learned counsel for the decree-holder relied on a ruling in 11 All 482 (1), which he claimed established the right of the decree-holder to waive payment which was made after a certain time. That ruling does not deal with limitation. It dealt with a decree which provided for instalments and stated that in case of default the decree-holder might execute the decree for the whole of the balance due. The language used in the present decree is different as it does not give an option to the decree-holder but states that in case of default the balance due will be paid. This language is imperative and renders the balance to be due for payment under the decree in case of default. In any case in the ruling in question a Bench of this Court held that the decree-holder should not be allowed to execute the entire decree for the default to pay an instalment because it held that he had waived his right. If that ruling were to be applied to the present case, I would have to hold that the decree-holder had also waived his right by not applying within limitation to execute his decree for the default. The lower Court has held that under Art. 181, Limitation Act, the right to execute the decree accrued to the decree-holder when the next two instalments up to 1st November 1930, were unpaid, and that the execution application was filed within three years of that date and was therefore in time. I am not able to follow the reasoning of the lower Court. The lower Court arrives at a conclusion by omitting to notice the default which occurred on 11th June 1928, which was more than three years before the application for execution of 5th September 1932. Learned counsel also desired to refer to rulings in regard to waiver of the Bombay and Calcutta High Courts. It may be that under those rulings some right arising from the doctrine of waiver would accrue to save limitation, but learned counsel failed to show that any such doctrine had been adopted in regard to limitation by this Court, and I prefer to follow the rulings of this Court. Learned counsel for the appellant referred to two rulings. One of these is reported in 1933 All 49 (2) in which the learned Chief Justice of this Court held that a certificate of payment out of Court would not extend limitation as it was not a step in aid of execution within the meaning of Art. 182, Limitation Act, and further that a payment by a judgment-debtor out of Court was not a step in aid of execution and would not extend limitation. The two payments there-

1. Buddhu Lal v. Rekkhab Das, (1889) 11 All 482=1889 A W N 186.

2. Jaikaran v. Panchaiti Akhara, 1933 All 49=143 I C 324.

fore of 29th April 1930 and 28th April 1929, which have been proved to have been made out of Court will not serve as steps in aid of execution to extend limitation. Learned counsel further referred to 1934 All 534 (3) where there was a case somewhat similar to the present before a Bench of this Court. That was a compromise decree for instalments with a clause that the decree-holder would be entitled to realise the total amount in case of default. It was held that the decree-holder had two distinct rights under this decree: (1) to receive instalments as and when they fell due, and (2) to enforce the payment of all the instalments that might remain unpaid in the event of two successive instalments remaining unpaid. That this right had become time-barred as the application to execute that right had first accrued beyond the period of three years from the date of the application, but that the bar of the second right did not necessarily bar the first right and that the decree-holder could recover such instalments as had fallen due by the date of the application for execution under Art. 182 (7), Limitation Act. I consider that I should follow this ruling in the present case and accordingly I allow the second appeal to this extent that I hold that the right of the decree-holder to apply for execution of the decree for the whole of the remaining sum due to him is time-barred. I hold however that of the decretal amount, he has a right to apply for execution of the instalments of Rs. 25 each, due on the 1st day of November 1930, May 1931, November 1931, and May 1932, that is, a total of Rs. 100 with the appropriate interest on the different instalments. It is open to the decree-holder to apply for execution in regard to the instalments which have fallen due since the date of this application, i. e., of 1st November 1932, and subsequent dates upto whatever time he makes his application provided the dates of those instalments are within time from the date of the new application. Proportionate costs are allowed in this Court and in the Courts below.

No ground has been shown for a Letters Patent appeal, so permission is refused.

K.S. *Order accordingly.*

3. Ram Prasad Ram v. Jadunandan Upadhia, 1934 All 534=149 I C 598.

A. I. R. 1935 Allahabad 261

NIAMATULLAH AND ALLSOP, JJ.

Mt. Phool Kunwar—Judgment-debtor—Applicant.

v.

Rikhi Ram—Decree-holder—Opposite Party.

Execution First Appeal No. 216 of 1933, Decided on 16th November 1934, from decision of Sub-Judge, Agra, D/- 21st April 1933.

(a) Hindu Law—Widow—Widow in possession of husband's property—Rent payable to widow in respect of property is part of husband's estate.

Where the widows are in possession of the property bolonging to their late husband, the fact that they have widow's estate under the Hindu law does not make them any the less legal representatives of their husband. It may be that in the eye of Hindu law their position as representatives of the estate of their deceased husband is peculiar, but it cannot be gainsaid that so long as they are alive, they alone represent the estate of their deceased husband. Hence the income accruing from the property in their possession as legal representatives of their deceased husband is income accruing from his estate and therefore an integral part thereof. Any rents which have accrued due and are payable to the widows must be considered to be part of his estate, and therefore liable to pay his debts. [P 262 C 1]

(b) Hindu Law—Widow in possession of husband's property—Nature of widow's estate is material only in question between widow and reversioners but not in question of involving husband's estate.

The existence of the widow's estate cannot be recognized as against the estate of her husband. The nature and extent of a widow's estate may be material where the question arises between her and the reversioner, but there can be no widow's estate where the question is whether the property once belonging to her husband is part of his estate or is part of the widow's estate which itself implies an estate carved out of the husband's estate. It continues to be husband's estate while it is in the possssion of the widow who represents it: 19 *All* 235, *Diss. from.* [P 262 C 2]

N. P. Asthana and *B. N. Sahai*—for Applicant.

S. K. Dar and *Din Dayal*—for Opposite Party.

Judgment.—This appeal arises from an application for execution made by the respondent Pandit Rikhi Ram who obtained a simple money decree against Shah Jwala Prasad since deceased. The decree-holder applied for execution of his decree by attachment of rents due from the tenants holding land left by the judgment-debtor. The latter's widows Mt. Phool Kunwar and Mt. Khem Kunwar objected to the attachment of the rents, inter alia, on the ground that they accrued after the

death of Shah Jwala Prasad and were therefore their personal property and not part of the assets left by the deceased. Their objection was dismissed by the lower Court. They have come up in appeal to this Court.

It is clear that the decree against the deceased judgment-debtor can be executed against the assets left by him. The question is whether the rents accruing due since his death and payable by the tenants holding immovable property once belonging to him can be considered to be part of his estate. The widows are in possession of the property belonging to their late husband as his legal representatives. The fact that they have widows' estate under the Hindu law does not make them any the less legal representatives of their husband. It may be that in the eye of Hindu law their position as representatives of the estate of their deceased husband is peculiar, but it cannot be gainsaid that so long as they are alive, they alone represent the estate of their deceased husband. It is equally undeniable that the income accruing from the property in their possession as legal representatives of their deceased husband is income accruing from his estate and therefore an integral part thereof. They do not claim his property adversely to him or his estate, but as representing it. Anything received by them should be deemed to have been received by his estate. This being so, any rents which have accrued due and are payable to the widows must be considered to be part of his estate and therefore liable to pay his debts.

The learned advocate for the appellants has strongly relied on 19 All 235 (1). The facts of that case are quite different from those of the case before us. The judgment-creditor in that case had applied for attachment of rents due in respect of the property of the deceased judgment-debtor in possession of his widow. The learned Judges composing the Division Bench which decided the case held that the attachment could not be sustained in view of a compromise which the parties had entered into previously. The effect of that compromise was that the decree-holder was not entitled to take out execution against movable property of the widow and was to obtain satisfaction of the decree by proceeding against his immovable property. The view there taken was that having regard to the terms of the compromise it was not open to the decree-holder to proceed against the rents receivable by the widow which in the circumstances of that case were considered to be the property of the widow and that the only manner in which the decree-holder could obtain satisfaction was by attachment of the immovable property. So far the decision does not involve any proposition of law which can be questioned. The learned Judges however proceeded to observe as follows:

> "There can be no doubt as we conceive the law to be in this country, that this lady, as the widow of a separated and sonless Hindu, became in virtue of her widow's estate, entitled upon the death of her husband to the rents which might accrue from the immovable property. Those rents if already received by her and put into her pocket, could not be treated in law as assets of her husband. They were her assets in virtue of her widow's estate. *It can make no difference if the rents which accrued due after her husband's death had not been actually put into her pocket. She was entitled to them, not as representative of her late husband, but in right of her widow's estate.*"

The italics are ours. With great respect, we are unable to accept the view that the rents and profits receivable by her constituted property in her own right and are part of her personal estate. She was entitled to the possession of her husband's estate only because she happened to be his legal representative. But for that circumstance she had no right either to the estate left by her husband or its income. The fallacy of the argument underlying the observations quoted above is that the existence of a widow's estate is recognized as against the estate of her husband. The nature and extent of a widow's estate may be material where the question arises between her and the reversioners, but there can be no widow's estate where the question is whether the property once belonging to her husband is part of his estate or is part of the widow's estate, which itself implies an estate carved out of the husband's estate. It continues to be the husband's estate while it is in the possession of the widow who represents it. If the observation quoted above had embodied the decision of their Lordships for the purposes of that case, we would have referred the question to a larger Bench. As in our opinion it is clearly an obiter dictum which was not part of the actual decision of the case, we feel, with all respect, that we are at liberty to differ from it.

1. Rani Kanno Dai v. B. J. Lacy, (1897) 19 All 235=1897 A W N 38.

In the case before us, it is not disputed that the appellants are in possession of the property of which the rents are in question, as the heirs and legal representatives of their deceased husband against whom the decree sought to be executed had been passed. This being so, the rents, attached at the instance of the decree-holder are, in our opinion, part of the estate of the deceased. The objection of the appellant was rightly overruled by the lower Court. This appeal is also dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 263

SULAIMAN, C. J. AND GANGA NATH, J.

Lal Ram Sarup — Plaintiff — Appellant.

v.

Kunji Lal and *others*.— Defendants— Respondents.

Second Appeal No. 848 of 1933, Decided on 1st November 1934, from decision of Sess. and Sub-Judge, Agra, D/- 22nd March 1933.

Mortgage — Mortgage in favour of several persons—One of them alone cannot sue for decree for his share of mortgage debt.

Where a mortgage is executed in favour of several persons, one of them alone cannot sue for a decree for his share of the mortgage debt : *Case law reviewed.* [P 263 C 2]

G. Agarwala and *K. N. Agarwala*—for Appellant.

N. P. Asthana and *B. N. Sahai* — for Respondents.

Sulaiman, C. J.—This is a plaintiff's appeal arising out of a suit for recovery of money on a hypothecation bond dated 15th August 1927. The bond was a mortgage-deed in favour of no less than six mortgagees. The plaintiff who is one of the mortgagees brought a suit and originally did not even implead his co-mortgagees, abandoned his security and wanted to obtain a decree for what he considered to be his share of the mortgage debt. On some objection being taken as to the indivisibility of the mortgage transaction, he impleaded the other mortgagees without in any way amending his relief. The suit was brought within six years of the registered document, but that period is now well over. Both the Courts below have dismissed the claim, holding that the plaintiff is not entitled to split up the single mortgage trasaction.

In appeal it is argued before us that it is open to the plaintiff to recover his share of the debt particularly when the other co-mortgagees did not come forward to oppose his claim. It seems to us that the case has to be looked at, not only from the point of view of the plaintiff-appellants, but also from the standpoint of the defendant mortgagors. They entered into one single transaction with a group of people to whom monies were due previously and with whom they contracted that the amount would be payable in one lump sum to them jointly and they jointly would have the right to recover the amount and would get the mortgaged property sold. If each one of them be allowed to bring a suit separately for his share of the mortgage debt the result would be that the mortgagor would be compelled to resist six separate suits and would be put to considerable inconvenience and harassment and such a view would encourage multiplicity of suits involving waste of time of the Courts as well.

As regards a suit brought by one of several mortgagees to recover his share of the mortgage debt, the point is well settled in view of the pronouncement of their Lordships of the Privy Council in 1919 P C 24 (1). The only proper course is for the co-mortgagee to implead the other mortgagees as defendants and sue for a decree for the entire amount or the sale of the entire mortgaged property. He cannot get a decree for his share of the mortgage debt or a sale of a part of the mortgaged property. It seems to us that the same principle applies even where one of the mortgagees chooses to abandon the security. His abandonment would not bind the other co-mortgagees who are jointly interested in the whole amount, nor does it seem fair that one mortgagee should steal a march over the other co-mortgagees to recover his share of the mortgage debt, either by attaching the mortgaged property later on or by attaching other property of the mortgagor and leave his co-mortgagees in the lurch. S. 45, Contract Act, clearly lays down that when a person has made a promise to two or more persons jointly then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives.

It was laid down by a Full Bench of this Court in 7 All 313 (2), that

1. Sunitabala Debi v. Dhara Sundari Debi, 1919 P C 24=53 I C 131=46 I A 272=47 Cal 175 (PC).
2. Kandhiya Lal v. Chandar, (1885) 7 All 313= 1885 A W N 34 (FB).

when upon the death of the obligee of a money bond, the right to realise the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond. It was held that the Court should permit an action to be brought by the heirs when the party or parties suing are in a position to sue for the whole debt, otherwise to permit one heir to realize his share would be to alter the nature of the contract and to subject the debtor to inconveniences and hardships. It was pointed out by another learned Judge in that case that Courts are bound to see that the debtors are not unduly harassed by representatives of a deceased creditor. In 33 All 327 (3), another Full Bench case of this Court, it was held that one debt creates one single and indivisible liability which gives rise to one single cause of action and that one of the heirs of the obligee of a money bond cannot sue for his share in the money due under the bond.

The learned advocate for the appellant relies on a single Judge decision of the Calcutta High Court in 1931 Cal 806 (4). But in that case the other co-mortgagees who had been impleaded as co-defendants had not put forward apparently any claim within the period of 12 years and the suit brought by one mortgagee was with reference to the whole of the mortgaged property. The learned Judge therefore pointed out that there was no question of the splitting up of the security in that case. The decision proceeded on the assumption that it was clear from the conduct of the co-mortgagees that they had no intention of claiming their share of the mortgage money. Those consideration do not apply to this case. We are accordingly of the opinion that the views taken by the Courts below that the suit is defective and cannot be entertained are perfectly correct. The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

3. Ghafur Khan v. Kalandari Begam, (1911) 33 All 327=9 I C 127.
4. Radha Nath v. Nagendra Nath, 1931 Cal 806=134 I C 767.

A. I. R. 1935 Allahabad 264

BENNET, J.

Narain Das and *another*—Plaintiffs—Applicants.

v.

Kashi Prasad—Defendant—Opposite Party.

Civil Revn. Nc. 151 of 1934, Decided on 31st October 1934, against decree of Small Cause Court Judge, Jhansi, D/- 27th November 1933.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 35 (ii) — Allegation that defendant reaped crops belonging to plaintiff by deceit amounts to offence of theft and suit is not cognizable by Small Cause Court.

Where the allegation of the plaint is that the crop belonged to the plaintiff and that the defendant by deceit reaped it, those allegations involve that the defendant intended to gain unlawfully by taking possession of the crop and to cause loss unlawfully to the plaintiff by doing so. Therefore in accordance with the definitions in Ss. 23 and 24, Penal Code, the defendant intended to act dishonestly and the facts alleged amount to an offence defined by S. 378, I. P. C. i. e. theft, an offence which comes under Ch. 17. The Small Cause Court therefore has no jurisdiction to try this suit. [P 265 C 1]

K. N. Laghate—for Applicants.

P. M. L. Verma—for Opposite Party.

Order.—This is an application in Civil Revision against an order of a Small Cause Court returning a plaint to the plaintiff for presentation to the proper Court. The lower Court held that the plaint should be heard on the regular side. The plaint set out that the defendant "without right and without consent by deceit unlawfully reaped the crop" of the plaintiff. The lower Court is not correct in saying that the word "forcibly" was used, but that does not appear to affect the matter. The lower Court held that these allegations would constitute an offence under Chap. 17, Penal Code, and therefore the suit was excluded from Small Cause Court jurisdiction by Art. 35 (2), Small Cause Courts Act. Learned Counsel argued on the strength of two rulings: 130 I C 481 (1) and 1932 All 472 (2), that the words in the plaint would not constitute an offence under Chap. 17, Penal Code, and that the Small Cause Court had jurisdiction. The first of those cases, decided by a Bench of which I was a member, related to taking the fruit of dak trees. These trees are jungle trees and a person taking the fruit from these trees would not

1. Bandhu Pandey v. Gauri Datt Pandey, (1930) 130 I C 481.
2. Bhan Dutt v. Moti Lal, 1932 All 472=140 I C 506.

necessarily know that the trees belonged to some one. The second ruling relates to the cutting of a nim tree. Again we have a tree which is self-sown.

In the present case the allegation is in regard to crops. Now, crops are not naturally sown and any one seeing the crop must be well aware that some human being must have cultivated that crop. The allegation therefore that a crop was taken without any right by deceit implies that the person taking the crop knew that the crop belonged to someone else. Learned counsel argued that in the definition of "theft" in S. 378, Penal Code, the word "dishonestly" is used and he argues that his client had not used the word "dishonestly" in the plaint. "Dishonestly" is defined in S. 24, Penal Code, as doing anything with the intention of causing wrongful gain to one person or wrongful loss to another, and in S. 23 "wrongful" gain is defined as gain by unlawful means of property to which the person gaining is not legally entitled, and "wrongful loss" is similarly defined. The allegation of the plaint is that the crop belonged to the plaintiff and that the defendant by deceit reaped it. Those allegations involve that the defendant intended to gain unlawfully by taking possession of the crop and to cause loss unlawfully to the plaintiff by doing so. Therefore in accordance with the definitions in Ss. 23 and 24, Penal Code, the defendant intended to act dishonestly. It appears to me therefore that the decision of the lower Court was correct and that the facts alleged did amount to an offence defined by S. 378, Penal Code, i. e., theft, an offence which comes under Chap. 17. The Small Cause Court therefore did not have jurisdiction to try this suit. Learned counsel also objected to the order of the lower Court that the costs hitherto incurred by the defendant should be paid by the plaintiff. He argued that the entire amount of the pleader's fee should not appear in the decree. The fee amounted to Rs. 20-12-0. I do not think this amount was excessive.

The application in revision is therefore dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 265

BENNET, J.

Chanar Singh Jai Ram—Defendant—Appellant.

v.

Chanar Singh Jeet Singh—Plaintiff—Respondent.

Second Appeal No. 1349 of 1930, Decided on 22nd October 1934, from decision of Dist. Judge, Khulna, D/- 31st July 1930.

(a) Custom (U. P.)—Cosharer in possession of plot as his khudkasht has right to mortgage it—Onus of proving different rule is on party alleging it—Cosharer.

The general rule of law in the United Provinces is that a co-sharer in possession of a particular plot as his khudkasht or as his sir has a right to mortgage the plot. It is therefore for the party who alleges to show that a different rule prevails in Kumaun. [P 266 C 1, 2]

(b) Partition—Person allowed certain plot is bound by transaction of predecessor-in-interest.

A person who has been allotted the plots on partition is bound by the transactions of his predecessors-in-interest. [P 266 C 2]

(c) Adverse Possession — It need not be brought to knowledge of owner—Possession must be overt and without any attempt at concealment.

While possession to be adverse must be adequate in continuity, in publicity and in extent, it is not necessary that it should be shown to have been brought to the knowledge of the owner. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought if he exercises due vigilance, to be aware of what is happening: 1934 *P C* 23, *Foll.* [P 267 C 1]

R. C. Ghatak—for Appellant.

Banke Behari—for Respondent.

Judgment.—This is a second appeal by the defendant, Chanar Singh, son of Jai Ram. The respondent plaintiff is also Chanar Singh, son of Jit Singh. The second appeal is against the decision of the District Judge in appeal in favour of the plaintiff who had failed in the Court of first instance. The suit was for possession. On the first hearing I remanded an issue as follows:

"Has the defendant Chanar Singh acquired the title of a mortgagee by adverse possession for over 12 years of the land in suit as a mortgagee?"

Further evidence was admitted and the lower appellate Court has come to a further finding which is to the effect that the defendant has not acquired the title of a mortgagee by adverse possession. The case has now been reargued as to whether this finding is correct in point of law on the facts found by the learned District Judge. These facts are as follows:

"In 1871 there was litigation between one Jai Ram father of Chanar Singh, the defendant in this case (now deceased) and two men named Khim Singh and Keshar Singh. This litigation was settled by the execution of sulehnama or deed of compromise. On 9th October 1871, Jai Ram had sued these two men and the sulehnama shows that they admitted that they owed him Rs. 24 in addition to Rs. 42 due on a mortgage. They agreed that Jai Ram should remain in possession of the land mortgaged until they paid off this debt It is not stated in the sulehnama when this mortgage was executed (and no mortgage deed is forthcoming). The sulehnama did not show definitely what land was mortgaged; no specific plots are referred to; it merely showed that Jai Ram was in possession as a mortgagee of eight plots belonging to Khim Singh and Keshar Singh.

"Khim Singh and Keshar Singh are said to have sold their rights in this land (as well as in other land) to one Lalmani, father of Amarnath. There is no evidence as to the date of sale. Neither Lalmani nor his father Amarnath ever obtained possession and in 1927, they sold this land with other land to Chanar Singh, the plaintiff in the case.

"Chanar Singh instituted partition proceedings and the land in suit was allotted to him in these proceedings in 1928. Jai Ram's son Chanar Singh, was in possession of the land and refused to vacate it and the other Chanar (son of Jit Singh) accordingly sued for possession."

And also:

"There appears to be no doubt that the appellant's family has been in possession since 1871 on the basis of the sulehnama referred to. No mortgage deed is forthcoming and it cannot therefore be said whether specific plots were mortgaged; all that can be said is that Khim Singh and Keshar Singh were not entitled to mortgage specific plots."

It is to be noted that the learned District Judge finds that the mortgage-deed was not produced and the sulehnama did not specifically show that the eight plots in question were mortgaged. He however finds that the sulehnama did show that Jai Ram was in possession as a mortgagee of eight plots belonging to Khin Singh and Keshar Singh. It appears to me that the finding of fact is sufficient to show that the mortgage was of the eight plots and the further question as to whether the mortgage-deed did or did not mention these specific numbers is not important. A point which appears to have influenced the District Judge is that the mortgage would be invalid. I asked learned counsel for the plaintiff to show any provision of law which may make the mortgage invalid and he did not refer to any provision of law. The general rule of law in the province is that a co-sharer in possession of a particular plot as his khudkasht or as his sir has a right to mortgage the plot. It is therefore for the plaintiff-respondent to show that a different rule prevails in Kumaun. All that the District Judge has referred to is a statement by Mr. Stowell in his Manual of Land Tenures of the Kumaun Division that the possession of specific plots by a co-sharer would not entitle the co-sharer to remain in possession of those plots after partition. Mr. Stowell does not apparently refer to the case where a co-sharer has made a mortgage of a specific plot.

In any case I do not consider that in the present case the partition affects the case because the plaintiff who has been allotted the plots on partition is in my opinion bound by the transactions of his predecessors-in-interest. If in the partition the plots in question had been allotted to a different co-sharer it is conceivable that different rights might arise although that has not been shown to me. Learned counsel for the respondent argued that in some way the rights of other co-sharers would be concerned with the question of the acquisition of mortgagee rights by adverse possession. I do not consider that this is the case. The co-sharers in possession of the plots in 1871, Khem Singh and Keshar Singh, chose to transfer a portion of the right to possession which they had in those plots for a limited time by a mortgage and a sulehnama. They and they alone were concerned with this question whether adverse possession established the rights of a mortgagee against them in Jai Ram. The learned District Judge has also referred to the fact that it has not been shown by evidence that attempts were made by Lalmani and Amarnath to obtain possession of the land. Lalmani and his son Amarnath were successors of Khem Singh and Keshar Singh, but it is not shown at what time Khim Singh and Keshar Singh sold their rights in the land to Amarnath. The learned District Judge finds that the defendant family has been in possession since 1871 on the basis of the sulehnama referred to. I understand that the District Judge means that they were in possession of the land in suit. I do not consider that it is necessary that any further evidence should be produced in order to establish the rights of the mortgagee by adverse possession in favour of the defendant's family. I would refer to the ruling of their Lordships of the Privy Council reported in 1934 P C 23 (1), where it is laid down:

1. Secy. of State v. Debendra Lal Khan, 1934 P C 23=147 I C 545=61 I A 78=61 Cal 262 (PC).

"While possession to be adverse must be adequate in continuity, in publicity and in extent it is not necessary that it should be shown to have been brought to the knowledge of the owner. It is sufficient that the possession was overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance, to be aware of what is happening."

Now, if we assume in favour of the plaintiff that Lalmani obtained the sale-deed from Khim Singh and Keshar Singh within the period of 12 years it is clear that Lalmani must have been well aware of the possession of Jai Ram. I consider that on the facts found by the learned District Judge, the conclusion is that the defendant has acquired the title of a mortgagee by adverse possession for over 12 years as mortgagee. Accordingly I allow this appeal and I restore the judgment of the Court of first instance dismissing the suit of the plaintiff with costs throughout. Permission is granted for a Letters Patent appeal.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 267

BENNET, J.

Motilal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 845 of 1934, Decided on 26th November 1934, from order of Sess. Judge, Gorakhpur, D/-30th April 1934.

Penal Code (1860), S. 179 — Magistrate requiring complainant as witness under S. 219, Criminal P. C.—Refusal to give evidence—He is guilty of offence under S. 179—Criminal P. C. (1898), S. 219.

Where the Court desires to examine the complainant as a witness for the prosecution of persons who have already been committed to Sessions on his own complaint, such an examination is relevant and the Magistrate has a discretion to require the complainant as a witness under S. 219, Criminal P C. If the witness refuses to answer questions and the Magistrate takes action under S. 480 and finds that he is guilty under S. 179, I. P. C., and convicts him, the conviction is correct: 13 *Bom* 600, *Expl.* and *Dist.* [P 268 C 1]

Madan Mohan Lal—for Applicant.

Asst. Govt. Advocate—for the Crown.

Order.—This is an application in revision by one Moti Lal who has been fined Rs. 50 under S. 179, Penal Code. The sole ground in revision taken is that no offence under that section was committed. The order of the Magistrate shows that Moti Lal accused was produced as a witness in a criminal case, King-Emperor v. Usman, etc. That case had been committed to the Court of Session by another Magistrate in December 1933. Moti Lal was complainant in that case. But on 17 hearings between 21st September, and 6th December 1933, he refused to answer questions as a witness because he alleged he was suffering from pain in his stomach. On two dates he was examined by a doctor who found that he was all right. The case therefore was committed to Sessions without the statement of Moti Lal the complainant, being recorded. On 26th February 1934, the Magistrate sent for Moti Lal who was produced before him and he desired to take the statement of Moti Lal under S. 219, Criminal P. C. That section empowers a Magistrate if he thinks fit to summon and examine supplementary witnesses after the commitment and before the commencement of the trial. An oath was administered to Moti Lal and he refused to answer questions put to him on the ground that he had pain in his stomach. The Magistrate saw Moti Lal smiling when he said this and Moti Lal remained in Court for 1½ hours and talked freely about other things. On this evidence the Magistrate took proceedings against Moti Lal under S. 480, Criminal P. C., and came to the conclusion that he was guilty of refusing to answer questions touching a subject on which he was bound to state the truth and therefore the Magistrate convicted him under S. 179, Penal Code, and fined him Rs. 50.

Learned counsel relies on an old ruling of a Bench of the Bombay High Court of the year 1889 reported in 13 Bom 600 (1). In that case one Ganesh Narain had made a complaint charging certain persons with purchasing judicial offices. The case was remanded for inquiry under S. 202, Criminal P. C. The complainant asked permission to withdraw from the prosecution alleging that he had no personal knowledge of the facts stated in his complaint. The Magistrate examined the complainant at great length as to the motives which had induced him to file the complaint and as to the names of the persons, at whose instigation he was acting. The complainant refused to answer those questions. The Magistrate ordered him to be imprisoned for seven days and dismissed the complaint. The Bombay High Court which had already ordered further inquiry in the case then sent for the record apparently with a view

1. In re Ganesh Narayan Sathe, (1889) 13 Bom 600.

to seeing what further proceedings should be taken in the case, and they decided that further action was not necessary, on p. 628. On pp. 603 and 604, it is stated:

"In order to ascertain who were the real complainants, the Magistrate interrogated the complainant, and, on his refusing to answer, he directed his imprisonment. Such questions however were irrelevant to the real issue—whether there was a prima facie case made out of an offence. Even assuming that the Magistrate thought the questions relevant, it is very doubtful whether he could force a complainant, voluntarily preferring a complaint to answer. A complainant can hardly be held a witness punishable for refusal to answer under either S. 485 or S. 179, Penal Code, or the Criminal P. C., respectively. I find no case which includes a complainant in those penal proceedings."

This is the statement of one learned Judge. The other learned Judge took a different view and on p. 625 he stated:

"The complainant would be bound when examined as a witness to answer all relevant questions."

It is to be noted that the first learned Judge on p. 604, did not definitely say that the complainant would not be bound to answer relevant questions merely because he was a complainant and not a witness. The proposition which learned counsel desires to draw from this ruling that in no case will a complainant be punishable under section 179, Penal Code, is clearly not supported by the ruling. All that the ruling lays down is in the opinion of of one learned Judge that where irrelevant questions were asked he should not have been punished under S. 179, Penal Code. In the present case the Court desired to examine the complainant as a witness for the prosecution of persons who had already been committed to Sessions on his own complaint. Such an examination would have been relevant and the Magistrate had a discretion to require the complainant as a witness under S. 219, Criminal P. C. I consider therefore that the conviction under S. 179, Penal Code, was correct. The revision is therefore dismissed.

K.S. *Revision dismissed.*

A. I. R. 1935 Allahabad 268

BENNET, J.

Sukhdeo Behari Lal— Surety-objector Applicant.

v.

(*Firm*) *Rama Nand Dwarka Das*—Decree-holder—Opposite Party.

Ex. Second Appeal No. 1195 of 1933, Decided on 25th October 1934,

(a) Practice—Pleadings — Pleadings must be in writing.

The Civil Procedure Code requires that the pleadings of the parties either in the original or in an appellate Court must be in writing. It does not contemplate that there should be oral pleadings. [P 269 C 1]

(b) Civil P. C. (1908), S. 11 — Decision on issue not arising on pleadings is not res judicata.

A decision on issues which do not arise on the pleadings does not operate as res judicata. [P 269 C 1]

M. A. Aziz—for Appellant.

N. P. Asthana and *Jwala Prasad Bhargava*—for Respondent.

Judgment.—This is an execution second appeal by a surety against whom the two lower Courts have given concurring decisions. The facts are that there was a decree obtained in suit No. 679 of 1928 by a certain firm against the Pioneer Mills, Bombay. There was an application for restoration and the Court required that sufficient security should be given by defendant for restoration of the suit. The appellant was counsel for the defendant and he gave a surety bond to the extent of Rs. 999-8-0. This bond very clearly states that he stood surety to the extent of Rs. 999-8-0. Learned counsel for the respondent desires to interpret that bond to mean that although the sum is mentioned, the surety undertook liability to the whole extent of the decree. I do not consider that the bond can be interpreted in that sense and to interpret it in that sense would in my opinion make it contradictory in its terms. The matter proceeded further and on a certain date the surety applied to the Court for permission to deposit Rs. 1,000. The decree-holder objected that this amount was insufficient. The Munsif before whom these proceedings took place held that the question of whether the surety was liable for a larger amount than Rs. 999-8-0 or not should be determined at a later stage. The surety took an appeal against this decision objecting to the decree being executed against him on the ground that the decree-holder has taken no steps to execute the decree against the original debtor. That was the only matter brought before the appellate Court by the grounds of appeal. The decree-holder did not file any cross-objection and there is nothing on the record to show that any person brought the matter of the extent of the liability of the surety before the appellate Court. In my opinion the appellate Court had no jurisdiction to decide

that issue unless the issue was raised before it. The issue might have been raised before it in the grounds of appeal, but it was not, or it might have been raised by an application in writing made to the Court by one of the parties, but it was not. Learned counsel for the decree-holder argues that the issue could have been properly brought before the appellate Court by oral argument of counsel on behalf of the parties. I do not consider that that is a procedure contemplated by the Civil Procedure Code. In my opinion the Code requires that the pleadings of the parties either in an original or in an appellate Court must be in writing. It does not contemplate that there should be oral pleadings. Learned counsel has referred to O. 41, R. 2, which states that the appellant shall not except by leave of the Court urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, and he suggests that leave was given. If such leave was given then there should have been a record on the order sheet or otherwise by the appellate Court, but there is no such record. All that we have before us is the judgment of the appellate Court. This judgment sets out that:

"the plaintiff sought to recover all the decree money from the surety appellant and the surety appellant opposes the plaintiff saying that he was liable to pay Rs. 999-8-0 and no more. The learned Munsif dismissed the objection. Hence this appeal."

The appellate Court failed to notice the grounds of appeal and was apparently under the impression that all the matters before the lower Court were again in issue in appeal. There lay the error of the appellate Court as this was not so. The appellate Court framed two issues, the first of which was, is the appellant liable to pay Rs. 999-8-0 only or all the decree money it is grown to by this time? That is an issue which did not arise before the appellate Court as there is no pleading of this nature in the grounds of appeal or otherwise before that Court. I consider therefore that the judgment of the appellate Court holding that the surety was liable to pay the whole of the decretal amount is a judgment which cannot operate as res judicata because the issue was not before that Court. Under S. 11 no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The matter was not in issue between the parties in that appeal and therefore in my opinion the decision of the appellate Court cannot operate as res judicata. This is the only ground on which the lower Court has proceeded. The lower appellate Court in fact remarks:

"Having regard to the terms of the bond this decision appears to be incorrect."

I consider also that this decision is incorrect that the terms of the bond imposed a liability on the surety to pay Rs. 999-8-0 only and no more. Learned counsel for the decree-holder argues that the Court would not have accepted a surety for a less than the total amount, which was Rs. 1,239. A Court is not bound to require security for the whole amount. For these reasons I allow this appeal with costs throughout and I dismiss the present application for execution against the surety with costs. I do not think that any case has been made out for a Letters Patent appeal, so permission is refused.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 269

HARRIS AND RACHHPAL SINGH, JJ.

Abdul Ahad—Objector—Applicant.

v.

Brij Narain Rai—Opposite Party.

Ex. First Appeal No. 25 of 1933, Decided on 5th November 1934, from decision of Sub-Judge, Ballia, D/- 20th August 1932.

(a) Transfer of Property Act (1882), S. 43 — Mortgagor is estopped from pleading that he is not entitled to mortgage property and also from defeating mortgagee's claim in respect of mortgaged property but subsequently acquired by mortgagor.

The mortgagor is estopped from pleading that he was not entitled to mortgage the property which he mortgaged. He is also estopped from defeating the claim of the mortgagee in any property which he had mortgaged and which he did not actually own at the time of the mortgage but has subsequently come into his possession.

[P 270 C 2]

(b) Execution—Decree binding— Mortgage decree — Execution Court cannot enter into question of mortgagor's title—Mortgage.

A Court executing a decree will not in the execution department enter into the complicated question as regards the nature of the title of the mortgagor. It is not entitled to decide whether the property which the mortgagor got after the execution of the mortgage-deeds can be sold in execution of a mortgage decree. It will look into the mortgage decree, and if it finds that the property sought to be sold is specified therein, then its plain duty will be to execute the decree leaving the parties to have their rights determined separately by institution of a separate suit.

[P 271 C 2]

Ambika Prasad—for Appellant.

M. L. Agarwala—for Respondent.

Judgment.—This is a judgment-debtor's appeal in an execution case. In order to understand the case it is necessary to keep in mind the following facts: Karam Ata and Abdul Samad were brothers. Abdul Ahad, the mortgagor, is the son of Abdul Samad. Absanullah and Mt. Razia Bibi are the two children of Karam Ata. Sheikh Abdul Ahad executed three mortgage-deeds in favour of the respondents. They were executed in 1906, 1914 and 1922, respectively. On foot of these three mortgage deeds, three separate suits were instituted and mortgage decrees were obtained by the respondents against Abdul Ahad. Those decrees have been made final. The respondents decree-holders have applied for execution of their decrees against the appellant. The objection taken by the appellant in the Court of the learned Subordinate Judge was that the decree-holders were not entitled to proceed against the entire shares mentioned in the application for execution, but only against portions thereof. In order to understand this plea it will be necessary to relate some other facts which are as follows:

On 27th April 1927, Mt. Razia Bibi and her daughter instituted a suit against Sheikh Abdul Ahad claiming a 5 annas 4 pies share in the estate which was at one time owned by Karam Ata and his brother Abdul Samad. It was alleged on behalf of Sheikh Abdul Ahad in that case that in 1886 there was a compromise under which he became the owner of the entire 16 anna share. On the other hand the two ladies who sued him contended that Abdul Samad and after him Abdul Ahad were trustees in respect of the 5 anna 4 pies share which they claimed in the estate. In that suit the mortgagee was also made a party. The learned Subordinate Judge, who decided the case, decreed the claim of the two ladies. Against that decree there was an appeal to the High Court. This Court discharged the decree of the learned Subordinate Judge and in lieu thereof passed a decree under which it was ordered that the ladies named above would get possession over 5 anna 4 pie share if they paid into Court a sum of Rs. 56,000 within a period of six months from the date of the decree of this Court. It appears however that the two ladies were unable to pay this amount. After that Sheikh Abdul Ahad and the two ladies entered into a compromise under which instead of 5 anna 4 pie share the two ladies got much less. The result was that the judgment-debtors got more than 10 anna 8 pie share.

When the respondents-mortgagees applied for the execution of their decrees, the plea taken by the mortgagor-appellant was that the mortgagees could proceed only against that share which, according to the finding of the Subordinate Judge in the suit referred to above, was owned by him. His plea was that the additional share which he possessed had become his in pursuance of the agreement which he had arrived at with the above-mentioned two ladies after the decree of the High Court and therefore the mortgagee could not proceed against that share. The learned Subordinate Judge in whose Court the application for execution was made repelled the contention and held that the mortgagor was estopped from taking any such plea and that the property which he had mortgaged was liable to be sold whether it was owned by the mortgagor at the time when he created the mortgage or whether it came to his possession subsequently. Against that decree the present appeal has been preferred.

The only question for our consideration is whether the decision of the learned Subordinate Judge on the point mentioned above is correct. We have heard the learned counsel appearing for the appellant and after hearing him we are satisfied that there are no grounds for disturbing the order passed by the learned Subordinate Judge.

It is a well-known proposition of law that the mortgagor is estopped from pleading that he was not entitled to mortgage the property which he mortgaged. He is also estopped from defeating the claim of the mortgagee in any property which he had mortgaged and which he did not actually own at the time of the mortgage had subsequently come into his possession. This is the principle which is enacted by S. 43, T. P. Act. The question has been discussed in Wiltsie on Mortgage Foreclosure, Edn. 3, pp. 637, 691 and 692 and the whole case-law on the subject (English and American) has been discussed at length. It is stated at p. 637 as follows:

"A party who mortgages his property with covenants of title is estopped from pleading in defence to a foreclosure, that at the time of the execution of the mortgage he had no title to, nor interest in the mortgaged premises, or any part thereof; neither can he set up as a defence a defect in his title"

At p. 692 we find the following observations which are based of the cases cited therein:

"Thus where a mortgagor in his mortgage warrants the title to lands which he really does not possess, and subsequently acquires title thereto, the title subsequently acquired will inure to the benefit of the mortgagee, the same as if the entire title had been originally possessed by the mortgagor, and will estop such mortgagor, and all persons claiming under him, from subsequently asserting any title against the mortgagee and those claiming under him. The reason for this seems to be that the mortgagor will not be permitted to attack a title, the validity of which he has covenanted to maintain."

We might be permitted to make one more quotation from this book which is to be found on p. 693 and which is as follows:

"The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase. And hence, the mortgagor and those in privity with him, in good faith and fair dealing should be for ever thereafter precluded from gainsaying it."

We are in agreement with the view expressed above. The mortgagor when he executed the three mortgage deeds believed that he was fully competent to execute them. Years after a claim was brought for a part of the estate. If the decree of the High Court had set aside the decrees which the mortgagee had obtained against the mortgagor, then the position would have been different, but the High Court never set aside the decrees which the mortgagee had obtained against the mortgagor. The litigation as regards a share in the entire 16 annas was between the mortgagor and his relations. The mortgagees certainly were also parties to the suit and if any decree had been made against them they would have been bound by it. For instance if 16 anna share had been mortgaged to them and under that decree of the High Court it had been decided that the mortgagor was the owner of only a 10 anna share, then certainly the mortgagees would have lost their 6 annas which had been mortgaged to them. The result of the High Court decree in the case before us in no way affected the three mortgages set up by the mortgagees. The two ladies were unable to pay the amount which they had been directed to pay under the decree of the High Court and any agreement which the mortgagor may have made with them would not in the least affect the rights of the mortgagees who were not parties to it.

In the case before us there is another point which is against the judgment-debtor. It is this: The mortgagees have obtained decrees on foot of the three mortgages against the mortgagor. The mortgagor in the three suits instituted against him never took the plea that he was not entitled to mortgage the entire property which he had mortgaged. Those decrees were made final. The Court executing the decree cannot go behind them. All that it has to see that the property against which the mortgagee decree-holder desires to proceed is in possession of the mortgagor or his representatives. If that be so, then the mortgagee is entitled to proceed against that property and a Court executing a decree will not in execution department enter into the complicated question as regards the nature of the title of the mortgagor. For instance, a Court executing a mortgage decree is not entitled to decide whether the property which the mortgagor got after the execution of the mortgage deeds can be sold in execution of a mortgage decree. It will look into the mortgage decree and if it finds that the property sought to be sold is specified therein, then its plain duty will be to execute the decree leaving the parties to have their rights determined separately by institution of a separate suit. In these circumstances we are of opinion that the decision of the Court below is correct and we accordingly dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 271

NIAMATULLAH AND ALLSOP, JJ.

Jumma Das and *another*—Plaintiffs.

v.

Misri Lal and *others*—Defendants.

Misc. Case No. 349 of 1934, Decided on 1st October 1934, from order of Collector, Agra, D/- 3rd July 1934.

Civil P. C. (1908), S. 9—Claim for profits by one cosharer of occupancy holding against another is of civil nature—Agra Tenancy Act (1926), S. 238.

Where one of several cosharers in an occupancy holding or other tenure is solely in possession, he cannot be considered to be in wrongful possession; nor can the cosharers suing for profits be said to have been wrongfully dispossessed from the holding of tenure. Possession of one cosharer is possession of all who should be deemed to be in constructive possession through the cosharer who is in actual possession by cultivating the land or by receipt of rents from subtenants. Hence a claim for profits by one cosharer of an occupancy holding against another

is a suit of a civil nature and is not one within the jurisdiction of the revenue Court.

[P 272 C 1, 2]

N. P. Asthana—for Applicants.

Niamatullah, J.—This is a reference under S. 267, Agra Tenancy Act, by the Collector of Agra. It appears that a suit was instituted by one of several co-sharers of certain occupancy holdings for profits in the Court of the Munsif, Agra, who returned the plaint for presentation to the Revenue Court on the ground that the suit is one which is within the exclusive jurisdiction of the Revenue Court. The learned Munsif made a reference to S. 99, Agra Tenancy Act, (3 of 1926), besides S. 230 of the same Act. The defendant is not represented in this Court and it is not clear whether it was on his objection that the learned Munsif returned the plaint for presentation to the proper Court. We do not find anything in S. 99 which may be applicable to the circumstances of this case. Perhaps the learned Munsif thought that the suit was one by a co-sharer in an occupancy holding for compensation for wrongful dispossession by another co-sharer who is holding under the same landlord as the plaintiff. If the learned Munsif was influenced by this consideration, we think that he proceeded on a far-fetched ground. Where one of several co-sharers in an occupancy holding or other tenure is solely in possession he cannot be considered to be in wrongful possession; nor can the co-sharers suing for profits be said to have been wrongfully dispossessed from the holding or tenure. Possession of one co-sharer is possession of all who should be deemed to be in constructive possession through the co-sharer who is in actual possession by cultivating the land or by receipt of rents from sub-tenants.

In our opinion, S. 230, Agra Tenancy Act, (3 of 1926), is decisive on the point. That section declares that suits and application of the nature specified in the fourth schedule shall be heard and determined by the Revenue Courts, and no Courts other than a Revenue Court shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application, or of any suit or application based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application. We are thus thrown back on Sch. 4, which does not make any mention of a suit by a co-sharer of an occupancy holding against another co-sharer for profits as one which the jurisdiction of the Revenue Court. It follows that the jurisdiction is not ousted by anything in S. 230, or Sch. 4, Tenancy Act. As to whether the civil Court has jurisdiction there can be no doubt that under S. 9, Civil P. C., it has jurisdiction to try all suits of a civil nature. It cannot be denied that a claim for profits by one co-sharer of an occupancy holding against another is a suit of a civil nature. This being so, the suit was in our opinion rightly instituted in the Court of the Munsif.

It appears that the plaint was subsequently filed in a Revenue Court which expressed the opinion that the suit was not cognizable by it. Accordingly the Collector made the present reference under S. 267. We take it that the plaint is still in the Revenue Court which shall return it to the plaintiff for presentation to the civil Court competent to try it. The reference is accordingly answered as above.

K.S. *Reference answered.*

A. I. R. 1935 Allahabad 272

BENNET, J.

Mool Chand—Creditor—Applicant.

v.

Dip Chand — Insolvent — Opposite Party.

First Appeal No. 145 of 1933, Decided on 16th November 1934, from order of Dist. Judge, Jhansi, D/- 23rd February 1933.

Provincial Insolvency Act (1920), S. 41 — Order of absolute discharge suspended till sale of property—On sale, order that sale has been held and proceeds should be distributed —Proceedings terminate.

In an insolvency proceeding an order was passed: "It is useless to carry on this insolvency longer and it does not appear that insolvent is to blame. His offer to pay in instalments has been refused by the chief creditor and so a composition is not possible. The property mentioned by insolvent will be sold and after the proceeds have been distributed the order of unconditional discharge will be written. If insolvent can arrange to sell this property in co-operation with the creditors it will be so much the better." The property was sold and an order was passed stating that the property has been sold and the proceeds should be distributed at once:

Held: that the first order was an order of absolute discharge which was suspended for a specific time, that is until the property has been sold and that the insolvency proceedings terminated with the second order with an unconditional discharge.

[P 273 C 2]

N. C. Vaish—for Applicant.

A. Sanyal—for Opposite Party.

Judgment. — This is a first appeal from an order brought by a creditor against an order of the learned District Judge of Jhansi under the following circumstances: The opposite party Dip Chand was adjudged an insolvent on 14th July 1915, under Act 3 of 1907. He made an application for discharge in 1922 and notice was issued to the creditors who were represented and the Court held a proceeding for discharge. The provisions in regard to discharge in S. 44 of Act 3 of 1907 are identical with the present provisions in Ss. 41 and 42 of Act 5 of 1920, with the exception that under the present Act a period is specified during which the application should be made. That question does not arise. The insolvent gave evidence that Rs. 150 had been paid by the sale of his house and that the debts were the debts of his father and that he also owned a ruined site of a house to the extent of a two annas share worth some Rs. 50 or Rs. 60 which he placed at the disposal of the creditors. The Court then passed an order on 6th October 1922, to the following effect:

"It is useless to carry on this insolvency longer and it does not appear that insolvent is to blame. His offer to pay in instalments has been refused by the chief creditor and so a composition is not possible. The property mentioned by insolvent will be sold and after the proceeds have been distributed the order of unconditional discharge will be written. If insolvent can arrange to sell this property in co-operation with the creditors it will be so much the better."

The question is what construction is to be placed on this order. Under section 44 of the former Act and S. 41 of the present Act the Court could pass an order on the application either granting or refusing an absolute order of discharge or passing an order or suspending its operation for a certain time or passing a conditional order of discharge. The intention clearly was to pass an unconditional order of discharge. Learned counsel argues that although that was the intention the actual order should have been passed as the Judge stated at some later date. I consider that the order of 6th October 1922, is an order of absolute discharge which is suspended for a specific time, that is until the property has been sold. The property was actually sold by the Court Amin in 1924 and there is an order of 6th February 1924, stating:

"The property has been sold. Let proceeds be distributed at once."

In my opinion there was a clerical error of the office in not drawing up a formal order of discharge on or after 6th February 1924, but I consider that the Judge by his order of 6th October 1922, had passed the order of absolute discharge suspended for a certain period. His object in suspending the order clearly was to retain jurisdiction to deal with the insolvency case until the remaining property had been sold and the proceeds had been distributed. Under these circumstances it is clear that the Court below was correct in refusing to appoint a receiver or allow attachment of property now at a date nine years after the final discharge. The present application sets out that the insolvent has subsequently acquired one-fourth share in a ruined house and some share, one-fourth or one-half in another house and yard and that the insolvent is a partner in a shop of Dukhi Ram-Lal Gopal. The creditor now desires attachment and sale of these assets. I consider that the insolvency proceeding terminated in 1924 with an unconditional discharge and therefore the insolvency proceeding cannot now be revived. The first appeal from order is therefore dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 273

BENNET AND BAJPAI, JJ.

Shera Khan—Applicant.

v.

Bhure Shah—Opposite Party.

Civil Revn. No. 455 of 1933, Decided on 5th November 1934, against decision of Dist. Judge, Meerut, D/- 26th May 1933.

(a) Civil P. C. (1908), S. 92—Scheme originally drawn up in proceeding under S. 92 — Application for removal of trustee and appointment of another to District Judge—District Judge has no jurisdiction in the matter — Proper procedure is by way of suit after obtaining sanction under S. 92.

A suit for the removal of a trustee and appointment of another can be made only with the sanction of the legal remembrancer for that purpose. And although the scheme is originally drawn up in a proper proceeding under S. 92 that fact does not remove the necessity imposed by the section for the obtaining of sanction before the Court can act under the section and remove a trustee or appoint another trustee. Hence a District Judge has no jurisdiction, where such an application is filed before him in the matter ; and the proper procedure is to get necessary sanction under S. 92 and proceed by way of suit : *Case law referred.* [P 275 C1, 2]

(b) Religious Endowments Act (1863), S. 5 — S. 5 applies only when vacancy exists at time of application and only in cases where there are trustees, managers or superinten-

dents under control of Government—It does not apply for removal of trustee and appointment of another.

Section 5 only applies where there is vacancy existing at the time the application is made and only in cases where there were trustees, managers or superintendents under the control of Government at the time of passing of the Act ; it does not apply in applications for removal of trustee and appointment of another. [P 276 C 1]

(c) Religious Endowments Act (1863), S. 14 — Words "appointed under Act" apply not only to members of committee but also to trustee, manager or superintendent.

The words "appointed under this Act" in S. 14 apply not only to "the members of the committee" but also the words "trustee, manager or superintendent." Hence an application for removal of a trustee and appointment of another is not governed by this section in absence of members of committee as parties. [P 276 C 2]

K. C. Mital—for Applicant.

K. Masud Hasan—for Opposite Party,

Bennet, J.—This is an application in civil revision brought by one Shera Shah against an order of the learned District Judge of Meerut, dated 26th May 1933. Shera Shah made an application on 19th March 1931 to the District Judge setting out that there was a shrine or dargah of Mastan Shah in Muzaffarnagar District and that this shrine was endowed and in 1906 a case No. 1 of 1906. Abdulla Shah and others v. Bunda Shah, was decided in the District Court for the removal of Bunda Shah and for framing a scheme for the management of the shrine. Learned counsel admits that this application was under S. 92, Civil P. C. The application proceeded that it was decided that Bunda Shah should remain as mutwalli and that the scheme of management should remain as was arranged in 1900, and that there should be a committee of three visitors, the Collector, the Tahsildar and a respectable person of the locality, to manage the shrine. Later the applicant, Shera Shah became the mutwalli. By an order of 3rd February 1931, without the information of the applicant, the committee dismissed the applicant from the post of mutwalli and appointed the opposite party Bhura Shah as mutwalli. The application asked that the proceedings of the committee should be set aside and that the applicant should be re-instated as mutwalli and Bhura Shah should be dismissed from the office of mutwalli. The application was directed only against Bhura Shah. The learned Additional District Judge issued notice to Bhura Shah who filed a reply. On 18th July 1931, the Additional District Judge passed an order stating that the committee of visitors had the power of removing the mutwalli for sufficient reasons to be recorded in a formal proceeding and the power of appointing a new mutwalli. He stated that the record did not show what charges were actually brought against Shera Shah and if he was given any opportunity to meet those charges. He proceeded to state:

"I will ask the committee to frame those charges, to give him an opportunity (to meet the charges) and then to reconsider their order of removal, and if after doing this they come to the same conclusion, then it will be for me to see whether the removal of the applicant is justified or not."

"Let a copy of this be sent to the Board of visistors through the Collector of Muzaffarnagar."

In compliance with this order the committee reconsidered the matter and confirmed their previous order. The matter was again before the learned District Judge and in the order under revision of 26th May 1933, the learned District Judge set out that he can find no provision under which he can interfere with the decision of the committee, that the learned pleader for the applicant only referred to Act 11 of 1920, and he could find nothing in that Act to justify interference. The application for removal of Bhura Shah and re-appointment of Shera Shah was therefore rejected. In revision it is contended by learned counsel for applicant that the District Judge failed to exercise jurisdiction vested in him by law and that as the learned Additional District Judge had already exercised jurisdiction in the matter it was no longer open to the District Court to consider the question of jurisdiction. On the question of res judicata learned counsel referred to two rulings: 6 All 269 (1) and 1921 P C 11 (2). In these rulings no question similar to the present question arises where a Court purports to exercise jurisdiction and later decides that it has not got jurisdiction. There was no issue before the Additional District Judge as to whether he had jurisdiction or not. In any case we consider that under S. 115, Civil P. C., it is for the applicant to satisfy us that the District Judge had a jurisdiction which he did not exercise and that no question of res judicata arises in this case.

Learned counsel relied firstly on section 92, Civil P. C., and secondly on the Religious Endowments Act, 20 of

1. Ram Kirpal v. Rup Kuari, (1884) 6 All 269=11 I A 37 (PC)
2. G. H. Hook v. The Administrator-General of Bengal, 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (PC).

1863. In regard to S. 92, Civil P. C., the argument of learned counsel was that as the claim had been settled in 1906, under that section in a proper proceeding in which the applicant at the time Abdulla and others had obtained the sanction required by S. 92, Civil P. C., no further sanction under that section was necessary, because the present application is in regard to a scheme which was settled under that section. Learned counsel referred to various rulings on this point. In 1921 Bom 297 (3), there was a second appeal from an appellate decree of the District Court upholding a decree of the Subordinate Judge to the effect that he had no jurisdiction to entertain a certain suit. The suit was brought by a hereditary pujari of a temple to establish his right to a certain share in the offering made to the deity which were being appropriated by the Guravas. We do not consider that the judgment is in favour of the applicant. All that can be quoted in his favour is a passage on p. 928, column 1, which states:

"It has been accepted before us at the Bar that it is open to anyone interested in this fund to apply to the District Court, which framed the scheme, to supplement or modify the same. It is not suggested that a separate suit under S 92 is necessary. Though no liberty to apply is reserved under the scheme, such a reservation can be afterwards implied. An application to the District Court seems to be the obvious and, as I hold, the only remedy open to the parties under the circumstances, to have a direction from that Court as to the offerings laid before the deity."

We understand from this passage that the Court considered that an application in regard to the carrying out of the scheme could be made to the District Judge and that a suit was not necessary for such a purpose. Be that as it may the present application is not one of that nature because the application asks for the removal of a trustee and the appointment of another trustee. Those matters form the subject of two of the reliefs: (a) and (b) under sub-S. (1), S. 92 and it is laid down that a suit is necessary with the sanction of the Legal Remembrancer for that purpose. Refererence was next made to 30 Mad 138 (4). In that case their Lordships of the Privy Council approved of a scheme for the administration of a certain trust of a religious nature. Learned counsel relies on paragraphs 10 and 11 of the scheme on p. 142. In para. 10 it is provided that any person interested may apply to the District Court with reference to the carrying out of the directions of the scheme. That will not, in our opinion, cover an application for the removal of a trustee and the appointment of another trustee. Para. 11 lays down that any person interested from time to time may apply to the High Court for any modification of the scheme. That is, any application for alteration of the scheme could not be made to the District Court, but must be made to the High Court. The present application to the District Court could not sustain any authority from that provision. Similarly in 17 I C 969 (5), it was held that when a scheme had been framed by the District Court under S. 539 Civil P. C., and confirmed by the High Court any application for modification of that scheme must be made to the High Court, but the District Court may give instructions for carrying out the modified scheme. In 1918 All 218 (6), it was held that an order of removal of a mahant by a District Judge can only be made when there is a suit before him under S. 92, Civil P. C., brought with the sanction of the Legal Remembrancer.

On the opposite side reference is made to 1926 Mad 559 (7). This ruling is quoted to meet an argument of learned counsel for the applicant which was to the effect that the scheme as drawn up in 1906 although it did not specifically reserve a power to the District Judge to revise the decision of the committee as regards the removal of a mutwalli, impliedly reserved such a power. On p. 584 it was held in the Madras ruling:

"When S. 92, Civil P. C., directs that for the settlement of a scheme and for other reliefs the sanction of the Advocate-General should be obtained, it would be ultra vires of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme."

We consider therefore that although the scheme was originally drawn up in a proper proceeding under S. 92, Civil P. C., that fact does not remove the necessity imposed by the section for the obtaining of sanction before the Court can act under the section and remove a trustee or appoint another

3. Sakharam Daji v. Ganu Raghu, 1921 Bom 297 =60 I C 924=45 Bom 683.
4. Prayag Doss Ji Varu v. Tirumala Sri Ganga Charla Varu, (1907) 30 Mad 138=17 M L J 236.
5. Umeshanandan Dut Jha v. Sir Ravaneswar Prosad Singh, (1912) 17 I C 969.
6. Mohan Dashan Das v. The Collector of Meerut, 1918 All 218=47 I C 850.
7. Abdul Hakim Baig v. Mohmed Burramiddin, 1926 Mad 559=95 I C 720=49 Mad 580.

trustee. We may note that the sanction in the suit No. 1 of 1906, was granted to certain persons Abdulla Shah and others and not to the applicant Shera Shah. The next point which was argued was in regard to Act 20 of 1863, the Religious Endowments Act. Under sub-S. 2, S. 92, Civil P. C., there is an exemption of the provisions of the Religious Endowments Act of 1863 and a suit brought under that Act does not require the sanction imposed by S. 92 (1). Learned counsel claimed that his application would come under S. 5 of Act 20 of 1863. That section begins:

"Whenever from any cause a vacancy shall occur in the office of any trustee, manager or superintendent to whom any property shall have been transferred under the last preceding section"

the Civil Court shall have power to appoint a manager, etc. Now, there are two objections to the application of this section in the present case. In the first place the application was made on 19th March 1931, and there was no vacancy at that time existing in the office of mutwalli which had been filled by the order of the committee of 3rd February 1931. The section only applies in our opinion where there is a vacancy existing at the time the application is made, and that is not the case in the application made before us. The second objection to the application of S. 5 is the words "to whom any property shall have been transferred under the last preceding section." That is a reference to S. 4 which provides for cases where there were trustees, managers or superintendents under the control of Government at the time of passing of the Act.

It is not shown that the endowment, in question came under that description or that it was in existence in 1863 or was under the control of Government. We consider therefore that S. 5, Religious Endowments Act, of 1863, will not apply. We have further considered the question as to whether S. 14 would apply. That section states that any person or persons interested in any mosque, etc., may sue before the Civil Court the trustee, manager or superintendent of such mosque, temple or religious establishment or the member of any committee appointed under this Act, for any misfeasance, breach of trust, neglect of duty, committed by such trustee, etc. The question is whether under this section the present application would lie against the trustees, etc., for misfeasance in dismissing the application without sufficient reason. We are of opinion that the words "appointed under this Act" apply not only to "the members of the committee", but also to the words "trustee, manager or superintendent" and that the section is to be read in the same manner as S. 5 in which a similar qualification is attached to the words "trustee, manager, or superintendent." Learned counsel argued that the words "appointed under the Act" only referred to the words "member of any committee." Even if we accepted this argument, which we do not, learned counsel is in the difficulty that for the present application we are of opinion that the members of the committee are necessary parties as the applicant alleges that the members of the committee were guilty of a misfeasance in passing the order of dismissal without due cause. As they are necessary parties and as learned counsel admits that the words "members of any committee" are qualified by the words "appointed under this Act" it is therefore clear that the present application could not lie even on his own admission under S. 14 of Act 20 of 1863.

For these reasons we are of opinion that the present application cannot lie under that Act. The position therefore is that in our opinion learned counsel has failed to show that the District Judge under the circumstances of this case had any jurisdiction in the matter. The proper course for the application to have adopted would have been in our opinion to obtain the necessary sanction under S. 92, Civil P. C., and to proceed in the Court of the District Judge by way of a suit under that section. He has not adopted that course and the District Judge has not got jurisdiction to deal with this application. Under these circumstances we cannot hold that the District Judge failed to exercise a jurisdiction which he had.

We therefore dismiss this application in revision with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 276

BENNET, J.

Rup Singh Nayal—Applicant.

v.

Mrs. Arjun Sen—Opposite Party.

Civil Revn. No. 171 of 1934, Decided on 1st November 1934, against order of Dist. Judge, Kumaun, D/- 12th December 1931.

Oath—Agreement to refer to oath — Party can resile from it even without satisfactory reason—Such resiling terminates agreement.

No conditions are attached to the desire to resile from an agreement to refer to oath and it is not necessary that the Court should be satisfied that the party had good reasons for resiling. And where a party resiles from such agreement, the agreement terminates and the appellate Court has no jurisdiction after this, to order that the trial Court should determine the case on oath: *Case law reviewed.* [P 277 C 2]

K. D. Malaviya—for Applicant.

G. S. Pathak—for Opposite Party.

Order.—This is a civil revision by a defendant against a decree of the lower appellate Court. The facts found are that on 6th July 1932, there was an application by a mukhtar of the defendant stating that if the plaintiff took an oath by Buddha that she had advanced Rs. 100 to the defendant then the suit should be decreed in favour of the plaintiff, and if the plaintiff did not take this oath then the defendant would take an oath by God that the defendant did not take any money from the plaintiff, and the suit should be dismissed. Neither parties were present on this date. The plaintiff's counsel stated that his client agreed and 12th July 1932, was fixed for the oath or oaths to be taken. On 9th July the defendant appeared in person and made a written application to the Court stating that he did not desire the proceeding by oath as the plaintiff was a Buddhist and the defendant would be outcasted if he agreed to the proceeding. The Court did not agree to that application. On 21st July, there was a report by a peon to the Court that the defendant did not go to the temple but the plaintiff went to the temple. The report did not state that the plaintiff took the oath. The plaintiff made a statement that she did take the oath. The lower Court did not accept this allegation and directed that the suit should proceed in the ordinary way and the suit was tried by the Court and dismissed. The plaintiff brought an appeal. The lower appellate Court has held that the case should be decided by the oath of the plaintiff and that no good ground had been shown by the defendant for resiling and that the defendant is bound by his offer.

The lower appellate Court therefore has remanded the case for disposal by the procedure which was the subject to the agreement of 6th July 1932. The defendant has filed this revision and alleges that the defendant was entitled to resile and that the Court has acted without jurisdiction in ordering that the case should be disposed of on oath. One of the chief questions is whether the defendant is entitled to resile. For the respondent-plaintiff reliance was placed on two rulings: 1924 All 126 (1) and 1927 P C 165 (2). In neither of these cases was there any question of resiling. In 1927 All 590 (3), a learned Single Judge of this Court held that a party could resile for satisfactory reasons. On the other hand in 1930 All 162 (4), a Bench of this Court held that a party could resile although the Court had found that the reason for resiling given by him was untrue. The resiling of course must be before the statement on oath has been taken. In 1931 All 557 (5), reference was made to this ruling on p. 395of 1931 A L J and it was followed. Similarly in 1932 All 404 (6), it was held by a Bench of this Court that a party could resile at any time before a proper statement had been made by the reference. These rulings show that no conditions are attached to the desire to resile and it is not necessary that the Court should be satisfied that the party had good reasons for resiling. Under these circumstances I consider that the Courts below were incorrect in holding that the defendant did not have a right to resile when he applied to do so on 9th July 1932. That being the case the resiling has terminated the agreement to refer to oath and the order of the lower Court that the trial Court should determine the case in this manner is an order which purports to give jurisdiction to a Court which the Court cannot have.

For these reasons I allow this application in revision and I remand the appeal to the lower Court for disposal according to law. The costs hitherto incurred in this Court and in the lower Courts will abide the result. The court-fee may be refunded under S. 13, Court-fees Act.

K.S. *Application allowed.*

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1. Mithu Lal v. Sri Lal, 1924 All 126=74 I C 918=45 All 724.
2. Indar Prasbad v. Jagmohan Das, 1927 P C 165=103 I C 386=54 I A 301=2 Luck 316 (P C).
3. Salik Ram v. Wali Ahmad, 1927 All 590=100 I C 473= 49 All 388.
4. Tumman Singh v. Sheodarshan Singh, 1930 All 162=122 I C 1?6=52 All 235.
5. Bishambhar v. Radha Kishanji, 1931 All 557= 133 I C 29=53 All 673=1931 A L J 393.
6. Chand Rekha v. Janki Prasad, 1932 All 404= 138 I C 606.

A. I. R. 1935 Allahabad 278 (1)

SULAIMAN, C. J. AND GANGA NATH, J.

Vishwanath Prasad Pathak—Plaintiff—Appellant.

v.

Parkash Chandra and *another*—Defendants—Respondents.

Second Appeal No. 1096 of 1933, Decided on 26th October 1934, from decision of Dist. Judge, Mainpuri, D/- 4th September 1933.

Hindu Law—Debts—Money decree against father—Debt found to be for immoral purpose—Son's share cannot be attached but father's share can be attached — Finding that debt is for immoral purpose is binding in second appeal—Civil P. C. (1908), S. 100.

Where the property is joint and ancestral and the debt borrowed by the father had been borrowed for an immoral purpose, and is therefore tainted with illegality, the son is in no way bound to pay such a debt. But the father cannot repudiate his liability to pay the amount which he borrowed. If both the father and the son are alive, there is no bar against the attachment of the father's interest in the joint property in execution of the decree which has been obtained against him. On the other hand, the son's share must be free from attachment. The finding of the lower appellate Court that the debt borrowed by the contesting defendant's father is tainted with immorality must be accepted in second appeal. [P 278 C 2]

P. L. Banerji and *Panna Lal*—for Appellant.

K. N. Katju and *M. L. Chaturvedi*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for a declaration that the property which has been attached in execution of the respondents' decree is liable to be attached and sold in execution of that decree. The plaintiff holds a money decree against the contesting defendant's father. The Court below has found that the property is joint and ancestral and that the debt borrowed by the defendant's father had been borrowed for an immoral purpose, and was therefore tainted with illegality. It is therefore quite clear that the son is in no way bound to pay such a debt. At the same time it is equally clear that the father cannot repudiate his liability to pay the amount which he borrowed. Both the father and the son are alive. In these circumstances there appears to be no bar against the attachment of the father's interest in the joint property in execution of the decree which has been obtained against him. On the other hand, the defendant's share must be free from attachment. The first Court decreed the whole suit, but the appellate Court has dismissed the whole claim.

It seems to us that the finding of the lower appellate Court that the debt borrowed by the contesting defendant's father was tainted with immorality must be accepted in second appeal. But the lower appellate Court should not have dismissed the whole claim because the plaintiff decree-holder was certainly entitled to attach the father's interest, whatever that may be in the joint property and to have it sold. We accordingly allow this appeal in part and modifying the decree of the lower appellate Court decree the plaintiff's claim with a declaration that he is entitled to attach and sell the undivided interest of the father, Amar Nath, in this joint property and dismiss the claim as regards any other remaining interest. We direct that the parties should bear their own costs in all Courts.

K.S. *Appeal partly allowed.*

A. I. R. 1935 Allahabad 278 (2)

GANGA NATH, J.

Mohammad Badrul Haq Rashidi—Plaintiff—Appellant.

v.

Shah Hasan Ahmad and *others*—Defendants—Respondents.

Second Appeal No. 780 of 1932, Decided on 30th November 1934,

Mahomedan Law—Wakf—Wakf of musha for mosque or burial ground is not valid.

Under the Mahomedan law 'musha' or an undivided share in property may form the subject of wakf whether the property be capable of division or not. But the wakf of a musha for a mosque or burial ground is not valid whether the property is capable of division or not. [P 279 C 1]

Mushtaq Ahmad—for Appellant.

K. Verma—for Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendant-respondents for a declaration that the plot of land detailed in the plaint on which the tomb of the late Maulana Asi stands was dedicated by the defendants that it is under the management of the Sajjadah Nashin of Khankah Rashidia of Jaunpur, and the Sajjadah Nashin of Khankah Rashinda is its mutwalli, that the defendants have no right to interfere with the land so dedicated, that the registered deed of wakf dated 27th November 1922, executed by the defendants was void and ineffective, and also for a perpetual injunction restraining the defendants from burying the dead

bodies of their family any more and from erecting any building on the land which might contravene the terms of the oral wakf. The plaintiff's case was that Maulana Asi who was a revered Mohamedan saint died at Ghazipur, on 25th February 1917. The Maulana was a very pious man and his followers regarded him as a saint. He was buried in front of the house in which his grand daughter used to live. The land belonged to the defendants and they made an oral wakf. The plaintiff is a disciple of Maulana Asi. The plaintiff alleged that last year he and other disciples of the deceased Maulana wanted to make constructions on the land, but were obstructed by the defendants. The defendants contended that no oral wakf was made; that out of them those defendants who were present at the time of the death of Maulana Asi did not make any objection to the burial of the Maulana in the plot in dispute, but rather gave implied consent to it because they desired that the dead of their family should be buried on the land which had been sanctified by the burial of the blessed corpse of the revered Maulana.

Both the Courts have found that the land in dispute is "musha" and belongs jointly to all the defendants and also that defendants 1 and 2, did not join in the alleged oral wakf. The Courts below held that the wakf of "musha" was invalid under the Mohamedan law and consequently no valid wakf was made. The only point for consideration in this case is whether any valid wakf of the land in dispute was made, because the plaintiff's case is based entirely on the oral wakf alleged to have been made by the defendants. It is not denied that the land in dispute is musha. The only point for determination is whether the wakf of "musha" is valid under the Mahomedan law. Under the Mahomedan law a "musha" or an undivided share in property may, according to the more approved view, form the subject of wakf whether the property be capable of division or not. But the wakf of a musha for a mosque or burial ground is not valid whether the property is capable of division or not, vide:

"page 233 Hamilton s Hedaya;
" 589 Tyabji's Mahomedan Law, 2nd Edn., 1919;
" 269 Ameer Ali's Mahomedan Law, Vol. 1, 4th Edn.;
" 352 Wilson's Anglo Mahomedan Law, 6th Edn."

Abu Yusuf holds that the wakf of musha is valid though the property may be capable of partition. He has declared that a wakf of a musha for a mosque or burial ground is invalid. He gives two reasons for it, one of which is that:

"the continuance of a participation in anything is repugnant to its becoming the exclusive right of God: see p. 233 of Hedaya."

The learned counsel for the appellant has referred to rulings which relate to gifts of musha. The specific reason why a wakf of musha for tomb or mosque is invalid has been given by Abu Yusuf as stated above. I therefore agree with the finding of both the lower Courts that the wakf was invalid and consequently the plaintiff has no right of suit. It is therefore ordered that the appeal be dismissed with costs. Permission for Letters Patent appeal is granted.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 279

BENNET, J.

Jalaun District Co-operative Bank, Orai—Appellant.

v.

Official Receiver, Jhansi and *another*—Respondents.

First Appeal No. 192 of 1933, Decided on 15th November 1934, from order of Dist. Judge, Jhansi, D/- 2nd September 1933.

Provincial Insolvency Act (1920), S. 28 (4) —S. 28 (4) refers to property acquired by insolvent by his own efforts or to property which devolves on him by rule of law — Property not coming under section sold by some one who has right to do so — Price realized by such sale does not become property of insolvent.

Section 28, sub-S. 4 of the Act refers to property which the insolvent acquires by his own efforts, such as his wages or salary, or to property which devolves on him by rule of law, such as by inheritance. It is not intended to apply to a case where property which does not come under the section is sold by some one who has a right to sell it. On such sale, the price does not become the property of the insolvent nor does it vest in receiver. [P 280 C 1]

N. C. Vaish—for Appellant.

Judgment.—This is a first appeal from order brought by the Jalaun District Co-operative Bank at Orai. A person called Ram Dayal was adjudged an insolvent in the Court of the District Judge of Jhansi. The appellant bank was owed a debt by Ram Dayal and the bank obtained permission of of the board of revenue to sell an eight pies zamindari share of the insolvent in a certain village called Paretha in Bundel Khand. The bank did not take

permission from the insolvency Court. Ram Dayal made an application to the insolvency Court alleging that such permission was necessary before the bank could sell his property. The Court below has held that the bank can sell property but that as soon as the property is sold the price becomes the property of the insolvent under S. 28 (4), Provincial Insolvency Act, and that this price then vests in the receiver, and that the Co-operative Bank has no priority over other creditors and that the money would be distributed among other creditors. The bank argues in first appeal that under S. 28 (5), Provincial Insolvency Act, the property of the insolvent for the purposes of that section shall not include any property which is exempted by any agreement from liability to attachment and sale in execution of a decree. Under the Bundelkhand Land Alienation Act, the zamindari share of Ram Dayal is so exempted. Clearly therefore this share is not property within the meaning of S. 28 and therefore under S. 28 (2) the zamindari share did not pass to the receiver in insolvency and the section does not prevent the bank from taking steps in regard to it. Now Sub-S. (4) states:

"All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver and the provisions of sub-S. (2) shall apply in respect thereof."

I do not consider that on the sale of the zamindari property it can be correctly stated that the price is acquired by the insolvent or devolves on him. It appears to me that as the bank has a legal right to sell the zamindari property under the Co-operative Societies Act, (Act 2 of 1912), the sale price of the property will go to the bank and cannot be considered as being acquired by or devolving on the insolvent. I understand S. 28, Sub-S. (4), Provincial Insolvency Act, to refer to property which the insolvent acquires by his own efforts, such as his wages or salary, or to property which devolves on him by rule of law, such as by inheritance. I do not think that the sub-section is intended to apply to a case like the present where property which does not come under the section is sold by some one who has a right to sell it. If the argument of the lower Court were correct then the same argument might be applied to the case of a secured creditor who sells the property of the insolvent on a mortgage and it might be said that as soon as the property was converted into cash by an auction sale then the cash ought to go to the receiver. For these reasons I consider that the order of the lower Court is incorrect in directing that as soon as the property is sold its price becomes the property of the insolvent and that it will vest in the receiver and that the money will have to be deposited in the insolvency Court for distribution to the other creditors.

I allow this appeal with costs in both Courts. The appellant Co-operative Bank will be permitted to retain the proceeds of the sale to the extent of this debt and it need only deposit with the receiver any excess of the sale proceeds over the amount due to the Co-operative Bank including costs.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 280

BENNET, J.

Hardeo Ram—Defendant—Applicant.

v.

(*Firm*) *Girdhar Lal Kanhayia Lal*—Plaintiff—Opposite Party.

Civil Revn. No. 82 of 1934, Decided on 30th October 1934, against decision of Small Cause Court Judge, Muhammadabad, Gohna, D/- 19th December 1933.

(a) Partnership Act (1932), Ss. 5 and 69—Hindu joint family business does not come under S. 69.

The relation of partnership arises from a contract and not from status and in particular the members of a Hindu undivided family carrying on a family business as such are not partners in such business. Hence father and son forming a joint Hindu family do not come under S. 69. [P 281 C 1]

(b) Civil P. C. (1908), O. 33, R. 1 (2)—Hindu joint family business of father and son—Father alone can verify plaint.

Where the father and son form a joint Hindu family, a Hindu father as manager can act on behalf of the family by signing and verifying a plaint. [P 281 C 1].

A. P. Pande—for Applicant.

Order.—This is a civil revision by a defendant against a Small Cause Court decree. The suit was on account books for a debt. The claim was for Rs. 100 principal and Rs. 36 interest up to the date of the suit at 2 per cent. per mensem. The first point taken is that S. 69, Partnership Act, applied to the plaintiff firm and the suit was not maintainable. This section makes it necessary for a firm to be registered before it can sue. S. 5 of the Act states that the relation of partnership arises from a contract and not from status and in particu-

lar the members of a Hindu undivided family carrying on a family business as such are not partners in such business. The plaintiffs are father and son forming a joint Hindu family and therefore they do not come under S. 69, Partnership Act. Learned counsel desired to take a further point not in his memorandum of revision to the effect that under O. 30, R. 1 (2) the plaint on behalf of the firm could not be verified by one member only. This particular plaint has been signed and verified by the father alone. But as the father and son form a joint Hindu family a Hindu father as manager can act on behalf of the family by signing and verifying a plaint. The next point which was taken was in regard to whether the decree was in accordance with the judgment. The judgment states:

"Decreed with proportionate costs for Rs. 100 usual pendente lite and future interest."

In regard to interest, the third issue was "Was any interest stipulated?" and the finding was "plaintiff has given up interest." Therefore the claim was reduced from Rs. 136 to Rs. 100. Proportionate costs should have been awarded, but the costs entered in the decree are Rs. 21. That is shown to be the total costs incurred in the suit for the plaint, the vakalatnama, the fee for vakil and notice. Accordingly I allow the revision on this part and direct that instead of Rs. 21 the decree shall be corrected to grant only 100/136 share of this Rs. 21. Some further argument was made in regard to pendente lite interest, but that point was not taken in the grounds of revision.

The revision therefore is allowed in part with costs proportionate to success and failure to the parties.

K.S. *Revision partly allowed.*

A. I. R. 1935 Allahabad 281

BENNET AND BAJPAI, JJ.

Mt. Naraini Kuer—Applicant.

v.

Thirpal—Opposite Party.

Civil Revn. No. 523 of 1933, Decided on 24th October 1934, against order of Sub-Judge, Mainpuri, D/- 12th October 1933.

Civil P. C. (1908), S. 151 — Two out of three arbitrators related to one of parties — —Court has inherent power to supersede reference - Arbitration.

There is an inherent jurisdiction in a Court to intervene and supersede the arbitration if the case falls under S. 151 of the Code, viz., where such an order is necessary for the ends of justice or to prevent the abuse of the process of the Court; it is necessary for the purpose of a just decision that a tribunal should be impartial. The fact that two out of three members forming the tribunal are more closely connected with a party is a fact which would vitiate the integrity and impartiality of the tribunal. In such a case Court has inherent power to supersede the reference to arbitration, if it finds that on account of this relationship, the arbitrators are prejudiced against the other party: 1929 *All* 743, *Rel on.* [P 282 C 1]

L. M. Roy—for Applicant.

N. C. Vaish—for Opposite Party.

Order.—This is an application in civil revision by one Mt. Naraini Kuer against an order of the learned Subordinate Judge of Mainpuri revoking a reference to arbitration. There was a civil suit in his Court No. 8 of 1933. Mt. Naraini Kuer v. Thirpal, and there was another suit No. 417 of 1933, Chirpal v. Somraj. Somraj is the nephew of the deceased husband of Mt. Naraini. The parties made an application jointly to the Court on 18th July 1933 stating that they were closely related to each other and that they desired arbitration of three arbitrators, Chhajju Ram, the arbitrator of Mt. Naraiji, Jagram, the arbitrator of Thirpal, and Bohra Panna Lal, said to be the umpire of the parties. Accordingly the Court made a reference to arbitration. On 4th September 1933 an application was made on behalf of Thirpal to the effect that when the other case No. 417 of 1933 was being heard by the arbitrator the arbitrator abused the petitioner Thirpal and turned him out of the room and did not take his evidence, that the arbitrators were acting in collusion with Mt. Naraini Kuer and Somraj, and the application asked that the arbitration should be superseded in case No. 8 of 1933. The learned Subordinate Judge made an enquiry into the matter and he finds that Thirpal was unaware of the relationship between Panna Lal, the umpire, and Somraj, the nephew of the husband of Mt. Naraini. He also finds that on account of this relationship the arbitrators are prejudiced against Thirpal defendant. It appears to us that this conclusion is correct and that the three arbitrators two of whom are connected with Mt. Naraini, are not a tribunal which is likely to decide justly between the parties. Learned counsel argues that the parties are related. That however does not appear to affect the situation.

The next argument which was put before us is that the lower Court had

no power to supersede an arbitration once a reference has been made on the agreement of the parties and that the powers of the lower Court are confined to the second schedule which deals with the power of the Court when the award is submitted. In the present case no award has yet been submitted. The lower Court has not stated under which section it acted, but apparently the action has been taken under S. 151, Civil P. C. The question is whether that section covers an order such as the present superseding a reference to arbitration. The section states that the Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It appears to us that it is necessary for the purpose of a just decision that a tribunal should be impartial. The fact that wo members out of three members orming the tribunal are more closely onnected with one party is a fact which would vitiate the integrity and impartiality of the tribunal. Learned counsel pointed out that in such arbitration cases as deal with partitions it is common to have the members of the family making the partition. That however is a class of case where knowledge of the family property is desirable. The present cases are not of that nature. The case of Mt. Naraini is for rendition of accounts between her and Thirpal alleged to be her karinda. In 1929 All 743 (1), a Bench of this Court had a similar question before it whether a Court had power under S. 151, Civil P. C., to supersede a reference to arbitration, and it was held that a Court had such power. On p. 744, Col. 2 it is stated: It may however be said in favour of the respondent that there is an inherent jurisdiction in a Court to intervene and supersede the arbitration if the case fell under S. 151 of the Code, viz., where such an order is necessary for the ends of justice or to prevent the abuse of the process of the Court. We agree with that dictum and we consider that the lower Court had power to act under S. 151, Civil P. C. The circumstances of this case in our opinion bring the matter within that section. Accordingly we dismiss this application with costs.

K.S. *Application dismissed.*

1. Bholanath v. Raghunath Das-Mithan Lal, 1929 All 743=122 I C 685=51 All 1010.

A. I. R. 1935 Allahabad 282

KENDALL, J.

Pansingh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 603 of 1934, Decided on 15th November 1934, from order of Sessions Judge, D/- 5th July 1934.

Penal Code (1860), Ss. 326 and 304—Devil dancers with consent of husband branding wife to exorcise devil with hot ladle—Death from injuries—Husband burying her due to panic and not for shielding dancers — Offence committed by dancers held to be under S. 326 and not S. 304-A.

Accused were hillmen and three of them were devil dancers who attempted at C's request, or at any rate with his consent, to dispossess C's wife of a devil by applying a hot ladle (Karchhuli), to her mouth and throat and to various parts of her body, with the result that she died. C subsequently became frightened and buried the body of his wife and for this reason he was convicted under S. 201, I. P. C., as well as of abetting the other offence.

Held: that S. 326 and not S. 304-A applied, as the dancers were not acting rashly or negligently but deliberately. The hurt was grievous because it endangered life, and it was caused voluntarily because the appellants must be held to have known that they were likely to cause hurt which endangered life and that Ss. 88 and 92 did not apply as woman did not give her consent to this abominable treatment; and though the appellants may have thought that it was impossible for her to signify consent because the devil was in possession of her and they believed that it was the devil who was addressing them, that was not a view which can be taken by the Court.

Held also: that their ultimate motive was to cure the woman, and that however barbarous their methods were, they were certainly acting in good faith. But it would be extremely dangerous in any way to countenance a crime of such a heinous nature on the ground that it was only believed to be the means to an end which is worthy of praise.

Held further: that it was possible however, to reduce the sentence of the husband under S. 201, I. P. C. on the ground that his action appeared to have been due to panic rather than a deliberate attempt to shield his confederates from punishment and accordingly it was reduced from two years to one year's rigorous imprisonment. [P 283 C 2, P 284 C 1]

K. D. Malaviya—for Appellants.

The Govt. Pleader—for the Crown.

Judgment.—The appellants, Pan Singh, and his sons, Nar Singh and Mohan Singh, and also Chunni, have been convicted by the learned Sessions Judge of Kumaon of offences under Ss. 326 and 326-109, Penal Code, and sentenced, the first three to five years' rigorous imprisonment and the fourth to three years' imprisonment under those sections, and Chunni

has also been sentenced to two years' rigorous imprisonment under S. 201, Penal Code. The story told by the witnesses for the prosecution is an unusual and painful one; but there is no doubt whatever, that it is true. It has been described in full by the learned Sessions Judge. The appellants are hillmen from the Almorah District, and the first three are apparently what are called devil dancers, who attempted at Chunni's request, or at any rate with his consent, to dispossess Chunni's wife of a devil by applying a hot ladle (karchhuli) to her mouth and throat and to various parts of her body, with the result that she died. Chunni subsequently became frightened and burried the body of his wife, and for this reason he has been convicted under S. 201, Penal Code, as well as of abetting the other offence.

Mt. Mohania, which is the name of the unfortunate woman, had been ill. So far as the oral evidence goes it only appears that she was suffering from a fit of giddiness. But Dr. Faruki, the medical officer who performed the post mortem examination, stated in evidence that she had been suffering from decease of the right lung, probably tuberculosis, and also from malaria. However that may be, Chunni—who had already consulted the witness Bhairab Dat about her called in the other three appellants to treat her. Between them they decided that she was possessed of a devil, and they attempted to exorcise it by applying a heated ladle to her mouth, to her private parts and to other parts of her body. She abused them and evidently had the strongest objection to the treatment, but the appellants appeared to have believed that though her body was her own, her mind was in the possession of the devil, and that it was the devil that was abusing them and objecting to the treatment. It appears from the medical evidence that the ladle was thrust right into her mouth, and two of her front teeth were broken. Chunni did not take part in the actual treatment, but he consented to it apparently in the belief that the devil would be exorcised. Bhairab Dat, the neighbour who had already been consulted by Chunni, heard cries from Chunni's hut and sent his servant to see what the matter was, and the servant came back with the news that devil dancing was going on and that Chunni's wife was being branded by the appellants, Nar Singh and Pan Singh, while another man was helping to hold the woman down. Next morning the woman, who was still alive, sent her son to Bhairab Dat who went to see her, and she was able to tell him roughly what had happened. Bhairab Dat, who was ill himself, told Chunni to take the woman to hospital, but Chunni did nothing, and as Bhairab Dat was not able to do anything effective, the unfortunate woman died without any medical help. Bhairab Dat subsequently discovered that the woman had died, and had been quietly buried, and he made a report on 22nd January, at 4 p. m.

Mr. Kapil Deva Malaviya, who appeared in this Court for the appellants, did not attempt to controvert the facts which had been found proved on behalf of the prosecution. He argued however in the first place that the offence was not one that was covered by the provisions of S. 326, Penal Code, but that S. 304-A would be more appropriate, and that in any case the sentences were too severe as all of the appellants were acting in good faith, though in great ignorance, with the object of curing the woman by dispossessing her of the devil. However ignorant the appellants may have been and however barbarous their methods, he suggested that as they had been in jail for several months, the law would be satisfied if they were to be punished with the imprisonment which they have already undergone.

As regards the first part of this argument, I think there can be no doubt that S. 304-A will not apply. The appellants were not acting rashly or negligently, but deliberately. S. 326 will apply if the appellants voluntarily caused grievous hurt by means of any heated substance. I have no doubt that the ladle comes under the category of "substance," and it was certainly heated. The hurt was grievous because it endangered life, and it was caused voluntarily because the appellants must be held to have known that they were likely to cause hurt which endangered life. Ss. 88 and 92, Penal Code, have been referred to, but it is quite clear that the woman did not give her consent to this abominable treatment; and though the appellants may have thought that it was impossible for her to signify consent—because the devil was in possession of her and they believed that it was the devil who was addressing them that is not a view which can be taken by the Court. The argument that has somewhat appealed to me is that their ultimate motive

was to cure the woman, and that however barbarous their methods were, they were certainly acting in good faith. I have therefore taken time to consider whether for these considerations the sentences inflicted by the learned Sessions Judge ought to be reduced. I have not seen any precedent that can be of any great use, though the instances of satti which are occasionally still brought to light are to some extent analogous. Those who take part in a satti however do not do so with the motive of saving mortal life, and the appellants may therefore claim more consideration than the abettors of satti. On the other hand it would be extremely dangerous in any way to countenance a crime of such a heinous nature on the ground that it was only believed to be the means to an end which is worthy of praise. If the offence had been committed with a motive that was ultimately criminal for instance, in the course of a dacoity, the suitable punishment would undoubtedly have been transportation for life, and I do not think that the Judge has erred on the side of severity in inflicting half the maximum penalty under S. 326. It is possible however to reduce the sentence of Chunni under S. 201, Penal Code, on the ground that his action appears to have been due to panic rather than a deliberate attempt to shield his confederates from punishment.

I must therefore uphold the convictions and sentence under Ss. 326 and 326-109, Penal Code, and only allow the appeal to this extent that the sentence of Chunni under S. 201, Penal Code, is reduced from two years' to one year's rigorous imprisonment.

K.S. *Appeal partly allowed.*

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BENNET AND ALLSOP, JJ.

Chiranji Lal—Defendant—Applicant.

v.

Irphan Ali and *another*—Plaintiffs and Defendants—Opposite Parties.

Civil Revn. No. 528 of 1933, Decided on 26th October 1934, from decision of Sess. and Sub-Judge, Agra. D/- 29th May 1933.

Civil P. C. (1908). S. 115 and O. 23, R. 1—Permission to withdraw suit and bring fresh suit granted—Criterion for revision is to see whether Court has applied its mind.

Where the lower Court has granted leave to withdraw a suit and to bring a fresh suit, all that the High Court has to do is to see that the lower Court applied its mind to the question before it. Even if the Court below had exercised a wrong discretion in granting leave to withdraw a suit, the case would not come under S. 115 for revision by the High Court : 1934 *All* 137 and 1918 *All* 418, *Rel on.* [P 284 C 2]

M. L .Chaturvedi—for Applicant.

K. L. Misra—for Opposite Parties.

Order.—This is an application in civil revision by a defendant against an order of the lower appellate Court. The plaintiff brought a suit for recovery of possession of a house against two persons and the Munsif dismissed the suit. The plaintiff brought an appeal and the question arose whether a certain person Mohan Lal should have been joined as a party to the suit. The plaintiff stated that he desired to make Mohan Lal a party and that for that purpose he desired permission to withdraw the suit and to bring a fresh suit under O. 23, R. 1, and the appellate Court granted the permission. The first argument of learned counsel was that the lower Court should have only allowed such permission on account of some formal defect. Under the rule in question there are two Sub-Rr. (a) and (b), one for a formal defect and the other for any other sufficient grounds. A Court may act under either of these sub-rules. The Court below has acted on what the Court considered to be "other sufficient ground." We do not consider that it is necessary for us to enquire into the sufficiency of the ground. All that we have to do is to see that the lower Court applied its mind to the question before it. The lower Court has written about a page on the subject and therefore it is apparent that it did apply its mind. Learned counsel for the applicant relied on certain rulings in the latest of which 1934 All 137 (1), a learned Judge of this Court laid down the criterion that this Court in revision under 115, Civil P. C., should see whether the Court below has or has not applied its mind to the matter before it, i. e., whether the plaintiff should be granted permission to withdraw his suit under O. 23, R. 1. In 1918 All 418 (2), a Bench of this Court held that even if the Court below had exercised a wrong discretion in granting leave to withdraw a suit the case would not come under S. 115, Civil P. C., for revision by this Court. Following these rulings we hold that no case has been made out for revision

1. Jumma v. Prem Sahai, 1934 All 137=147 I C I C 776.
2. Jhunku Lal v. Bisheshar Das. 1918 All 418=46 I C 71=40 All 612.

and we dismiss this application with costs.

K.S. *Application dismissed.*

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NIAMATULLAH AND ALLSOP, JJ.

Sajjanpal Singh and *others*—Defendants—Appellants.

v.

Mt. Harnaraini Kunwar—Defendants—Respondents.

First Appeal No. 7 of 1931, Decided on 21st December 1934, from decision of Sub-Judge, Ettah, D/- 26th August 1930.

(a) Pardahnashin Lady—It is improbable that she will not know about intimate family matters concerning relationship.

There are certain matters of which a pardahnashin lady may well not be aware, but it is improbable that she would not know about intimate family matters concerning relationship. [P 289 C 1]

(b) Pardahnashin Lady — Document executed by—She will be bound by terms only if she has thoroughly understood what she was purporting to do.

Whereas a Court will suppose, in the absece of evidence to the contrary, that an adult person who has executed an instrument intends to be bound by its terms, it will make this exception in favour of a purdahnashin lady that it will make no supposition of this kind but will consider her bound by the terms of the instrument which she has executed only if it is positively satisfied by direct evidence or by evidence of the circumstances which obtained at the time that she did thoroughly understand what she was purporting to do and that she executed the instrument with full knowledge of its effects: 1929 *All* 824; 1925 *P C* 204; 28 *Cal* 546 and 36 *All* 81, *Ref.* [P 291 C 1]

(c) Hindu Law—Widow—Widow entering into agreement to avoid possibility of litigation—Such settlement beneficial to reversioner—Agreement is binding on reversioner.

A Hindu widow in possession of her husband's estate is competent to enter into a valid compromise binding the reversioners so as to prevent injurious litigation.

Where a widow in possession of husband's estate entered into settlement so as to avoid the possibility of litigation between the members of the family and the settlement was very beneficial to daughters who would have taken the estate in course of time.

Held: that the settlement was binding on the daughters: 1915 *Cal* 629, *Ref.* [P 291 C 2]

P. L. Banerji and *H. C. Mukerji*—for Appellants.

K. N. Katju and *R. N. Gurtu*—for Respondents.

Allsop, J.—This is an appeal by some of the defendants in a suit for possession which was decreed by the learned Subordinate Judge of Etah. The property in suit is a share of 4 biswas in the village of Esauli. This property originally belonged to one Jiwa Ram who died on 27th August 1890. It is now admitted that it was ancestral property. Jiwa Ram also had other property which he had separately acquired. His widow, Mt. Hans Kunwar, succeeded to the whole of his property and remained in possession up to her death on 12th February 1928. The plaintiff-respondent, Mt. Har Naraini Kunwar, is the sole surviving daughter of Jiwa Ram. She got possession of the separately acquired property on the death of her mother, Mt. Hans Kunwar, but she failed to induce the Revenue Court to enter her name in the register as being in possession of the property in Esauli. She therefore instituted the suit which has given rise to this appeal and obtained a decree for possession, from the lower Court.

In order properly to understand the question in issue between the parties it is necessary to set forth their relationship with the original owner, Jiwa Ram. This Jiwa Ram was the son of Lachhman Singh who had five brothers. One of these brothers, Chet Ram, died without leaving male issue. The other brothers were Lekhraj Singh, Dulab Singh, Muktabil Singh and Girdhari Singh. The defendants are Sajjanpal Singh, Mahendarpal Singh, Jogendarpal Singh and Gajendarpal Singh are the great-grandsons and great great-grandsons of Muktabil Singh. The defendants, Lal Singh and Basdeo Singh are the grandsons of Girdhari Singh. The defendants, Narain Singh, Lokhpal Singh, Balwant Singh, Chhatarpal Singh are the great-grandsons of Gulab Singh. The defendant, Shankar Singh, is the grandson of Lekhraj Singh and defendant, Mt. Tika Kunwar is the widow of Sundar Singh, the son of Lekhraj Singh. The plaintiff Mt. Har Naraini Kunwar is, as we have already said, the sole surviving daughter of Jiwa Ram by his wife Mt. Hans Kunwar. Some of the defendants are the appellants before us and others have been impleaded as respondents. The plaintiff-respondent based her claim on two grounds, namely, as the daughter of Jiwa Ram under the Hindu law and as the legatee under a will which was executed by Jiwa Ram on 20th August 1890, and registered on the 23rd August of that year.

After the death of Jiwa Ram there was a dispute about succession to his property. The mother of the defendant Narain Singh set up the plea that her son had been adopted by Jiwa Ram

and in support of her contention she relied upon a will or declaration said to have been executed by Jiwa Ram on 24th August 1890. It appears that one branch of collaterals, that is the branch of Lekhraj Singh, set up a claim that Jiwa Ram had died as a member of a joint Hindu family and that they were entitled to succeed to his property by way of survivorship. There is upon the record a report made by the Tahsildar of Jalesar on 7th January 1891, in connexion with the mutation of the register. In that report he mentioned that there was a claim that Narain Singh had been adopted by Jiwa Ram and also said that Sundar Singh and others had claimed that the property was ancestral, that they were heirs and that Mt. Hans Kunwar had only a right to maintenance. From this we infer that the latter claim was to the effect that Jiwa Ram and the claimants had been members of a joint Hindu family up to the time of Jiwa Ram's death. It is now said that there was also a custom in the family that collaterals should succeed to ancestral property in preference to daughters and daughter's sons, but it is not clear whether that claim was also made after Jiwa Ram's death in the year 1890.

In continuation of the claim that Narain Singh was the adopted son of Jiwa Ram an application was made by him under the guardianship of his mother for probate of the alleged will of 24th August 1890. Mt. Hans Kunwar was of course claiming a widow's estate and there was also the question at issue whether after her death her daughters or the collaterals should succeed. At that time there were alive not only Mt. Har Naraini Kunwar, the plaintiff-respondent, but also Mt. Hewal Kunwar who was Jiwa Ram's daughter by another wife. Jiwa Ram had married five wives, four of whom had died before him. He had two daughters besides Mt. Hewal Kunwar and Mt. Har Naraini Kunwar, namely, Mt. Chandan Kunwar and Mt. Het Kunwar, but Mt. Chandan Kunwar was not alive at the time of his death and Mt. Het Kunwar was a posthumous daughter.

The dispute which had arisen about the property led to an agreement dated 27th February 1891, by which the questions in issue were referred to arbitration and this agreement was followed by an award dated 2nd April 1891, by which Mt. Hans Kunwar was to remain in possession of all the property during her lifetime and after her death the self-acquired property was to go to the daughter and the property in Esauli was to go to the collaterals. Each of the surviving branches, namely, those of Lekhraj Singh, Gulab Singh, Muktabil Singh and Girdhar Singh were to get a share of ¼th in the property, that is, one biswa out of the 4 biswas. After the agreement was entered into on the 27th February, Narain Singh's mother Mt. Naim Kunwar withdrew on 12th March 1891, the application for probate which she had made on his behalf.

When the plaintiff instituted the present suit, the contentions put forward by the defendants were that she had no right under the will of 20th August 1890, that there was a custom, which we have already mentioned, which prevented her from succeeding to the property and that the award of the arbitrators by which they were entitled to the property was binding upon the parties to the suit. The learned Subordinate Judge did not rely upon the will as giving Mt. Har Naraini Kunwar a right to the property in Esauli. He said that the plaintiff was entitled to rely upon the will and was entitled to the relief claimed, but he added that she was entitled to the self-acquired property of Jiwa Ram under the will and to the ancestral property of Jiwa Ram in Esauli under the Hindu law. He clearly meant that the will did not give her a claim to the ancestral property, but that there was no proof of any family custom by which this property should go to the collaterals and that the ordinary Hindu law would entitle the daughter to claim the property in preference to the collaterals. He explicitly found indeed that the custom was not established. He found that the arbitrators went beyond the reference in deciding what should happen to the property after the death of Mt. Hans Kunwar and consequently decided that the award was not binding upon the plaintiff.

We think that it will be convenient for us to dispose of the arguments based upon the will and upon the alleged custom before we proceed to discuss the effect of the award which is the important question in this appeal. (After dealing with these questions, His Lordship proceeded). We have already mentioned the circumstances in which the parties entered into an agreement on 27th February 1891, to refer their disputes to arbitration. The agreement itself is Ex. B-1. The parties were the collaterals and Mt. Naim Kunwar as the guardian of Narain

Singh on the one side and Mt. Hans Kunwar in her own right and as the guardian of Mt. Har Naraini Kunwar, Mt. Het Kunwar and Mt. Kewal Kunwar on the other side. The agreement recited that there was a dispute between the parties in respect of the property forming the estate of Thakur Jiwa Ram Singh, but did not go into further detail. It added that the parties had agreed to abide by the decision of certain arbitrators. These arbitrators were Jeolahal Singh and Bhagwan Singh who were appointed by the collaterals and Mt. Naim Kunwar on the one side and Megh Singh and Balwant Singh who were appointed by Mt. Hans Kunwar, Mt. Het Kunwar and Mt. Kewal Kunwar on the other side. There was also an umpire Khushal Singh who was accepted by both parties. The agreement was registered on the 3rd March 1891, and the award of the arbitrators was delivered on 15th April 1891. As we have already said, the award was that the Esauli property should remain in the possession of Mt. Hans Kunwar during her lifetime and after her death should pass to the collaterals and that the remaining property should remain in the possession of Hans Kunwar during her life-time and after her death should go to the surviving daughters or their heirs. There was a further provision that Mt. Hans Kunwar was a purdahnashin lady and had no experience of the management of an estate and that therefore Sumer Singh should act as manager of the estate and should receive a salary of Rs. 200 per annum. This Sumer Singh was the husband of Mt. Kewal Kunwar and the son-in-law of Jiwa Ram. The award was registered on 15th April 1891, and was followed by mutation of the register in favour of Mt. Hans Kunwar.

The learned Subordinate Judge found that the award was not binding upon the plaintiff-respondent, Mt. Har Naraini Kunwar, because the arbitrators had changed the course of devolution, because the arbitrators travelled beyond the scope of the reference in deciding what should happen to the property after the death of Mt. Hans Kunwar and because the arbitrators, having found apparently that Narain Singh was not the adopted son and having also found that Jiwa Ram was not at his death a member of a joint Hindu family, were not competent to destroy the rights under the Hindu law of the daughters. He also found that Mt. Hans Kunwar executed the agreement to refer, but that she did not understand its effects and that for this reason, as she was a purdahnashin lady, the award was not binding upon her or her daughters.

The first question we have to consider in this connexion is whether in the circumstances we can hold that the agreement to refer was an agreement properly executed by Mt. Hans Kunwar so as to bind her. The learned Subordinate Judge was much influenced, as appears from his judgment, by the fact that he believed that the reversioners had been making dishonest efforts to prevent the Esauli property from passing out of the hands of their family and particularly that they had set up a forged will or wills. We have already referred to the fact that Mt. Naim Kunwar had relied upon a document executed on 24th August 1890. In this document Jiwa Ram referred to the will of the 20th August and to another will which he said that he had sent in a registered cover, presumably to the District Judge, on the 22nd August. He added that these two wills had not laid down all the conditions which he wished to be applied to his property. He declared that he had adopted Narain Singh as his son and had performed the necessary ceremonies. He then said that he was making a final will in order to do away with any possible disputes. The terms of the will were that in the event of the birth of a son to Mt. Hans Kunwar the adopted son should get ¼th of the property in accordance with Hindu law and that in the event of the birth of a daughter the adopted son should get the whole property. The argument of the learned Subordinate Judge is that the will of the 22nd August must have been a forgery and as a consequence the will of the 24th August which mentioned the previous will must also have been a forgery. No will of the 22nd August has been produced by any party to the suit. There is an application by Jiwa Ram, Ex. 4. This application is dated 26th August 1890, and is addressed to the District Judge. It stated that the petitioner had received an envelope under a registered cover containing a forged and false will and that the only will that was true and correct was the will executed on the 20th August and registered on the 23rd August. The petitioner suggested that the forged and false will was fabricated by Sundar Singh and that as it had been delivered to the post office insufficiently stamped

and in a torn envelope it had been returned to the petitioner. Jiwa Ram died on the 26th or 27th August, and it is admitted that he had gone from his village to Soron on the banks of the Ganges and had died in that place.

It is therefore doubtful whether this petition refers to any will of the 22nd August, because it is not certain whether a document delivered to an outlying post office on the 22nd August would have been returned to Jiwa Ram at Soron in time for him to execute the petition which we are considering. The learned Subordinate Judge assumes that the petition refers to that will and considers that the statement made by Jiwa Ram in the petition is conclusive upon the point whether that will was forged. In our opinion it cannot be assumed that the wills of the 22nd August and the 24th August, were not executed by Jiwa Ram. We must remember the circumstances. Jiwa Ram, according to the endorsement made by the sub-registrar on the will of the 20th August, was about 65 years of age. According to Khushal Pal Singh, a witness produced by the plaintiff, Jiwa Ram was very ill at the end of August and had gone to Soron on the 25th of that month because his case was hopeless and he wished to die on the banks of the Ganges. Manphul Singh, a witness for the plaintiff, has stated that Jiwa Ram was suffering from dysentery and Mt. Naim Kunwar, who was examined on commission, has said that he was ill for some two months before his death. There is no suggestion by any witness that he was suddenly taken ill and that he was in good health when he executed his will on the 20th August. The mere fact that he executed a will indicated that he was aware that he had not long to live.

In these circumstances it was natural, as he lived in Isauli where his collaterals also lived, that he should have been subjected to various influences and he himself may have been attempting to reconcile conflicting interests. From the contents of the admitted will of the 20th August, it is apparent that he was concerned in some measure about his own spiritual welfare and the consequent necessity for the adoption of a son. It is also probable from the terms of this will that he had some feeling that the ancestral property in his native village in Esauli should go to his own family, that is, to his collaterals and should not pass to other families into which his daughters might have married or might in future marry. This being so, it is likely enough that he might have wavered from time to time and executed a series of wills under the influence of his wife and daughters and their immediate relations on the one side and of the collaterals on the other side. It may well be that the will of the 24th August, was executed as the result of a feeling that Mt. Hans Kunwar might not adopt a son. At that time Jiwa Ram might have felt that it was safer for him to make the adoption himself subject to a provision for the possibility that a natural son might be born to him posthumously. These are suppositions, but they do lead to the conclusion that it is possible to explain the existence of more than one will otherwise than on the presumption that all the wills except that of the 20th August must have been forged.

It has been suggested that the statement in the will of the 24th August that an adoption had taken place could not possibly be true because the will of the 20th August was registered on the 23rd August and that was the date on which the adoption is alleged to have been made. After this period of 40 years we cannot expect the witnesses to remember accurately the various dates on which the incidents occurred. It is argued that it can be inferred from statements made by Mt. Naim Kunwar that the adoption must have taken place on the same date as the registration of the will, but she is not at all clear upon this point and we think that it is conceivable that there may have been some form of ceremony, whether strictly legal or not, on the 21st or 22nd August. We do not hold, and indeed it has not been argued, that there was a valid adoption; but we consider that the circumstances are not sufficient to justify the finding that the two wills to which we have referred are forged wills and that for this reason it must be supposed that the collaterals were at that time already making dishonest attempts to prevent the property from passing out of their hands. The learned Subordinate Judge was evidently of the opinion that it was a valid conclusion from the existence of these earlier dishonest proceedings that the subsequent proceedings evidenced by the agreement to refer and by the arbitration award must also necessarily have been dishonest. This is an argument with which we cannot agree because we are not

satisfied that the earlier proceedings were dishonest.

We must consider the agreement to refer and the award upon their own merits. In Jiwa Ram's will of the 20th August and in the award itself it was mentioned that Mt. Hans Kunwar was a pardahnashin lady and incapable of managing the property. In the will Jiwa Ram appointed Sumar Singh and, in the event of his death, one Kunwar Lal Kayasth to manage the property for her. In the award Sumar Singh was appointed by the arbitrators as we have already mentioned. We may take it therefore that Mt. Hans Kunwar was a pardahnashin lady and that she had no capacity for business. We have to consider therefore whether it can be said that there is sufficient material on the record for holding that she must have understood what she was doing when she entered into the agreement to refer the dispute to arbitration. The learned Subordinate Judge has made a point that the agreement was not precise in defining the dispute which was the subject of the reference. The agreement did mention that there was a dispute about Jiwa Ram's property and a list of the property was attached. There had already been proceedings in the Revenue Court about the mutation of the register. We have already referred to the report of the Tahsildar of Jalesar dated 16th January 1891, in which he set forth the claims of Narain Singh, Sundar Singh and others. We think that Mt. Hans Kunwar must have known about these proceedings and that she must have known about the claims which were being made against her. Living as she did in Isauli, it is hardly possible that she did not know that it had been asserted by Mt. Naim Kunwar that Jiwa Ram had adopted Narain Singh and that Sundar Singh and others were alleging that Jiwa Ram was a member of the joint Hindu family with them.

There are certain matters of which a pardahnashin lady may well not be aware, but it is improbable that she would not know about intimate family matters concerning relationship. On 15th January 1891, the mutation Court had passed an order, Ex. 9, that mutation should be effected in favour of Mt. Hans Kunwar. We think that she must have been aware of this fact and of the result of the dispute which had arisen. We do not think that we can infer that Mt. Hans Kunwar did not know what she was doing when she executed the agreement to refer merely from the fact that the disputes existing were not set forth in detail in that document. We notice that Sumer Singh was one of the persons who identified the ladies who were parties to the agreement at the time when the agreement was registered. We also notice that Kunwar Lal Kayasth was one of the witnesses to the award. Sumer Singh was Jiwa Ram's son-in-law and he and Kunwar Lal were clearly trusted by him. The learned Subordinate Judge has thought that Sumer Singh was a party to a conspiracy to defraud Mt. Hans Kunwar because by the award he was to obtain an income of Rs. 200 a year for managing the property. Sumer Singh's wife, Mt. Kewal Kunwar, was a party to the agreement and, as she was one of the daughters, her rights were affected as much as the rights of the plaintiff.

It has been argued that Mt. Kewal Kunwar was nearly as old as Mt. Hans Kunwar, being the daughter of a previous wife of Jiwa Ram's, and that Sumer Singh may have thought that she had little chance of succeeding and consequently that he was prepared to barter away her possible chances of succession in order to obtain the advantage of earning this income of Rs. 200 a year. We do not think that there is any force in this suggestion. Sumer Singh was giving away the possible rights of his wife and of his sons and in any event he was to manage the property of Mt. Hans Kunwar and if he chose to be dishonest, he could embezzle as much of the income as he wanted. We see no reason for supposing that he was a dishonest man or that he had any sufficient incentive for wishing to deceive the widow. Mt. Kewal Kunwar herself was a woman of about 32 years of age and was a party to the agreement. Kunwar Lal had also been trusted by Jiwa Ram and there is no suggestion that he had any reason for not bringing the true facts to the notice of Mt. Hans Kunwar. There is direct evidence that the agreement was read over to the women at the time when it was executed. We may refer to the evidence of Manphul Singh and of Mt. Naim Kunwar. The latter was in the same position as Mt. Hans Kunwar and she has said that she understood what was happening. Her interests were affected because under the award her son, Narain Singh, was losing the rights which he would have had if it had been found that the adoption had taken place. Sirdar Singh, Mt. Naim Kunwar's brother, has

also given evidence of the fact that the draft and afterwards the fair copy of the agreement was read over to the ladies who were parties to it. We might perhaps, in other circumstances not attach a great deal of importance to this oral evidence of witnesses who are deposing to facts which took place so many years ago, but where everything points to the probability that the proceedings were thoroughly understood by all the ladies, we see no reason to disbelieve the evidence. It has also been suggested by the learned Subordinate Judge that the arbitrators were all in collusion with the collaterals. Jeolahal Singh and Bhagwan Singh were appointed by the collaterals and it is quite likely that they may have been favourably inclined towards them. They are said to have been agents of Sunder Singh. There is however very little reason for thinking that Megh Singh or Balwant Singh were also in a conspiracy against the widow and her daughters. It is suggested by the Subordinate Judge that Megh Singh, who was one of Jiwa Ram's sons-in-law but whose wife was dead at that time, had no reason for helping the widow and that he belonged to the same family as Jeolahal Singh and consequently was likely to support the collaterals. It is not clear what relationship there was between Megh Singh and Jeolahal Singh and we consider that this argument is farfetched. Balwant Singh has been produced as a witness by the defendants. The learned Subordinate Judge has said that he has reason to be against the plaintiff. The reason apparently is that Sheo Ram Singh, the plaintiff's husband, had at some time summoned him as a witness in a case and, as he was away in Gwalior, had got a warrant of arrest issued against him. We do not know enough about the circumstances to say whether this incident would probably have made Balwant Singh an enemy of the plaintiff's but even if it had been sufficient to do so, it would have had no effect in the year 1891 long before it occurred. We can see no reason for thinking that the arbitration was in any way dishonest or unjust.

Apart from the other circumstances we must also consider the effect of the agreement. It certainly did not in any way affect the rights of Mt. Hans Kunwar who was to remain in possession of the whole property during her life-time. It cannot be said greatly to have affected the rights of the daughters who were given the reversion of the separately acquired property. The plaintiff's own witness, Khushal Pal Singh, said that the income of the self-acquired property was about Rs. 2000 a year whereas the income of the property in Isauli was about Rs. 600 a year. The suggestion has been thrown out that Mt. Hans Kunwar in order to preserve her own rights gave away the rights of her daughters. The plaintiff herself has relied on the will of the 20th August. Under that will Mt. Hans Kunwar was empowered to adopt a son to Jiwa Ram and if she had made the adoption, the Isauli property was to go to the son and not to the daughters. It is evident therefore that Mt. Hans Kunwar had no need to enter into this arbitration to deprive her daughters of the Isauli property. It was sufficient for her to make the adoption in order to produce that result. All that she did was to give up her right to adopt a son in order to conciliate the collaterals who were claiming the whole property. The daughters were not adversely affected in any true sense of the term by this arrangement. It must be remembered that there was real cause for apprehension that there might be a ruinous litigation between the members of the family. We have said that we consider that the will of 20th August does not in the absence of an adoption deprive the daughters of any share in the Isauli property, but it must be conceded that it was at least arguable that the will might have that effect.

We realise that it is not established now that Narain Singh was adopted by Jiwa Ram, but the claim had been made and it was supported by documentary, evidence, so that there was every ground for contention upon the point and at the time when the agreement to refer was executed the application for probate made by Mt. Naim Kunwar on behalf of her son was still to be considered by the Courts. The custom that collaterals should succeed to ancestral property in preference to daughters and their sons has not been established by evidence, but the claims that such a custom existed was clearly not an impossible claim in the circumstances. There was the agreement which was made at the time of Chandan Singh's death and there was Jima Ram's own statement in the wajibularz which might possibly have been construed in favour of the custom. There were real causes of

dispute and we must remember that it might have been extremely difficult for Mt. Hans Kunwar to obtain reliable witnesses from Esauli where the family of Jiwa Ram had always lived and were well established. It seems to us that she adopted a very wise course in coming to a settlement with the collaterals and the result of the award was entirely in her favour and almost entirely in favour of her daughters. We find from the evidence and all the circumstances of the case that Mt. Hans Kunwar thoroughly understood what she was doing when she entered into the agreement to refer the disputes to arbitration and there is nothing in the circumstances which could possibly lead us to suppose that the arbitration was in any way unfair to her or to her daughter. We therefore find that the award would have been binding upon Mt. Hans Kunwar if she had been alive.

We have been referred to certain cases as authorities. We may mention: 1929 All 824 (1), 1925 P C 204 (2), 28 Cal 546 (3) and 36 All 81 (4).

We do not think that it is necessary to discuss these cases at any length. It seems to us that the law on the subject is quite clear. Apart from dicta which refer to the peculiar circumstances of each of these cases, we consider that one broad principle emerge from them all. Whereas a Court will suppose, in the absence of evidence to the contrary, that an adult person who has executed an instrument intends to be bound by its terms, it will make this exception in favour of a pardanashin lady that it will make no supposition of this kind but will consider her bound by the terms of the instrument which she has executed only if it is positively atisfied by direct evidence or by evidence of the circumstances which obtained at the time that she did throughly understand what she was purporting to do and this executed the instrument with full knowledge of its effects. In our opinion, in this case the condition is fulfilled and the instrument was binding on Mt. Hans Kunwar.

It still remains for us to go into the question whether the agreement and the award were binding upon the plaintiff-respondent, Mt. Har Naraini Kunwar. In the case of 1917 P C 95 (5), it was held that a right to reversion is a mere spes successionis and cannot be transferred. That was a case of a minor and it was held that the guardian could not bargain with the spes successionis on his behalf or bind him by any contractual agreement in respect thereof. In the case of 6 C L R 76 (6) to which the learned Subordinate Judge has referred, it was held that the daughters could not in any circumstance be bound by a compromise entered into by their mother, a Hindu widow.

In so far as Mt. Hans Kunwar purported to act for her daughters as their guardian, it is possible that she was not entitled to de so, so as to prevent the plaintiff from claiming the property which she has claimed in the suit which has given rise to this appeal. We however think that the matter may be regarded in another way. Mt. Hans Kunwar represented the estate of her husband. Certain attacks were being made against the estate. It was her duty to protect it. Let us presume that the claims were false. If that was so, Narain Singh was asserting a title to property which was not his and Sundar Singh and others who were setting up the existence of a joint family were aiming at the destruction on the estate in so far as it was the estate of a separated Hindu. We would refer to the case of 1922 P C 356 (7). In their judgment in that case, their Lordships of the Privy Council referred to the case of 6 C L R 76 (6). They said that it must be remembered what that case really was and that if the language was rather wide no one referring to the case in full could be misled by it. Their Lordships approved of the doctrine laid down in 1915 Cal 629 (8). Their Lordships advered upon the difficulties which would arise if a Hindu widow in possession of her husband's estate was unable to enter into a valid compromise binding the reversioners so as to prevent injurious litigation, as would be the case if such a

1. Beni Din v. Ram Naresh, 1929 All 824=12 I C 99.
2. Farid un-nisa v. Mukhtar Ahmad, 1925 P C 204=89 I C 649=52 I A 342=47 All 703 (P C).
3. Annoda Mohun v. Bhuban Mohini Debi,(1910) 28 Cal 546=28 I A 71=8 Sar 58 (P C).
4. Kali Bakhsh Singh v. Ram Gopal, (1913) 36 All 81=21 I C 985=41 I A 23.
5. Amrit Narayan Singh v. Gaya Singh, 1917 P C 95=44 I C 408=45 I A 35=45 Cal 590 (P C).
6. Imrit Kunwar v. Boop Narain Singh, (1880) 6 C L R 76 (P C).
7. Ramsumran Prasad v. Shyam Kumari, 1922 P C 356=69 I C 71=49 I A 342=1 Pat 741 (P C).
8. Mahendra Nath Biswas v. Shamshul-nissa Khatun, 1915 Cal 629=27 I C 954.

compromise was not binding upon them. We consider that in the circumstances of the case before us it was very necessary for Mt. Hans Kunwar to enter into the agreement into which she did enter so as to avoid the possibility of litigation between the members of the family. It appears to us to make no difference whether the arbitration was a real one in the sense that the arbitrators decided the questions at issue or whether the transaction was a mere settlement between the members of the family which was embodied in the form of an agreement to refer and an award. Mt. Hans Kunwar was representing her husband's estate which would pass in course of time to her daughters or to other reversioners and she came to a settlement which was very beneficial to the daughters. We consider that the plaintiff-respondent is bound by the arrangement and we cannot fail to notice that she is in possession of the separately acquired property without dispute as a result of that arrangement. We find that the plaintiff-respondent had no title to the property which she claimed. We allow the appeal setting aside the judgment and decree of the learned Subordinate Judge we dismiss the suit with costs in both the Courts.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 292 (1)

BENNET, J.

Habibul Razzaq—Judgment-debtor — Applicant.

v.

Shiam Bahadur—Decree-holder— Opposite Party.

Ex. Second Appeal No. 947 of 1933, Decided on 30th October 1934, from decision of Dist. Judge, Budaun, D/- 2nd May 1933.

Civil P. C. (1908), S. 60 (1) (c)— "Agriculturist" — Cultivation by hired labourers by person having different occupation — Such person is not agriculturist.

An agriculturist refers to an occupation and a man is an agriculturist who engages in the cultivation of land, that is who ploughs land, sows the crop and attends to it. The cultivation of land by hired labourers by a person who has a different occupation does not constitute the person an agriculturist. [P 292 C 2]

Mushtaq Ahmad—for Applicant.

Judgment.—This is a second appeal by a judgment-debtor who claims exemption of the house in which he resided from attachment and sale in execution of a simple money decree. The exemption is claimed on the ground that he is an agriculturist under S. 60 (1) (c). I understand that an agriculturist refers to an occupation and that a man is an agriculturist who engages in the cultivation of land, that is, who ploughs land, sows the crop and attends to it. The appellant admittedly does not cultivate land himself by his own efforts. His occupation is that of a mukhtar-i-am. As part of his pay he receives from his master some land free of rent in a village which is 16 or 17 kos from his residential house in the town of Budaun. This land is cultivated by labourers hired by the appellant. I do not consider that the cultivation of land by hired labourers by a person who has a different occupation constitutes that person an agriculturist. Accordingly I dismiss this second appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 292 (2)

NIAMATULLAH AND ALLSOP, JJ.

Narain Mohan Dev—Appellants.

v.

Mt. Krishna Ballabhi Devi and *others* —Respondents.

Civil Case No. 388 of 1931, Decided on 12th December 1934, from report of Chief Inspector of Stamps, United Provinces.

Court-fees Act (1870), Art. 17 (6) — Suit with prayer for injunction and prayer for framing scheme so that plaintiff and defendant may carry on service of idol and enjoy emoluments of office separately is in nature similar to partition suit — Art. 17 (6) applies.

Where plaintiffs instituted a suit in order to obtain an injunction restraining the defendants from interfering with the service by the plaintiffs of an idol and to frame a scheme, so that they and the defendants might be entitled to carry on the service of the idol and to enjoy the emoluments of the office separately and without interference from each other :

Held : that there was no question of declaration and that the suit, though it could not be described as a suit for partition, yet it was in a sense a suit which may be regarded as a suit of a similar nature for the purpose of estimation of court-fees and that Art. 17 (6) applied. [P 293 C 1]

P. L. Banerji—for Appellant.

K. N. Katju and *I. B. Banerji* — for Respondents.

Muhammad Ismail—for the Crown.

Order. — The plaintiffs-respondents instituted a suit in order to obtain an injunction restraining the defendants from interfering with the service by the plaintiffs of an idol and asking the Court to frame a scheme, so that they and the defendants might be entitled to carry on the service of the idol and

to enjoy the emoluments of the office separately and without interference from each other. The first relief was valued at a sum of Rs. 100 and the court-fee was paid ad valorem. The second relief was valued for the purposes of jurisdiction at a sum of Rs. 5,400, but a fixed court-fee of Rs. 10 was paid upon it. An objection has been taken by the Chief Inspector of Stamps that this was a suit for a declaration with a consequential relief of injunction and that an ad valorem court-fee should have been paid upon the value assessed on the second relief for the purposes of jurisdiction. It seems to us that there was no question of declaration. The plaintiffs maintained that they were enjoying the emoluments of the office which they claimed and that they were carrying on the worship, although they said that the defendants were inclined to interfere with them.

It was not maintained by the plaintiffs that the defendants had not a joint right with them to worship the idol and to enjoy the emoluments attached to the office. It seems to us that, although this cannot be described as a suit for partition, yet it is, in a sense, a suit which may be regarded as a suit of a similar nature for the purpose of estimation of court-fees. We think that this is a suit coming under Art. 17 (6), Sch. 2, Court-fees Act, in that it is not possible to estimate the subject-matter in dispute at a money value. Suits for partition have always been held to be governed by this article; and we suppose that the reason for this is that a person in possession as a co-sharer who asks for partition is not asking for any advantage which can be estimated at a money value. He is already entitled to a share and all that he asks is that that share for the purposes of convenience should be divided by metes and bounds, so that he may have exclusive enjoyment of part of the property instead of joint enjoyment of the whole. The present relief is of a similar nature. The plaintiffs have asked that there should be some scheme by which they can enjoy separately the fruits of the office which they hold jointly with others instead of enjoying the emoluments jointly with them at all times. We consider therefore that this is a suit to which Art. 17 (6), Sch. 2, applied, and we hold that the court-fee paid was sufficient.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 293

BAJPAI, J.

Ajodhya Prasad Dube—Plaintiff—Appellant.

v.

Mahabir and *others* — Defendants — Respondents.

Second Appeal No. 1211 of 1932, Decided on 21st December 1934, from decision of Addl. Judge, Basti, D/- 2nd June 1932.

(a) Practice—Document not objected to in lower Court—Appellate Court cannot reject it—Evidence.

The question of proof is a question of procedure and if it can be shown that the documents went in without any objection in the trial Court, it cannot be urged in the appellate Court that they were not properly proved in the Court below [P 294 C 1]

(b) Practice—Appraisement of witnesses is final and binding in second appeal.

The appraisement of the witnesses by the lower Court is final and cannot be questioned in second appeal. [P 294 C 1]

A. P. Pandey and *K. N. Pandey* — for Appellant.

M. A. Aziz—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit brought by him for the recovery of arrears of rent for the years 1333 and 1334 Fasli. The suit was filed upon the allegation that the rent was paid by the defendants in kind. The Court of first instance decreed the plaintiff's suit for about Rs. 121. On appeal the learned Judge dismissed the plaintiff's suit holding that there was no proper evidence to enable the Court to justly estimate the claim of the plaintiff.

The facts are that two bahi khata jinsi (grain rent ledger), one for the year 1333 and the other for the year 1334, were filed by the plaintiff. The first of them was marked Ex. A and was prepared by Badri Lal patwari and the second was marked Ex. B and was prepared by Dwarka Prasad Patwari. These documents were presumably prepared under the provisions of S. 32, Cl. (e), Land Revenue Act. They were however filed by another patwari and the plaintiff neither examined Badri Lal nor Dwarka Prasad, although perhaps both of them are alive. The documents were tendered in evidence in the Court of first instance. They were exhibited and the patwari who filed them was examined with reference to these two documents. No objection was taken by the defendants in the trial Court as to the admissibility of these documents on the ground that they had not been properly proved. When

the defendants' appeal came up for hearing the lower appellate Court repelled several objections taken by the defendants and although there does not seem to be any specific plea on the question of the admissibility of the bahi khata jinsi filed by the plaintiff, yet the lower appellate Court of its own accord came to the conclusion that as the patwari who had prepared these ledgers had not been produced in Court to prove them legally the ledgers were of no value at all and disbelieving the other witnesses produced by the plaintiff came to the conclusion that the plaintiff's claim was not proved by proper evidence.

In second appeal it is contended before me by the plaintiff that the lower appellate Court should not have rejected the two bahi khatas when no objection was taken to them in the trial Court by the defendants. I agree with this contention. The two documents were not inherently inadmissible. They were relevant, but in order to form part of the record they had to be formally proved. The question of proof is a question of procedure and if it can be shown that the documents went in without any objection it cannot be urged in the appellant Court that they were not properly proved in the Court below. I am therefore of the opinion that the lower appellate Court should not have rejected them. At the same time his appraisement of the other witnesses produced by the plaintiff is final and cannot be questioned in second appeal before me. Under these circumstances I think the proper course for me is to send back the case to the lower appellate Court with directions to that Court to allow the plaintiff to produce the two patwaris Badri Lal and Dwarka Prasad. It must now be taken that the defendants are objecting to the two documents and they require to be formally proved, but the plaintiff must be given an opportunity to prove the two documents.

The result is that I allow this appeal and in my inherent jurisdiction send back the case to the lower appellate Court with the directions already mentioned. The plaintiff will be given an opportunity of proving the two bahi khatas and the Court below will after considering that evidence decide the appeal. It must be clearly understood that as regards the value to be attached to the two documents, if they are proved, that Court is the final Judge and it can even now if it thinks that the documents have no evidentiary value, dismiss the plaintiffs' suit or give a decree to the plaintiff for a lesser amount than awarded by the trial Court, but as there were no cross-objections by the plaintiff before the lower appellate Court it is not possible for that Court to award a larger amount than awarded by the trial Court. Costs here and heretofore will abide the event.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 294

BENNET, J.

Mt. Bhagwati Devi and *another* — Applicants.

v.

Gajadhar Prasad—Opposite Party.

Criminal Ref. No. 917 of 1934, Decided on 18th December 1934, from order of Sess. Judge, Aligarh, D/- 17th September 1934.

Criminal P. C. (1898), S. 488 — Compromise arrived at as to amount of maintenance —No other terms or conditions — Magistrate can enforce order by taking proceedings under S. 488.

Where a compromise is arrived at only as to amount of maintenance and no other terms or conditions are imposed in it a Magistrate can enforce order by taking proceedings under S. 488: 1932 *Lah* 349, *Ref.* [P 295 C 1]

B. S. Darbari—for Applicants.

Asst. Government Advocate — for the Crown.

Order.—This is a reference by the learned Sessions Judge of Aligarh asking this Court to set aside the order of a Magistrate who has refused to enforce an order for maintenance by taking proceedings under S. 488, Criminal P. C. The Magistrate refused on the ground that there had been a compromise between the parties and that he considered that a Criminal Court could not enforce a compromise and that only Civil Court could enforce it. The original order for maintenance was passed on 20th April 1930, and the order sets out that an application for maintenance was made on behalf of Mt. Bhagwati Devi and her son against Gajadhar Prasad, her husband, that Gajadhar Prasad had agreed to pay Rs. 50 maintenance for both, wife and child, per month and that the offer had been accepted. The Magistrate then passed an order for the sum of Rs. 25 to be paid monthly to Mt. Bhagwati Devi and a sum of Rs. 25 to be paid to her minor son from 1st April 1930. The Magistrate who passed the order clearly considered that he was passing the

order under S. 488, Criminal P. C. If Gajadhar Prasad had considered that he was making a compromise which can be enforcible by a Civil Court then he ought to have objected in revision or otherwise to the terms of the order of the Magistrate. Various rulings have been mentioned, but I understand that those rulings referred to cases where there is a compromise in writing between the parties which is of a nature that could be enforced in a Civil Court.

In the present case there was no such compromise and no terms were imposed in the compromise. All that had been happened was that a compromise was arrived at as to the amount of maintenance. There is no ruling of this Court to the effect suggested by the Magistrate and the rulings which have been referred to of other High Courts do not appear to me to touch the present matter. For the applicant reference has been made to 1932 Lah 349 (1.) In this ruling it was held that a Magistrate can pass an absolute order under S. 488, Criminal P. C., based on a compromise between the parties referring only to the amount fixed as maintenance and nothing else. This case is similar to the present and shows that the former rulings of the Punjab High Court were considered to be different as those rulings have been considered in the judgment in question and the case has been distinguished from those former rulings. Accordingly I accept the reference of the learned Sessions Judge and I set aside the order of the Magistrate and direct that he should proceed to dispose of the application according to law.

K.S. *Reference accepted.*

1. Pal Singh v. Mt. Nihal Kuar, 1932 Lah 349= 137 I C 364=1932 Cr C 430=33 Cr L J 488.

A. I. R. 1935 Allahabad 295

Special Tribunal

THOM AND HARRIS, JJ. AND SIR TEJ BAHADUR SAPRU.

Election of Bar Council, In the matter of.

Application, Decided on 19th November 1934.

(a) Bar Councils Act (1926), S. 26 —Publication of rules in Local Official Gazette is not condition precedent to their coming into force—Interpretation of statutes.

One of the grounds on which a statutory rule or a bylaw may be treated as ultra vires is that it has not been made, sanctioned and published in the manner prescribed by the statute which authorises the making of that rule. S. 18 provides that all rules made under this Act shall be published in the local official gazette of the province in which the High Court, by which or with whose sanction the rules are made, exercises jurisdiction. It provides only for the manner of the publication of the rules but it does not make the publication of these rules in the local official gazette a condition precedent to their coming into force. [P 297 C 1]

(b) Bar Councils Act (1926), S. 6 (2)—Bar Council approving rules before sanction of High Court—But not doing so after High Court's sanction — Omission is only irregularity.

Where the Bar Council approved of certain rules and subsequently the High Court sanctioned them but the Bar Council did not again pass those rules:

Held: that the omission on the part of the Bar Council, which is a statutory body, strictly to follow the provisions of the law as laid down in S. 6 (2) was no doubt to be regretted, but that it did not amount to an illegality. [P 297 C 2]

(c) Election—For election can be set aside; it must be shown that it was not conducted according to rules framed for holding it.

Before a Court will set aside an election because of any irregularities it must be satisfied that the election was not an election in substance conducted under existing election law according to the rules framed for the holding of the election: *Woodward* v. *Sarsons*, (1875) 10 *C. P.* 733, *Rel. on.* [P 298 C 1]

(d) Practice—Statutory body must strictly follow law to which it owes its existence.

It is incumbent upon a statutory body to strictly follow the law to which it owes its creation and existence and the rules which are framed in accordance with the statute creating it and defining its powers and duties. This is all the more incumbent in the case of a learned and professional body like the Bar Council, which must be presumed to know the law and its implications. [P 299 C 1, 2]

K. Verma—for Council.

Baleshwari Prasad—for Objector.

Order.—The applicants are members of the Bar. In their applications they seek to have the election of the opposite parties, who are also members of the Bar, as members of the Bar Council, declared null and void.

The opposite parties were declared duly elected as members of the Bar Council on 11th August 1934. The applicants challenge their election on the ground that the Bar Council elections were held under rules which were not in force at the time the elections took place. The applicant, Mr. Baleshwari Prasad, challenges the election of the opposite parties on certain other subsidiary grounds. The opposite parties did not oppose the application and were not represented before the Tribunal.

By S. 6, Bar Councils Act, of 1926, provision is made for the framing of

rules governing amongst other matters the manner in which elections of members of the Bar Council shall be held. Sub-S. (2), S. 6 is in the following terms:

"The first rules under this section shall be made by the High Court, but the Bar Council may thereafter, with the previous sanction of the High Court, add to, amend or rescind any rules so made"

Under the powers conferred upon it by the Bar Councils Act the High Court of Judicature at Allahabad in the year 1926 framed rules for the holding of Bar Council elections. These rules came into force on 1st June 1928. A Bar Council election was held in the months of June, July and August 1934. Prior to this election the Bar Council under the powers conferred upon it by S. 6 (2), Bar Councils Act, framed new rules under which the election was to be held. These rules were approved of by the Bar Council and received the sanction of the High Court. They were published in the local Gazette on 14th July 1934. Prior to this date however on 21st April 1934, in the local Gazette, the Bar Council modified dates for the reception and secutiny of nomination papers, the issue and return of voting papers, the counting of votes and announcement of elections. Nomination papers were to be returned between 25th June and 7th July. The scrutiny of the nomination papers was to be held on 8th and 9th July. The return of the ballot papers which were issued for the purpose of election was to be before or on 7th August. Counting of votes was fixed for 8th, 9th and 10th August. The announcement of the result of the election was to be made on 11th August

The election which the applicants now seeks to be declared invalid was conducted under the rules which were published on 14th July 1934. The nomination. scrutiny, election, counting of votes and the announcement took place upon the dates notified in the local Gazette of 21st April 1934. The contention of the applicants is that inasmuch as the amended rules were not published in the Gazette in accordance with provisions of S. 18, Bar Councils Act, they were not in force on the dates when the nomination of candidates and the scrutiny of nomination papers took place and that therefore the whole proceedings in connection with the elections are fundamentally vitiated. The main question for our decision is whether the rules which were published on 14th July 1934 under which admittedly the Bar Council elections were held, were in force between 25th June and 11th August 1934.

If the rules published on 14th July 1934, were not in force between these two dates we were inclined to the view that the election of the opposite parties is invalid. It is not necessary however for us to make any pronouncement on this matter. In the view we take of the main contention of the applicants, namely, that the rules under which the election was held were not in force during the period of the nomination and the scrutiny of the nomination papers, the question of the effect of the alleged non-compliance with the old rules does not arise.

The applicants contended that although the new rules may have been passed prior to 25th June, they did not come into force until they were published in the official gazette in accordance with S. 18, Bar Councils Act. S. 18 is in the following terms:

"All rules made under this Act shall be published in the Local Official Gazette of the province, or of each Province, as the case may be, in which the High Court by which or with whose sanction the rules are made exercises jurisdiction,"

The contention of the applicants is that since the provisions of S. 18 are mandatory no rules passed under S. 6, Bar Councils Act, can come into force until they are published in the local official Gazette. In our view this contention is untenable. Had the legislature intended that rules framed under S. 6 (2), Bar Councils Act, should not come into force until the publication of these rules in the local official Gazette it would have said so in specific terms. The applicants ask the Tribunal to read into S. 18, Bar Councils Act, a provision which is not there. They were unable to suggest, any sufficient reason for so extending the perfectly plain and simple provisions of the section. Learned counsel for the Bar Council, who appeared before the Tribunal and was allowed to address the Tribunal in the capacity of amicus curie, contended that wherever the legislature intended that rules made under statutory enactments should be published before they come into force it has made special provision to that effect. In support of his argument he referred to S. 79, Sub-S. (3), Provincial Insolvency Act. By this sub-section it is declared that all rules made under this section shall be published in the Gazette of India or in the local official Gazette, as the

case may be, and shall on such publication have effect as if enacted in this Act. The intention of the legislature clearly was that publication should be a condition precedent to the rules coming into effect. Thus the words "on such publication" are inserted in the sub-section. No such words however appear to S. 18, Bar Councils Act. Learned counsel for the Bar Council referred further in this connection to the Guardians and Wards Act, S. 50. Sub-S. (2). In this section it is enacted in specific terms that certain rules shall not have effect until they have been approved by the Local Government and published in the official Gazette. It seems to us that one of the grounds on which a statutory rule or a byelaw may be treated as ultra vires is that it has not been made, sanctioned and published in the manner prescribed by the statute which authorises the making of that rule (See Craies on Statute Law, p. 266). S. 18, Bar Councils Act, provides that all rules made under this Act shall be published in the local official Gazette of the province in which the High Court, by which or with whose sanction the rules are made, exercises jurisdiction. It provides only for the manner of the publication of the rules but in our opinion it does not make the publication of these rules in the local official Gazette a condition precedent to their coming into force.

We are satisfied that there is no force in the contention of the applicants that the rules under which the Bar Council elections were held and which were published on 14th July 1934 did not come into operation until that date.

Learned counsel for the Bar Council was requested to file an affidavit to prove that the new rules had been framed and passed in accordance with the provisions of S. 6, Sub-S. 2, Bar Councils Act. According to this affidavit the rules were passed by the Bar Council on 18th February 1934. The rules were submitted in accordance with the above sub-section to the High Court on 27th February 1934. The rules were approved by the High Court and approval was intimated by letters dated 29th March 1934. Learned counsel for the applicants contended that the Bar Council in framing the new rules had not observed the provisions of S. 6, Sub-S. (2) of the Act and therefore these rules were invalid and the election held under the rules was null and void. From the affidavit filed by Mr. Kamla Kant Varma it appears that the Bar Council appointed a sub-committee to frame the rules under Sub-S. (2), S. 6, Bar Councils Act. The sub-committee reported in due course and the rules suggested by them were passed by the Bar Council. Thereafter these rules obtained the sanction of the High Court. The contention of learned counsel for the applicants was that, inasmuch as the rules were not again passed by the Bar Council after they had received the sanction of the High Court, the provisions of Sub-S. (2), S. 6 had not been strictly complied with. It is true that the Bar Council had approved of the rules before they received the sanction of the High Court, We are are satisfied however that there was substantial compliance with the provisions of the Act though the procedure enjoined in the section was not strictly followed as it should certainly have been. The omission on the part of the Bar Council, which is a statutory body strictly to follow the provisions of the law as laid down in S. 6 (2) is no doubt to be regretted, but in in our opinion it does not amount to an illegality. It is no more than an irregularity and it has not been shown to us that that irregularity has in any manner prejudiced the applicants.

We hold therefore for reasons above given, that the rules under which the Bar Council elections were held were passed in accordance with the provisions of the statute and that they were in force at the time when the elections were held.

We now proceed to consider the other grounds upon which the validity of the election is challenged in the application of Mr. Baleshwari Prasad. He has contended in the first place that the election is invalid in respect that R. 2 (1) framed by the Bar Council was not complied with. secondly, that R. 4 (1) framed by the Bar Council was not complied with. The chairman of the Bar Council, it is alleged, did not publish any notice in the local official Gazette calling for nomination by advocates; the only notice published in the Gazette was in the issue of 21st April 1934, fixing dates for nomination and election. Thirdly, it is alleged that many advocates who were on the rolls of the advocates of the High Court were practising in Oudh, Delhi, Ajmere and Native States and that no notice was sent to the District Judge or Bar Associations of these places as required

by R. 1. No nomination form or list was sent out to these places, although ballot papers were sent. Fourthly, it is objected that whilst according to R. 4 (1) of the Rules any advocate was entitled to nominate an advocate who was on the rolls on the date fixed for nomination, that is, 8th July 1934, he could in fact nominate under R. 2 (1) only those advocates who were enrolled two and a half months before the elections and whose names were entered in the list. Fifthly, The proceedings were irregular as certain nomination papers were not received by post and were not handed over personally and that they were therefore it was argued invalid and should have been rejected; the contention being that the words "delivered by hand" meant "delivered personally." Sixthly, it was argued that certain nomination papers were not received in envelopes bearing on the outside the words "Bar Council nomination" and that these nomination papers, were invalid and should have been rejected. Seventhly, it was objected that the votes of advocates who were in Government State service should not have been counted, as during the period of their service they were technically outside the jurisdiction of the High Court and not entitled as of right to practice in the High Court. Eighthly, it was contended that certain directions printed in the ballot papers were misleading and contrary to the rules and this irregularity invalidated the election.

We consider it quite unnecessary to deal with all these objections to the validity of the Bar Council election individually. None were admitted by the Bar Council or supported with evidence by the applicant. It may well be that there were certain irregularities in the conduct of the Bar Council election. But before a Court will set aside an election because of any or all of these irregularities it must be satisfied that the election was not an election in substance conducted under existing election law according to the rules framed for the holding of the election. The law upon this matter has been clearly laid down in 10 C P 733 (1) and 5 O M and H 125 (2). Commenting upon the first case Rogers in Vol. 2 of his book on the law of elections states:

"As a rule it way be said that to whatever extent the provisions of an Act of Parliament are violated even wilfully, if it does not enact that the consequences of those Acts void the election the election will not be invalidated."

In the Islington case Kennedy and Darling, JJ., stated:

"Our opinion is that an leection ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of an election where the Court is satisfied that the election was made in substance conducted under the existing law, and that the result of the elcction, that is, the success of the one candidate over the other, was not, and could not have been affected by those transgressions."

Now learned counsel for Mr. Baleshwari Prasad has failed completely to show that any of the irregularities which are set forth in the application were committed with any corrupt motive or that they could possibly have affected the result of the election. To take as an example one of the alleged irregularities. Learned counsel contended that certain advocates who were on the rolls as a result of the rules passed by the Bar Council and the fixing of the dates for nomination and election were not eligible for nomination, nor could they nominate or vote at the election. He referred to those advocates whose names were placed upon the rolls after the notice in regard to nomination and holding of the election. His complaint was that as a result of the rules passed by the Bar Council, advocates enrolled between 15th May 1934 and 7th August 1934 could not vote, nor could any other advocate nominate or vote for them. It is inevitable in the very nature of things that a certain number of advocates who may be on the rolls at the time of the election cannot be nominated where the names are placed upon the rolls after the date fixed for final nomination. Be that as it may, it appears from the affidavit filed by the Bar Council that only two gentlemen were enrolled as advocates during this period and we can hardly believe that a responsible body like that of a professional electorate would nominate or elect to the Bar Council advocates whose total period of professional life was not more than two months or so, or that the exclusion of these two advocates from the election could legitimately be treated by a professional electorate like that of the advocates as a grievances. It cannot be seriously contended that the fact that these two advocates could not be nominated or could not nominate or vote themselves, had any effect at all upon the result of the Bar Council election.

1. Woodward v. Sarsons, (1875) 10 C P 733=44 L J C P 293=32 L T 867.
2. Islington, (1901) 5 O'm & H 125.

We are satisfied that none of the irregularities referred to in Mr. Baleshwari Prasad's application, assuming that there were these irregularities, had any effect, or could have any effect, upon the result of the Bar Council election. In the result we dismiss both applications.

We take this opportunity of directing the attention of the Bar Council to the necessity of reconsidering and reframing many of the rules which they have passed under S. 6, Bar Councils Act. We specially direct their attention to the fact that there is no provision in these rules limiting the time within which an application for the setting aside of an election may be filed. This is in our opinion a grave omission which should be remedied before the next Bar Council election.

We would further direct the attention of the Bar Council to the misleading heading of the notification of the new rules published in the local Gazette of 14th July 1934. The notification is headed as follows: "In accordance with R. 3, Bar Councils Act, No. 38 of 1926, it is hereby notified" etc. There is no "R. 3" of the Bar Councils Act and we are at a loss to understand how the notification should have been so inaccurate.

In conclusion we must state that the Bar Councils themselves are responsible in no small measure for these proceedings in which it is sought to have the Bar Council election set aside. Quite clearly they have failed to comply strictly with the letter not only of the Bar Councils Act but of rules which they have framed in pursuance of the power conferred upon them by the Act. Had they complied strictly with the provisions of the Act and with their rules the election would never have been challenged as it has been by the applicants. We are clearly of the opinion that the new rules should have been published long before 14th July. We are further of the opinion that the notification in the Gazette of 21st April should have been framed with strict accuracy. We are frankly astonished that in the framing of their rules and in the conduct of the election the Bar Council should have been so slack and slipshod in their methods as to provide the applicants with the grounds for preferring these applications. In our opinion it is incumbent upon a statutory body to strictly follow the law to which it owes its creation and existence and the rules which are framed in accordance with the statute creating it and defining its powers and duties. This is, in our opinion, all the more incumbent in the case of a learned and professional body like the Bar Council, which must be presumed to know the law and its implications.

At the end of the arguments learned counsel for the Bar Council asked for costs. We are not disposed to allow any costs in view of our observations in regard to the unsatisfactory character of the rules and the irregularities committed by the Bar Council some of which, though not fatal to the election which has been held, seems to us to be grave.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 299

NIAMATULLAH AND ALLSOP, JJ.

Raj Singh and *others* — Defendants—Appellants.

v.

Seth Kishan Lal and *others*—Plaintiff and Defendants—2nd Party — Respondents.

First Appeal No. 266 of 1931, Decided on 10th January 1935, from decision of First Sub-Judge, Saharanpur, D/- 27th March 1931.

(a) Hindu Law — Partition — Separation of one—No presumption that other members also have separated arises.

Where one member has separated from the others, the presumption that the family is joint disappears; but no contrary presumption arises that the other members have separated.

[P 300 C 2]

(b) Hindu Law — Alienation — Manager is not entitled to transfer family property merely because he thinks it will be for benefit of family.

It must not be supposed that the managing member of a joint Hindu family is entitled to transfer the family property merely because he thinks that the transfer will be for the benefit of the family. Some thing more than that is required to make the transaction binding upon the family. It must be a transaction arising out of a situation of which no prudent person acting as manager could fail to take advantage. The manager is not entitled to speculate with the family property, even if he does so in good faith believing that his conduct of affairs will ultimately be of advantage to the family.

[P 301 C 2; P 302 C 1]

K. C. Mital and *Nanak Chand* — for Appellants.

B. Malik, S. K. Mukerji and *Bimal Prasad*—for Respondents.

Niamatullah, J.—This is a first appeal against a decree passed by the learned first Subordinate Judge of Saharanpur, in favour of the plaintiff in

a suit for sale upon the basis of a mortgage. It will be convenient to state certain facts in chronological order. On 3rd August 1923, Kishan Lal, the plaintiff, executed a theka or lease in favour of Ran Singh, one of the original defendants, and of Indarjit Singh who is not a party to this suit. The property comprised in this lease was an area of about 150 village bighas in the village of Landhaura and 85 village bighas in the village of Kabirpur Mazra. The lessees were to pay every year a sum of Rs. 310 to the Government as revenue and a sum of Rs. 1,120 to Kishan Lal. On 22nd December 1924, Kishan Lal sold the land in Kabirpur Mazra to a person who is not a party to the suit and on 23rd December 1924, he sold the property in Landhaura for a sum of Rs. 22,000 to Indarjit and to the original defendants 1-4, i. e. Ran Singh, Balwant Singh, Bharat Singh and Durga Singh. Indarjit acquired one-third of the property and paid for it in cash. The other four vendees, in order to supply consideration on their part executed a mortgage of the property which they had purchased and of certain other property in five villages which is admittedly their ancestral property. The amount secured by this mortgage was Rs. 15,000. The deed of sale and the deed of mortgage were both presented for registration on 23rd December 1926. Then on 22nd December 1930, Kishan Lal instituted the suit which has given rise to this appeal on the basis of the mortgage. He claimed a sum of Rs. 15,000 as principal and a sum of Rs. 14,600 as interest. The rate of interest to which the parties had agreed in the deed was Re. 1 per cent per mensem compound. The plaintiff impleaded not only the four mortgagors, but also their sons and grandsons who were defendants 5-14. As we have already said, the plaintiff obtained a decree from the Court below. This appeal has been instituted by the sons and grandsons of the mortgagors. Their defence to the suit was that they and the four mortgagors were all members of a joint Hindu family and that there was no necessity for the transfer by way of mortgage. We may mention at this stage that Durga Singh is the son of Mohar Singh and that Bharat Singh, Balwant Singh and Ran Singh are the grandsons of Fatch Singh. Mohar Singh and Fatch Singh wer brothers. Indarjit Singh who was concerned in the lease and in the sale is the grandson of Jiwan Singh who was another brother of Fateh Singh's and Mohar Singh's.

The first question which has arisen is whether it is true that the four mortgagors and their sons were all members of the same joint Hindu family. Although the property in the five villages other than the village to which the deed of sale referred is admittedly ancestral, this question of jointness has acquired some importance because it is pointed out that Durga Singh and Balwant Singh had no sons living when the mortgage was executed. Durga Singh's son, Bhopal Singh, was about 8 months old and Balwant Singh's son, Bijai Pal Singh, was about one year old at the date of the institution of the suit. The learned Subordinate Judge in discussing this question has said:

"There is no proof on behalf of the plaintiff that the family of the mortgagors was separate. nor is there any such plea clearly taken in the plaint. There is a presumption of Hindu law that the family is joint and more so in the case of own brothers."

It has been argued that there was no presumption in favour of jointness because Indarjit Singh had admittedly separated from the rest of the family. We may concede that where one member has separated from the others, the presumption that the family is joint disappears; but, we must emphasize the fact that no contrary presumption arises that the other members have separated. In these circumstances, the question whether the defendants were members of the joint Hindu family or not is a question dependent on proof. Learned counsel for the plaintiff-respondent has placed some reliance upon the recitals in the mortgage-deed. In describing themselves the mortgagors have said that Bharat Singh was acting on his own behalf and as the guardian of his son, Raj Bhagwan Singh, and as member and managing head of a joint Hindu family, and Ran Singh has also described himself as the managing head of a joint Hindu family and the guardian of his minor sons. The conclusion which counsel for the plaintiff would have us draw is that the four mortgagors obviously considered themselves as separate, the two who had sons acting as managing members of two separate joint Hindu families consisting of themselves and their sons. He places reliance also upon the fact that each of the mortgagors held himself liable for a definite and separate amount of the mortgage debt. We do not think that any importance can be attached to the recitals in the deed

which evidenced the transaction. A reference has also been made to the sale deed under which specific shares in the property are allotted to the four mortgagors. The same argument applies to this document as to the deed of mortgage. Apart from these documents there is only oral evidence to support the allegation that the members of the family had separated. The witnesses are Munshi Ram, Nihal Singh, Harkesh Singh, Ram Singh and Chater Singh. These witnesses have certainly said that the members of the family are separate, but their evidence is vague and unconvincing. It is not quite clear whether they mean that the various members of the family are separate in the sense that they are no longer members of a joint Hindu family or whether they merely mean that for the sake of convenience they live in separate houses or separate parts of a house and have their meals separately. There is evidence on the other side of a similar kind and all we can say is that none of this evidence is sufficient to justify a definite finding either way.

In these circumstances it is important to consider on which party the burden of proof lies. It has been argued on behalf of the plaintiff that the defendants-appellants have asserted their right to the mortgaged property in face of a definite document which has been executed in his favour and that the burden of proof lies upon them. We cannot agree that there is any force in this argument. The plaintiff has chosen to implead the defendants-appellants and is seeking to obtain a decree against them which will result in their being deprived of the property if it is theirs. In these circumstances we consider that the burden of proof is upon him. In order to illustrate our point we may suppose a somewhat extreme hypothetical case. Say that A who has no title in certain property mortgages it to B. Thereafter B has some reason to suspect that C may be the real owner. B institutes a suit against A on the basis of the mortgage and impleads C. Can it be said that B will obtain a decree against C unless C can positively establish his own title ? Manifestly it cannot. It is an elementary principle that nobody can deprive another of property unless he can establish his own absolute title thereto and if he is a transferee he must establish not only the validity of his transfer but the title of his transferor. No question of title would arise between A and B, but such a question would certainly arise between C and B and B could not obtain a decree against C unless he could establish the validity of his transfer from A and the validity of A's title to the property which he purported to transfer. The position in the case before us is similar. The plaintiff-respondent cannot obtain a decree against the defendants-appellants, who were no parties to the deed of mortgage, unless he can establish that the mortgagors had a right to transfer the whole property to him or at least were entitled to execute a deed which was binding upon their sons the defendants-appellants. We hold therefore that the burden of proof was upon the plaintiff and that, as the plaintiff has failed to establish that the members of the family were separate, we must proceed on the finding that all the defendants were members of a joint Hindu family and that the mortgagors were not the absolute owners of the whole property which they purported to transfer.

The next question which arises is whether the transfer of the ancestral property is binding upon the defendants-appellants. The learned Subordinate Judge has found that this was a transaction which, at the time when the mortgagors entered upon it, was reasonably profitable and advantageous to the family. We do not consider that this finding would justify the conclusion that the transaction was binding upon the defendants-appellants. It is now settled that a transaction entered into by the manager of a joint Hindu family to be binding on the other members need not be one which the manager is compelled to enter into as a defensive measure in order to protect the family property. There may be cases in which a transaction is so advantageous that any prudent person would certainly enter into it and in these circumstances such a transaction would be binding upon the family as a whole. We do not think however that this principle should be extended too far. It must not be supposed that the managing member of a joint Hindu family is entitled to transfer the fa-ly property merely because he thinks that the transfer will be for the benefit of the family. We consider that something more than that is required to make the transaction binding upon the family. We think it must be a transaction arising out of a situation of which no prudent person acting as

manager could fail to take advantage. The manager is not entitled to speculate with the family property even if he does so in good faith believing that his conduct of affairs will ultimately be of advantage to the family.

In the present case there has been some argument about the details of the transaction. It has been pointed out that Indarjit, who was acting on his own behalf, purchased one-third of the property at the sale and that the property in the other village of Kabirpur Mazra was purchased by an independent person, Ram Saran who had nothing to do with the family. It is suggested that there is no reason to suppose that Indarjit and the other vendee were not prudent men who would have acquired property for a price which was unfair. Fighty five bighas was sold for Rs. 4,000 to Ram Saran. The price paid would be at the rate of about Rs. 47 a bigha and at this rate the 450 bighas in Landhaura if of the same quality would be worth very nearly Rs. 22,000. The learned Subordinate Judge has also come to the conclusion that the price was reasonable on another basis. The revenue payable was Rs. 310 and the amount of rent paid by Indarjit and Ran Singh as lessees was Rs. 1,020 a year. He has thought that the lessees would not have taken the lease unless they had hoped to make a reasonable profit out of it and he says that even if this profit is considered to be no more than Rs. 800 a year, even then the annual profit would be Rs. 1,820 and at 25 years' purchase the capital value would be Rs. 22,000. We very much doubt whether any person would give a lease of property bringing in an annual income of Rs. 1,820 for a sum of Rs. 1,020. We realise that the mortgagors may have hoped to make a certain income out of the property, but we find it difficult to understand how they could have expected to pay off the principal debt of Rs. 15,000. The interest alone would have amounted to Rs. 1,800 a year.

It has been argued that the real reason why the mortgagors purchased the property in Landhaura and transferred that in the other five villages was that they had hopes of bringing a large part of the Landhaura property under their personal cultivation because it was near their homes whereas the land in the other villages was largely in the possession of tenants and those villages were some distance away from the place where they live. Even if this was so, it does not appear that the transaction was one that was very clearly for the benefit of the family. The most that can be said for it is that it was not obviously a foolish transaction and that it might in some circumstances have been a success. That, as we have said, is not a sufficient reason for holding that the transaction was binding upon the defendants-appellants. It was at best a speculation which might or might not have been successful. The managing members of a joint Hindu family cannot transfer the family property in circumstances such as these. We hold therefore that the transaction was not binding upon the defendants-appellants and that the plaintiff-respondent is not entitled to a decree against them upon the basis of the mortgage.

As a result of our findings we must set aside the decree of the Court below; but we feel that we cannot dismiss the suit entirely because if we did so, the result would be that the defendants would retain the property which they had purchased under the deed of sale and would not supply any consideration whatsoever to the plaintiff. This aspect of the affair was present to our minds during the course of the arguments and we suggested to learned counsel for the plaintiff-respondent that there might be certain courses open to us which protect him as far as was legally possible. These courses were: (1) to give the plaintiff-respondent a personal decree against the four defendants who executed the deed of mortgage; (2) to return the property in Landhaura to the plaintiff, and (3) to give the plaintiff a decree on the basis of his mortgage against the Landhaura property alone and to leave it to him later to obtain a personal decree against the mortgagors under O. 34, R. 6, Sch. 1, Civil P. C. We suggested that he might consult his client and inform us which course he would prefer that we should take. He now tells us that his client would prefer to get a personal decree against the four mortgagors.

We consider that we can legally pass the decree which the plaintiff-respondent desires us to pass. It may be that Durga Singh, Ran Singh, Balwant Singh and Bharat Singh, purported to acquire the property by means of the deed of sale not only for themselves, but on behalf of the family as a whole and that when they executed the deed of mortgage they purported to execute it

on behalf of the whole family. We have found however that they were not entitled to execute the mortgage on behalf of the whole family or to bind the family to supply consideration for the sale and we are prepared therefore to find and we do find that the sale and the mortgage were together a transaction into which they entered personally on their own behalf in so far as it affected the property in Landhaura. That being so, they were under a personal liability to pay the Rs. 15,000 which was the price of the property which they purchased, and there is no reason—except that two of them are dead—why a personal decree should not be passed against them in accordance with the separate liabilities which they undertook to meet. The two who are dead are Balwant Singh and Ran Singh. We cannot pass a personal decree against them, but we can pass a decree against their assets in the hands of the defendants-appellants and we would make it clear, if it is not clear already, that those assets include their shares in the property in Landhaura which was sold to them by the plaintiff-respondent.

We allow the appeal and set aside the decree of the Court below, but we substitute for that decree a personal decree for Rs. 2,500 against Bharat Singh, for Rs. 2,500 against the assets of Balwant Singh in the hands of the defendants-appellants for Rs. 5,000 against the assets of Ran Singh in the hands of the defendants-appellants and for Rs. 5,000 against Durga Singh with interest at the contractual rate in each case up to the date of the institution of the suit and pendente lite and future interest at the rate of 6 per cent per annum. The defendants-appellants will get their costs throughout from the plaintiff-respondent and the plaintiff-respondent will get his costs from the defendants-respondents who still survive and from the assets in the hands of the defendants-appellants, Balwant Singh and Ran Singh.

K.S. *Appeal allowed.*

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NIAMATULLAH AND ALLSOP, JJ.

Magan Lal—Defendant—Appellant.

v.

Mt. Krishna Bibi—Plaintiff—Respondent.

First Appeal No. 531 of 1930, Decided on 29th November 1934, from decision of Sub-Judge, Allahabad, D/- 30th June 1930.

(a) Hindu Law — Joint family — Father and son are presumed members of joint family — But no presumption that they own joint family property.

A Hindu father becomes a member of joint Hindu family with his son and as soon as one is born or is adopted. There is a presumption that father and son are members of a joint Hindu family. There is however no presumption that the two own any joint family property. [P 305 C 2]

(b) Practice—Pleadings —Plaintiff closing his case—Defendant should not be allowed to raise new defence based on evidence disclosed which is substantially different from case in written statement.

The defendant should not be allowed to base his defence on the case disclosed in the course of the evidence led by him, after the plaintiff had closed her case, if it is substantially different from case in written statement and such as to take plaintiff by surprise. [P 306 C 2]

(c) Hindu Law — Joint family property — Adoption — Property possessed by adoptive father and subsequently acquired property can be treated as joint family property of two, only if adoptive father has abandoned all his separate claims to it— Such intention to waive separate right cannot be inferred from acts done merely from kindness or affection nor from fact that adopted son shared in management of father—Conduct of father in disposing of property by gift and will and acquiescence by adopted son — Father held sole owner.

An allegation by adopted son that the properties existing at the time of his adoptive father's death had been acquired by him as a member of a joint Hindu family so as to become joint family properties can succeed only if the evidence goes so far as to establish that the father abandoned all separate claims to the properties which he possessed at the time of the adoption and subsequently treated it and the properties acquired with its aid as joint family properties belonging to himself and his adopted son. A clear intention to waive his separate right must be established and this will not be inferred from acts which may have been done merely from kindness or affection. Merely because the adopted son also shared the management of the business, it is impossible to infer from it that the father and son became joint owners of the entire property originally belonging to the father and that acquired with its aid. And further where the father had disposed of the property by

gift and will and this was acquiesced by the adopted son :

Held : that the father was the sole owner of property held by him at the time of his death.

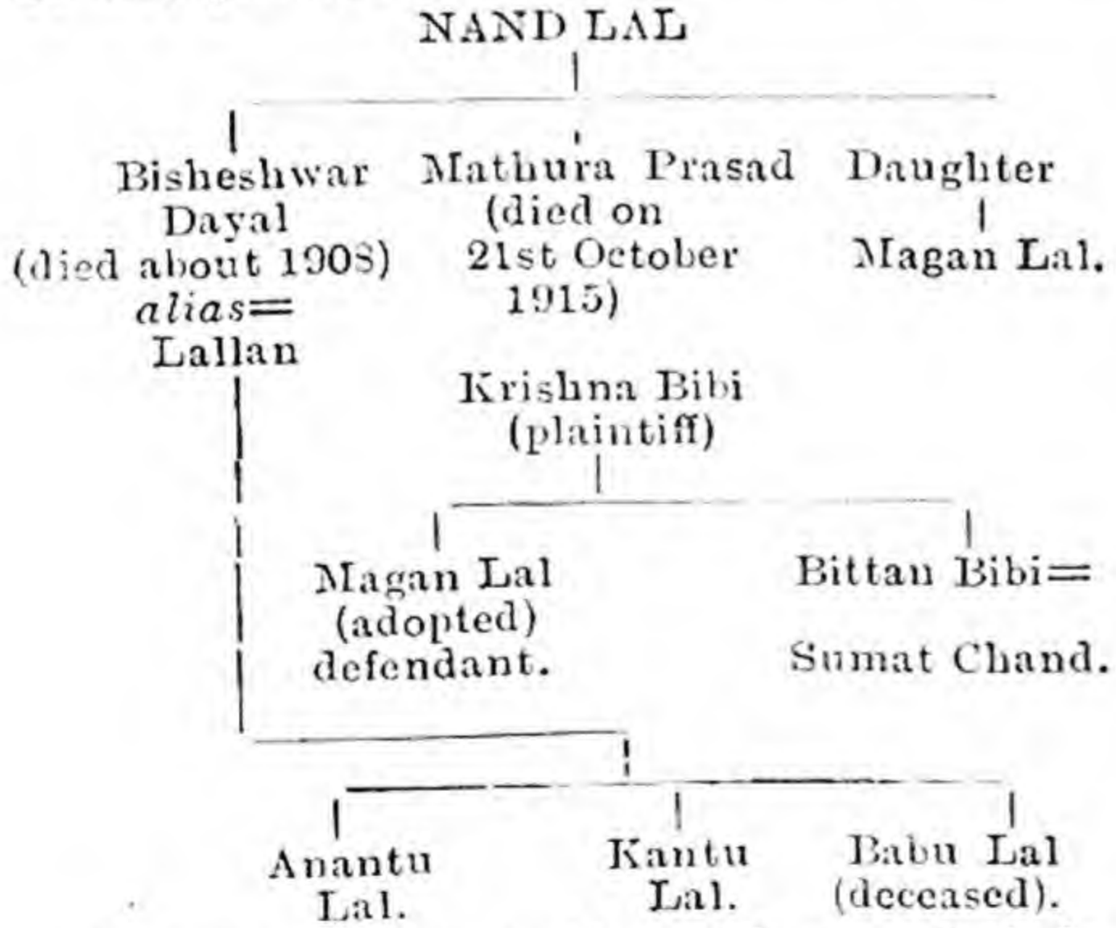
[P 308 C 2; P 309 C 1]

Haribans Sahai and *K. Verma* — for —Appellant.

S. K. Dar, *Panna Lal* and *S. N. Seth* —for Respondent.

Niamatullah, J.—This is an appeal from the decree passed by the learned Subordinate Judge, Allahabad, in a suit brought by the plaintiff-respondent, Mt. Krishna Bibi, against the appellant, Magan Lal, the adopted son of her husband Mathura Prasad and herself, for recovery of Rs. 5,000 in terms of her husband's will, dated 2nd July 1915, for determination of her maintenance which is claimed by her at the rate of Rs. 20 per mensem, and for recovery of arrears thereof for two months before the suit. She also claimed a declaration of her right to reside in the house described in Sch. B annexed to the plaint. Her claim to recover certain moveables, mentioned in Sch. C, was dismissed by the lower Court. She has not challenged that part of the decree either by a separate appeal or cross-objection. The other reliefs, referred to above, were granted by the lower Court, whose decree in respect of them is impugned in appeal.

The following pedigree will explain the facts of the case and the position of the parties:



It will be seen that Magan Lal is the sister's son of Mathura Prasad and was adopted by the latter, his maternal uncle. The factum and validity of adoption have not been questioned before us. The parties belong to a Jain family, and the adoption of a sister's son must have been in pursuance of law or custom applicable to that community. It is common ground that Mathura Prasad's father Nand Lal lived at Shahzapur, a village in the Allahabad District, in which he had, besides a residential house, one-fifth share in certain lands assessed to Government revenue of Rs. 13 and a grove. It is not disputed that its income was negligible. Nand Lal died sometime in seventies. The exact year of his death cannot be stated with certainty. The appellant stated in his evidence that Nand Lal died 50-55 years before the present litigation, i. e., sometime between 1870 and 1875. The family migrated to Allahabad long before the defendant was adopted. According to the plaintiff it was after the death of Nand Lal that Mathura Prasad and Bisheshwar Dayal left Shahzadpur for Allahabad, where they started a "sarrafi" shop with funds raised by sale of ornaments of their womenfolk. It is also alleged by her that Mathura Prasad and Bisheshwar Dayal, who carried on a joint "sarrafi" shop after their migration to Allahabad, made a partition of their joint effects in about 1898. According to the evidence of the defendant's witnesses it was Nand Lal who migrated to Allahabad with his sons and started a "sarrafi" shop with funds brought by him from Shahzadpur and the same business was continued after his death by his sons who made a partition in about 1896-97, after which Mathura Prasad carried on his own business and prospered. The defendant was adopted in 1898 by Mathura Prasad who brought him up. Mathura Prasad died on 21st October 1915, leaving him surviving his widow, the plaintiff, his adopted son, the defendant, and a daughter, Bittan Bibi, who is married to Sumat Chand, a witness for the plaintiff. He left, besides a residential house, property valued by the defendant at Rs. 43,800. The parties lived amicably till a time two years before the suit, when the plaintiff began to reside with her daughter in the same neighbourhood.

The plaintiff's case is that Mathura Prasad, who was the sole owner of the property existing at the time of his death, left a registered will, dated 2nd July 1915, by which he devised a sum of Rs. 5,000 to her with the direction that the same be deposited in his shop and interest at the rate of 6 per cent paid to her regularly. The will also gave her a right of residence in the house occupied by Mathura Prasad. Three other legacies provided for by the will need special mention, as they

have some bearing on an important question to be hereafter discussed. A sum of Rs. 1,000 was left to Bittan Bibi with a direction similar to that in case of the plaintiff as regards deposit and payment of interest. A sum of Rs. 1,000 was left for charity. R. 500 was left to a niece of Mathura Prasad. According to the plaintiff's evidence interest at the rate of 6 per cent on Rs. 5,000 was paid to her before the relations between the parties became strained and she was turned out, as she alleges, or left the house, as the defendant alleges. If the will is genuine and valid, she is undoubtedly entitled to recover the sum of Rs. 5,000 in absolute right. Her right of residence in the house, clearly given by the will, cannot, likewise, be questioned in that case. Her claim to maintenance is based on general Hindu law. The will, which leaves the rest of the property to the defendant, makes no express mention of her maintenance. At the same time it does not negative it. The defence, so far as it has been urged in appeal, is that Mathura Prasad and the defendant formed a joint Hindu family and the entire property existing at the time of Mathura Prasad's death belong to such family, Mathura Prasad having no disposing power over any part thereof. Accordingly it is pleaded that the will relied on by the plaintiff is not valid. The genuineness of the will was also denied.

The original will, which is presumably in possession of the defendant, has not been produced. Secondary evidence in the shape of a certified copy thereof, taken from the Rigistration Office, has been produced by the plaintiff. The lower Court held that the will was duly executed by Mathura Prasad and is a perfectly genuine document. This finding has not been challenged in appeal. The sole question argued before us is whether Mathura Prasad had power to make the various dispositions in favour of the plaintiff. The decision of this question will turn on the answer to the further question whether the property disposed of by the will—and the whole property existing at the time of Mathura Prasad's death is dealt with by the will—belonged exclusively to Mathura Prasad or was joint family property belonging to himself and the defendant. The latter repudiates the will, even though he is the residuary legatee under it. The reason is obvious. He stands to gain if the will is not upheld, and remains a residuary legatee if it is upheld.

The case presented before us on behalf of the appellant is three-fold. It is argued: (1) That Nand Lal, who started the "sarrafi" shop at Allahabad, left assets with which Mathura Prasad and his brother Bisheshwar Dayal continued the "sarrafi" business till they effected a partition in 1897 or thereabout, after which Mathura Prasad continued the "sarrafi" business with the assets allotted to him, and that such assets were mere augmentations of the ancestral business originally started by Nand Lal in which the defendant acquired an interest on his adoption by Mathura Prasad; (2) That assuming the evidence does not establish that the business carried on by Mathura Prasad and Bisheshwar Dayal was a mere continuation of that stated by their father, but was started by the two brothers for the first time with funds which were not ancestral, the evidence on both sides establishes the fact that they jointly carried on the "sarrafi" shop; and being members of a joint Hindu family the shop and its assets should be considered to be the joint family property of the two, and that even in such a case the adopted son, the defendant, acquired an interest on his adoption, although a partition had taken place previously between Mathura Prasad and Bisheshwar Dayal, there being no difference between "joint ancestral property" and "joint property" acquired by the joint efforts of members of a joint Hindu family; and (3) That at all events, it is established that Mathura Prasad associated his adopted son, the defendant, who was a member of a joint Hindu family with him in his business treating the assets which he had received on partition (assuming the same were self-acquired) and subsequent accretions as joint Hindu family belonging to himself and the defendant.

It is noteworthy that the only case pleaded by the defendant in his written statement is the last. The first two are not pleaded directly or indirectly in any part of the written statement. It is alleged in para. 9 of the written statement that the defendant became a member of joint Hindu family with Mathura Prasad on the adoption of the former by the latter. This is right and cannot be disputed. A Hindu father becomes a member of joint Hindu family with his son as soon as one is born or is adopted. There is a presumption that father and son are members of a joint Hindu family. There is however no presumption that

the two own any joint family property. I think that para. 9 of the written statement should not be construed as implying that the defendant became a member of a joint Hindu family with Mathura Prasad at the time of adoption qua all the property he was then possessed of. The plea is no more than an allegation as regards the status of the defendant in Mathura Prasad's family having no reference to any property. The plea as regards his interest in Mathura Prasad's property is contained in the next paragraph (p. 10), in which it is alleged that:

"while living jointly the entire property and assets were purchased and acquired by their joint efforts, and the contesting defendant, as a surviving member of the family, has exclusively become the owner and in possession thereof."

It is clear that the defendant's case rested solely on the allegation that the properties existing at the time of Mathura Prasad's death were joint family properties, because the same had been acquired by the joint efforts of the father and son. It was not the case of the defendant that apart from "joint efforts" such properties were the joint family properties because they had accumulated around the nucleus of ancestral property left by Nand Lal or the nucleus of joint family property received by Mathura Prasad on partition with his brother Bisheshwar Dayal.

Evidence was led by the plaintiff in the first instance. Her witnesses, including Kuntu Lal, one of the sons of Bisheshwar Dayal, and the plaintiff herself, gave evidence in support of the will and regarding the state of the family from the earliest time that could be remembered. According to their story Mathura Prasad and Bisheshwar Dayal left Shahzadpur and started "sarrafi" business at Allahabad after the death of Nand Lal. According to the evidence of Kuntu Lal and Sumat Chand, the two brothers lived separately in two different parts of the same house. Their business was however to all appearances, joint till a partition was effected. The statements of the plaintiff's witnesses so far as they bear on the question whether Mathura Prasad and Bisheshwar Dayal were members of a joint Hindu family owning the "sarrafi" shop as such, are of a casual nature and were not made with a view to admit or controvert the defendant's case as it developed in course of the evidence subsequently led by him. His witnesses attempted to establish a case of continued joint family from the time of Nand Lal down to the partition of 1897. If the defendant's evidence be accepted in its entirety, it certainly lends countenance to the contention that the defendant acquired an interest in the property belonging to Mathura Prasad at the time of his (the defendant's) adoption. As already shown, this is substantially different from the case in the written statement. I am of opinion that the defendant should not be allowed to base his defence on the case disclosed in the course of the evidence led by him, after the plaintiff had closed her case, if it is such as to take her by surprise. Having carefully considered the evidence and the conclusion of law which are reached if the evidence is accepted, I am clearly of opinion that, unless the defendant's case is limited to the written statement, the plaintiff will be greatly prejudiced, she having had no opportunity of meeting the contentions now urged, namely, that the property existing at the time of his adoption was an augmentation of the ancestral estate left by Nand Lal or of the joint family property acquired as such by Mathura Prasad and Bisheshwar Dayal.

The plaintiff has no difficulty in meeting the defendant's case that the "sarrafi" business had been started by Nand Lal and that the same was continued by his sons. The only evidence which the defendant has produced in support of that allegation cossists of the testimony of Chandika Prasad and the defendant himself. On his own showings the defendant has no personal knowledge, because he was not even born when Nand Lal died. All that he can say on the subject is hearsay, which is not admissible in evidence. Chandika Prasad however is an old man of 74 and professes to have personal knowledge of the circumstances in which Nand Lal left Shahzadpur and carried on his business at Allahabad. According to him Nand Lal left Shahzadpur, 60 years before the suit, i. e. 1870 or thereabout, and lived for five or six years thereafter in Allahabad during which time he carried on the "sarrafi" business. He gives his own age at the time to have been 15 years. The reason why Chandika Prasad though not a relation or fellow-casteman of Nand Lal, knew about the affairs, is that his father also migrated to Allahabad and the witness used to sit at Nand Lal's shop to learn work. During this time he heard Nand Lal saying to the witness's father that "he had lost all in weddings and thefts and had only 12 to 15 hundred rupees left."

He stayed at Allahabad only for about 1½ months, during which time he was maintained by Nand Lal. The witness was abroad on service from 1908 to 1915. As against his evidence we have the statement of the plaintiff and one or two of her witnesses that Nand Lal never migrated to Allahabad. In my opinion, Chandika Prasad's evidence is not convincing. The graphic account which he gives of what Nand Lal said or used to do has no ring of truth about it. He is apparently a man of straw and otherwise unreliable.

The second part of the defendant's case has more evidence in support of it. His witnesses, who state that Mathura Prasad and Bisheshwar Dayal lived and carried on business as members of a joint Hindu family are corroborated by the evidence of the plaintiff's witnesses who admit that the two carried on business "jointly." According to the evidence of Kuntu Lal and Sumat Chand, they lived in two separate parts of the same house which had been purchased by them. It was "kachcha" and each re-built his separate portion. It is not clear whether this was after or before the partition. If the defendant's case be accepted and it be held that Mathura Prasad and Bisheshwar Dayal were members of a joint Hindu family and as such acquired joint family property which was divided between them, the question which arises and which is not quite free from difficulty is whether the defendant acquired an interest in such property on adoption, assuming, as we must do on this part of the case, that there was no leaven of the ancestral property left by Nand Lal. The defendant relies on 1926 Bom 408 (1), in which it has been held:

"Where property, acquired in the course of a business carried on by members of a Hindu joint family, is alleged to be joint family property, it depends in each case on the evidence whether the members of the family have lived separately or together and, if the latter, whether they have dealt with the property acquired by their joint exertions as joint family property."

The learned Judge proceeded to lay down that:

"Ordinarily speaking . . . . . there would be a presumption that Narayandas and the plaintiff Haridas constituted a joint Hindu family, and the evidence would be sufficient for the plaintiff to establish that the property acquired by virtue of their exertions in the family bnsiness was held as joint family property."

It seems to be conceded that the rule of Hindu law, under which a son acquires an interest by birth in joint family property, is limited to cases in which the joint family property consists of ancestral property or its augmentation; but the same incidents would attach to the property which is not ancestral property, but as acquired by the joint efforts of members of a joint Hindu family, if they dealt with it as "joint family property" and not merely as "joint property", between which a distinction is drawn, the latter being such as is known to English law under which though the rule of survivorship is applicable, but the sons cannot take an interest by birth. The distinction between "joint family property" and "joint property" has been lucidly explained by Beaman, J., in 32 Bom 479 (2), in which that learned Judge observed that:

"there is nothing either in practice or theory which excludes the possibility of members of the same family starting a family fortune holding it as members of a joint family, and thereby clothing it with all the legal qualities and incidents of joint family property, chief among which is that every member born into the family after the property has acquired that character and before it has been divested by partition obtains by birth an interest in it."

In the view taken by the Bombay High Court the decisive point is whether the acquirers so treated the property as to make it "joint family property" as distinguished from mere "joint property." According to 1926 Bom 408 (1), such intention is to be presumed from the fact that they lived in commensality as members of joint Hindu family and carried on business as such, but the presumption is rebuttable. In 25 Mad 149 (3), the same view is expressed in an obiter dictum. Mayne in his work on Hindu law has adopted the statement of law contained in 1926 Bom 408 (1). As against this, it has to be admitted that the Mitakshara, Chap. 1, S. 1 (27), in which alone the rule on the subject is to be found, this principle is not made expressly applicable to property acquired with joint efforts of members of the joint Hindu family. Ghosh in his work on Hindu law, Vol. 1, Edn. 3, p. 400, says:

"The Allahabad High Court have held that property may be joint with rights of survivorship without being ancestral, and that is also the view of the Bombay High Court. It is, however difficult to see how there can be any right of survivorship when there is no ancestral property The reason given for the existence of such right would be wholly wanting in such a

1. Haridas Narayandas v. Devkuvarbai, 1926 Bom 408=97 I C 820=50 Bom 443.
2. Karsondas Dharamsey v. Gangabai, (1908) 32 Bom 479=10 Bom L R 184.
3. Sudarasnam Maistri v. Narasimhulu Maistri, (1902) 25 Mad 149=11 M L J 353.

case. But when there was some ancestral property subsequent acquisitions should be considered as accretions to it and the rule of survivorship would be applicable."

As a matter of fact, the Allahabad High Court has not subscribed to that view. The learned author refers to 29 All 667 (4), in which the question was whether sons acquired an interest by birth in the property inherited by their father. Referring to the Bombay view, the learned Judges observed:

"It is a well-known rule of the Mitakshara law that property may be joint property without having been ancestral. In the case of such joint property it has never been held that a son would by birth alone acquire an interest in the property. This appears to have been the view adopted by the Bombay High Court in 9 Bom 438 (5) and that seems to be the opinion of Mr. Mayne also. Having regard to the whole context of the rule laid down by the Mitakshara, it is clear that it is only in the case of property which was derived from a paternal ancestor that such property becomes the joint property of the father and his son, and we should have considerable hesitation in agreeing with the opinion expressed by Bhashyam Ayyangar, J., in 25 Mad 149 (3) if he thereby intended to hold the contrary."

This is in accord with the opinion expressed by Ghosh in his book on Hindu law and is opposed to the view taken by the Bombay High Court and Bhashyam Ayyangar, J. It is however an obiter dictum, and the point did not arise before the learned Judges of this Court who had to decide a different question namely, whether the sons of a certain person acquired an interest by birth in the property which he had inherited from his maternal grandfather. It was not alleged in that case that, though the father originally acquired the property by inheritance from his maternal grandfather, he subsequently made it part of joint family property or treated it as such. If this had been the case and if there had been a finding of fact to that effect, the dictum quoted above could not be considered obiter. I think that the question is res integra. I would have proceeded to express an opinion on this important question if the circumstances of this case had made it necessary. In view however of the pleadings I do feel called upon to express an opinion on the divergent views set forth above. I have indicated them at length to show what questions of fact are involved in accepting the defendant's contention. If we adopt the view taken by the Bombay High Court in 1926 Bom 408 (1), and the obiter dictum of Bhashyam Ayyangar, J., in 25 Mad 149 (3), which is pressed upon us by the defendant's learned advocate, it will be necessary to find not only that Mathura Prasad and Bisheshwar Dayal were members of a joint Hindu family but also that the properties, acquired by them became joint family properties, in which their offspring would take an interest by birth. This result will be arrived at by means of a presumption, which is rebuttable according to the two cases last referred to. The plaintiff has had no opportunity of rebutting such presumption and, indeed, of showing that the two brothers, who lived separately, were only tenants-in-common. For these reasons I hold that the defendant should be limited to the only case which is pleaded in his written statement, namely, that the properties existing at the time of Mathura Prasad's death had all been acquired by them with their joint efforts.

The defendant's allegation that the properties existing at the time of Mathura Prasad's death had been acquired by him and the defendant as members of a joint Hindu family so as to become joint family properties can succeed only if the evidence goes so far as to establish that Mathura Prasad abandoned all separate claims to the properties which he possessed at the time of the defendant's adoption and subsequently treated it and the properties acquired with its aid as joint family properties belonging to himself and his adopted son. As their Lordships of the Privy Council laid down in 18 Cal 341 (6), a clear intention to waive his separate right must be established and will not be inferred from acts which may have been done merely from kindness or affection. In the present case, when the defendant was adopted, ex hypothesi he had no interest in Mathura Prasad's properties. Any properties subsequently acquired by Mathura Prasad will be likewise his. The defendant was aged 9 when he was adopted sometime in 1898. He says that he joined his adoptive father in the "sarrafi" business at the age of 14 or 15. If so, he must have done so with a view to learning the business which it was expected, would devolve on him after Mathura Prasad's death. I cannot accept his statement that even at that age he signed "hundis" or advanced loans. So far as the documentary evidence shows, it appears that between 1911 and 1915 a number of

4. Jamna v. Ram Protap, (1907) 29 All 667=1907 A W N 211=4 A L J 582.
5. Chatturbhooj v. Dharamsi, (1885) 9 Bom 438.
6. Mudun Gopal Lal v. Khikhiuda Koer, (1891) 18 Cal 341=18 I A 9=5 Sar 676 (PC).

mortgage-deeds and bonds were executed by third persons in favour of Mathura Prasad and the defendant, suits were brought by them on foot of the mortgages and bonds, and decrees were obtained. Some sale-deeds were also taken in their names during that period. There is no need of a date prior to 28th June 1911. It is not unreasonable to suppose that Mathura Prasad initiated his son into his business, trained him, and as the latter grew up, he actively participated in the business of his father. That 4 or 5 years before Mathura Das's death deeds were taken in their joint names does not indicate an intention on the part of Mathura Prasad to divest himself of all exclusive interest in his properties. The fact that suits were brought by them jointly is accounted for by their being joint obligees under the deeds and bonds sued on. Mathura Prasad had become old and infirm, and these facts are consistent with a desire on his part to allow a free hand in his affairs to one who was to succeed to his estate.

The whole of Mathura Prasad's conduct negatives the intention to make his property joint family property. On 5th April 1908, he executed a deed of gift in favour of his daughter, Mt. Bittan, in respect of a house belonging to him. In the deed he asserts himself to be the exclusive owner of the house, having "no co-sharer or co-parcener." The defendant is one of the attesting witnesses. The defendant says that the gift was made with his "acquiescence." This is perhaps correct. The defendant had to acquiesce, as he had no alternative. The important fact is that Mathura Prasad did not at this time regard his son as his co-sharer, and asserted himself to be the sole owner of the property disposed of by him. If he had abandoned all separate interest in all his properties, the recital would have been otherwise and the defendant would have been persuaded to join with Mathura Prasad as an executant. Similarly, the will executed by Mathura Prasad recites the fact that its executant was "the absolute owner of the entire property." He made dispositions of all his properties, leaving the bulk of them to the defendant himself. This conduct is wholly inconsistent with the theory that he had allowed the whole of his property to become joint family property. The defendant has given the following account of the extent to which he participated in the management of the shop:

"Mathura Prasad gave me religious education and taught me shop work. Thirteen months before his death Mathura Prasad's health became impaired and only for the last 7-8 months before his death he stopped going to the shop. Before that he would go and sit on the shop 'gaddi' and I would do the actual work of the shop. For 4-5 years before his death Lala Mathura Prasad would, for the most part, do Court work, I for the most part would do shop work. I cannot say what my personal expenses amounted to, over and above feeding and clothing expenses all my personal expenses, would be met out of the shop income. Whatever properties other than the residential house were acquired were so acquired with the joint income of myself and Mathura Prasad. When I started to work in the shop, the firm was a going concern, but its income was less than what it became after. I, too, had begun to work in it and to exert myself to improve its income."

Stripped of all exaggeration as regards the credit due to him for the prosperity of the shop the facts stated by him are just what one would find in cases of a businessman who is not a Hindu. As the son grows up, he is trained in the business of his father. His share in the actual management grows with the advancing age of the father till the father is relieved of all care by one who expects to inherit all his property. It is impossible, in my opinion, to infer from facts of such equivocal character that the father and son became joint owners of the entire property originally belonging to the father and that acquired with its aid. The conduct of the defendant in relation to be legacies is extremely significant. On his own showing, he paid Rs. 1,000 to Mt. Bittan in terms of the will of Mathura Prasad. His explanation is that he gave that sum to her in obedience to a verbal direction given by Mathura Prasad. This is palpably untrue, as in the "khata" of Bittan Bibi opened by him in his account book he has mentioned at more than one place the fact that payment was made to Bittan Bibi in pursuance of the "wasiyatnama," which implies a testamentary instrument. Similarly, he paid Rs. 500 to the niece as directed in the will. The thousand rupees left for charity was also paid. These are all admitted facts. His explanation, which cannot be accepted, is that it was not in pursuance of the will in question, but of verbal instructions given to him by Mathura Prasad.

In spite of his attempt to tamper with his account there are many entries in the "khata" opened in the name of the plaintiff which show that interest at the rate of Rs. 25, a month was paid to her. The account books are

in "mahajan" character and extracts from them in those characters with their transliteration had to be filed according to the rules. In the transliteration, which is in Urdu character, the words "in respect of interest" occurring in the original are omitted. On examination it has been found that for several months consecutively he paid Rs. 25 as interest to the plaintiff. Now, interest at the rate of 6 per cent on Rs. 5,000, provided for in the will, comes to Rs. 25 a month. The sworn testimony of the plaintiff that she received interest regularly till not long before the institution of the suit, receives material corroboration from the entries in the defendant's account books. But for the rupture, which occurred two years before the suit, the plaintiff would have, in all probability, continued to receive the interest. The defendant's conduct taken as a whole is good evidence of an implied admission by him that the will was a perfectly valid document, Mathura Prasad having disposed of property which belonged to him exclusively. Having carefully considered all the evidence in the case and the probabilities thereof, I am led to the unhesitating conclusion that Mathura Prasad was the sole owner of the property felt by him at the time of his death and devised by his will, and that the legacies in favour of the plaintiff are valid and enforceable against the defendant. The decree appealed from was not challenged before us except on the general ground discussed above. No arguments were addressed to us as regards the amount of maintenance awarded by the lower Court or the right of the plaintiff to recover arrears, nor was the plaintiff's right to reside in the house described in Sch. B questioned. The result is that I dismiss the appeal with costs.

Allsop, J.—I agree with my learned brother in the conclusions which he has reached. There is no satisfactory evidence that the business which was carried on by Mathura Prasad and his brother was started by their father or by them with a nucleus of joint family capital. There is a presumption that the brothers were members of a joint Hindu family and there is nothing in in the evidence or in the circumstances which would rebut this presumption. Even if the brothers were joint, it would not follow that the business was a joint family business. There may be a presumption in favour of the finding that the business was a joint family business, but this is a question upon which it is not necessary for me to express any definite opinion. Even if there was such a presumption it would be rebuttable and there can be no doubt that the case based on presumption was not set forth in the written statement of the defendant-appellant with the result that the plaintiff-respondent had no opportunity of meeting it. In these circumstances, it would be most unfair to the plaintiff-respondent to allow the defendant-appellant to succeed on the basis of the argument which has been addressed to us.

The alternative case that the defendant-appellant and his father Mathura Prasad were owners as members of a joint Hindu family of the property now in suit depends upon the argument that Mathura Prasad in some way withdrew from his position as sole owner and converted his property into joint family property owned by himself and his adopted son. It is true that Mathura Prasad allowed the defendant-appellant to assist him in conducting the business out of which the property grew, but that was a natural course of conduct on his part and did not in my opinion, lead to the conclusion that Mathura Prasad intended that the property should be joint property. On the other hand, Mathura Prasad's conduct in making a gift of a house to his daughter 10 years after the adoption and in making a will before his death in which he said that he was the sole owner of this property makes it clear that he always regarded himself as the sole owner. The law and the fact on the case are discussed at length by my learned brother and it is unnecessary for me to reproduce his arguments at any length. As I have already said, I agree with his conclusions and I would dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 310

IQBAL AHMAD AND HARRIS, JJ.

British India Corporation, Ltd.— Applicant.

v.

Shanti Narain—Opposite Party.

Civil Revn No. 27 of 1934, Decided on 21st December 1934, against order of Dist. Judge, Cawnpore, D/- 28th November 1933.

(a) Words and Phrases — Preliminary objection

A preliminary objection is one that challenges the competence of a Court to hear and decide a particular cause before it. [P 314 C 2]

(b) Civil P. C. (1908), S. 115— High Court considering whether case comes under any clause in S. 115 —It necessarily considers it on merits.

The moment the High Court proceeds to consider whether a particular case does or does not fall within either of the clauses in S. 115, it necessarily considers the revision application on its merits. [P 314 C 2]

(c) Companies Act (1913), S. 3 — Local Government conferring power on District Court under proviso to S. 3—That Court has exclusive original jurisdiction— But this does not oust revisional jurisdiction of High Court — District Court acting under Companies Act is subordinate to High Court — Civil P. C. (1908), S. 115.

A District Judge who has been empowered by Local Government under proviso to S. 3 has exclusive original jurisdiction to decide the matters arising under the Companies Act with reference to the companies the registered offices of which are within that district. But the exclusive original jurisdiction conferred on the District Court can in no way oust the revisional jurisdiction that is conferred on the High Court by S. 115 ; that jurisdiction is neither expressly or impliedly ousted by the Companies Act ; nor the District Court, while exercising jurisdiction under that Act, is not subordinate to the High Court within the meaning of S. 115 : *Case law reviewed.* [P 315 C 2]

(d) Companies Act (1913), Ss. 6 and 54 — To vary conditional rights and privileges given to various share-holders by strictly complying with articles of memorandum does not amount to alteration of conditions in memorandum — To ascertain rights of particular classes of shares, memorandum must be read as a whole.

To vary the conditional rights and privileges given to various classes of shares by following strictly the articles and the memorandum does not amount to an alteration of the conditions contained in the memorandum, because one of the conditions in the memorandum is that the rights and privileges are subject to variation. To hold otherwise would be to ignore the condition in the memorandum providing for variation in the rights for the time being attaching to particular classes of shares. In order to ascertain the rights attaching to particular classes of shares, the memorandum must be read and given effect to as a whole, unless any particular provision of the same violates an express provision of the statute, in which case, that particular provision will be treated as invalid : *English Cases Rel on.* ; 1929 *Bom.* 38, *Dist.* [P 318 C 2]

(e) Companies Act (1913), S. 153 — Company varying rights of different classes of shares in exercise of powers given by memorandum and articles is not tantamount to compromise or arrangement within meaning of S. 153.

The mere fact that year after year the company, by appropriate means, as laid down in the memorandum varies the rights of different classes of shares cannot be tantamount to a compromise or arrangement between the company and its members or to a variation of the conditions in the memorandum of association. [P 319 C 2]

(f) Companies Act (1913), S. 54 — Resolution sweeping away rights and privileges of ordinary and deferred shares and leaving both precisely with same rights valid — But proposal to make these two classes into one involves consolidation modifying memorandum.

A resolution which has the effect of sweeping away the rights and privileges attaching to the ordinary and deferred shares and which leaves two classes of shares with precisely the same rights is prefectly valid and does not require sanction of the Court. But where even after this resolution, a deferred share cannot be sold as an ordinary share, a proposal to make these two classes of shares into one class involves a consolidation of the different classes of shares and such consolidation modifies the condition of the memorandum. [P 320 C 1, 2]

(g) Civil P. C. (1908), S. 115 — Mere error of law in deciding case by Court having jurisdiction is not illegal or irregular exercise of jurisdiction—But Court not judicially considering what it ought to have done — There is illegal or irregular exercise of same.

A mere error of law in deciding a case by a Court having jurisdiction cannot be said to be an illegal or irregular exercise of jurisdiction possessed by that Court. But where the Court below does not judicially consider what it ought to have considered, and decides something that it is not called upon to decide, there is illegal or irregular exercise of jurisdiction. [P 321 C 1]

K. N. Katju—for Applicant.

G. S. Pathak—for Opposite Party.

Iqbal Ahmad, J.—This is an application in revision against an order of the District Judge of Cawnpore rejecting an application filed by the applicant, the British India Corporation Ltd. Cawnpore, (hereinafter called the Company), praying that sanction be accorded to the proposed consolidation of the deferred and ordinary shares of the company and that "the minute suggested be approved." The application purported to be an application under S. 54 (1), Companies Act, (Act 7 of 1913). The section runs as follows:

"(1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganize its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes :

Provided that no preference or special privilege attached to or belonged to any class of shares shall be interfered with except by resolution passed by a majority number of share-holders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of share-holders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all share-holders of the class."

The admitted facts so far as they are material for the decision of the application in revision before us are as fol-

lows: The company was incorporated in the year 1920 as a company limited by shares with an authorised capital of Rs. 10,00,00,000 (ten cores of rupees) divided into 3,00,000 (three lakhs) 8 per cent. cumulative preference shares of Rs. 100 each, 60,00,000 (sixty lakhs) ordinary shares of Rs. 10 each, and 10,00,000 (ten lakhs) deferred shares of Rs. 10 each. The company allotted 81,000 preference shares. 41,40,000 of its ordinary shares and 5,50,000 of its deferred shares. The shares allotted were fully subscribed.

The respective rights and privileges of different classes of shareholders were specified in paras. 6 and 7 of the Memorandum of Association. The usual preference was given to preference shareholders but we are not concerned with the same in the present case. It was provided inter alia by the said paragraphs that after the preference shareholders were paid their profits the balance of the profit was to be distributed amongst the ordinary and deferred shareholders in the following manner: The ordinary shareholders were to receive 10 per cent. dividend on their shares and if nothing was left out of the profits the deferred shareholders were to get nothing. But if some balance was left after paying the dividend on preference shares and 10 per cent. dividend to ordinary shareholders, the deferred shareholders were to get dividend upto a limit of 10 per cent. If some amount of the profits was even then left then half of the amount so left was to be divided between ordinary shareholders and the other half between deferred shareholders. In the case of winding up of the company the assets available for distribution after payment of the capital paid up on the preference shares with any arrears of dividend thereon was to be distributed amongst the ordinary and deferred shareholders in the following manner: (1) To pay off the capital paid up on the ordinary shares. (2) To pay off the capital paid up on the deferred shares. (3) The balance, if any, to be distributed as to one-half amongst the holders of ordinary shares and as to the other half amongst the holders of deferred shares.

These rights and privileges of the various classes of shareholders were however subject to the provisions of para. 8 of the memorandum and much of the argument addressed to us as regards the merits of the application before us has centred round this paragraph. It is as follows:

"The right for the time being attached to said several classes of shares may be modified or dealt with in a manner mentioned in Cl. 7 of the accompanying Articles of Association but not otherwise and that clause and also Cl. 138 of the said Articles of Association shall be deemed to be incorporated herein and have effect accordingly."

Article 7 of the Articles of Association prescribed the method and procedure by which the special rights attaching to any class of shares may be "varied, abrogated or affected." Art. 138 is immaterial for the decision of the application in revision before us. The capital of the company was reduced from time to time and the ultimate reduction in capital was made on 21st November 1932, by an order of the District Judge of Cawnpore dated 21st November 1932, in accordance with which the following minute was recorded by the District Judge:

"The capital of the British India Corporation Ltd., henceforth is Rs. 3,65,00,000 (three crores sixty-five lakhs) divided into 3,00,000 cumulative preference shares of Rs. 100 each, 60,00,000 ordinary shares of Re. 1 each and 10,00,000 deferred shares of Rs. 0-8-0 each. At the time of the registration of this minute 81,000 cumulative preference shares, 41,40,000 ordinary shares and 5,50,000 deferred shares had been issued. The sum of Rs. 100 has been and is to be deemed to have been paid up on each of the said 81,000 preference shares. The sum of Re. 1 has been and is to be deemed to have been paid up on each of the said 41,40,000 ordinary shares. The sum of Rs. 0-8-0 has been and is to be deemed to have been paid up on each of the said 5,50,000 deferred shares. The remaining 2,19,000 preference shares, 18,60,000 ordinary shares and 4,50,000 deferred shares are unissued."

It would be apparent from the above question that from 21st November 1932, the nominal value of each ordinary share was Re. 1 and the nominal value of each deferred share was annas 8 and that all the issued ordinary and deferred shares were to be deemed to be fully paid up.

In or about the year 1933 it was considered desirable to do away with the distinction between ordinary and deferred shares and to put the rights and privileges attaching to these classes of shares on an identical footing. With this object in view extraordinary general meetings of: (a) the deferred shareholders, (b) the ordinary shareholders, and (c) of the share-holders of the company were held on 2nd August 1933, and extraordinary resolutions were passed by all the meetings approving the consolidation of the deferred share capital in such a manner that every 2 of the existing deferred shares of the nominal value of annas 8 should constitute one new

share of the nominal value of Re. 1. In order to deal with the case of people whose deferred shares of the old class might amount to an odd number, a special class of holders of fractional share certificates was created, and these entitled to dividends but not to any other rights. The resolution further provided that in lieu of the existing rights conditionally attached to the deferred share capital by paras. 6 and 7 of the memorandum, each one newly consolidated a deferred share of the nominal value of Re. 1 shall be placed on the same footing in all respects as each ordinary share of the nominal value of Re. 1. The extraordinary resolution passed by the extraordinary general meeting of the shareholders of the company on 2nd August 1933, was passed as a special resolution by the shareholders at a meeting held on 18th August 1933. In order to obliterate the distinction even in name between the two classes of shares the following extraordinary resolution was passed by the deferred shareholders of the company on 11th October 1933.

"That this meeting of deferred share-holder of the Corporation, in view of the fact that the ordinary and deferred shares respectively now carry the same rights in all respects as regards dividend, on winding up and voting, considers it expedient that the capital of the Corporation be re-organized by the consolidation of the ordinary and deferred shares, and that the Directors of the Corporation be, and they are, hereby declared at liberty to take such action as may be necessary to effect such consolidation and to obtain any necessary sanction of the Court thereto."

Identically worded extraordinary resolutions were passed on the date, viz., on 11th October 1933, at extraordinary general meetings of the ordinary shareholders and of the shareholders of the company. It was also resolved by the extraordinary general meeting of the shareholders that suitable alterations specified in the resolution be made in the memorandum and Articles of Association so as to give effect to the resolution quoted above. The extraordinary resolutions passed by the shareholders of the company were passed as special resolutions at a general meeting of the shareholders on 27th October 1933.

Having passed the resolutions referred to above the company decided to register the following minute:

"The capital of the British India Corporation, Ltd., Cawnpore henceforward is Rs. 3,65,00,000 divided into 3,00,000 cumulative preference shares of Rs. 100 each and 65,00,000 ordinary shares of Re. 1 each,"

and filed an application before the District Judge praying that the minute suggested be approved and that sanction be accorded to the consolidation of the deferred and ordinary shares under S. 54, Companies Act, and in support of the application filed an affidavit detailing the facts and the resolutions noted above.

Shanti Narain the opposite party before us, filed an objection to the application of the company. He stated in his objection that the company originally wanted to put up a scheme of amendment of the memorandum and Articles of Association and the consolidation of the ordinary and deferred shares at an extraordinary general meeting called for 25th March 1933, but in that meeting the chairman of the meeting pointed out that the proposed amendment was in the opinion of the legal advisers of the company governed by the provisions of S. 54 of the Act and, as the requisite majority of the shareholders provided for by the proviso to S. 54 was not available, the resolution could not be considered by the meeting. Accordingly the extraordinary general meetings of the ordinary and deferred shareholders convened for 25th March 1933, were dissolved. The objector further maintained that the directors having failed to carry out the proposed scheme of the reorganization of the share capital by consolidating the ordinary and deferred shareholders and the amendment of the memorandum and Articles of Association in the meeting of 25th March 1933, made a deliberate attempt to circumvent the provisions of S. 54, Companies Act. In this connection he pointed out that, as the directors could not by the consolidation of ordinary and deferred shares modify the conditions contained in the memorandum so as to re-organize the share capital of the company, they resorted to the device of attaining the object in view by splitting up the proposed scheme into two parts, viz., firstly to consolidate the deferred shares into shares of Re. 1 each and to put the same on a par in all respects with ordinary shares, and secondly by special resolution to consolidate the ordinary and deferred shares and amend the memorandum and Articles of Association. The objector maintained that what the company could not do by a single step it could not accomplish in two steps. In short, the chief objection of the objector was that the division of the original scheme of reconstruction and reorganization of the

share capital and of amending the memorandum and Articles of Association into two parts by the management was for the purpose of evading the mandatory provisions of S. 54 and thereby affecting adversely the rights and privileges attached to the holders of the deferred shares.

The learned Judge held that the scheme referred to above was a fair and equitable scheme and "should be sanctioned on the merits." He however held that the two sets of resolutions passed on 2nd August and on 11th October cannot be split up and that both the resolutions must be read and taken into consideration together. In this view of the matter he held that it was not open to the applicant company to ask for the confirmation of the resolution of 11th October and not for the resolution of 2nd August. In other words, he held that the two resolutions must be read together and the scheme treated as a single scheme and sanction should be accorded or refused to the scheme as a whole. His conclusion was that he was not competent to grant the application of the company under S. 54 of the Act as the effect of the two resolutions passed on the two dates mentioned above was to reorganize the share capital of the company by consolidation of the shares of different classes, and the reorganization had the effect of interfering with the preference or special privileges attaching to ordinary shares and the majority of the shareholders contemplated by the proviso to S. 54 was not present at the meetings on which those resolutions were passed. In the alternative he held that:

> "if the object that the company has in view can be obtained without modifying the conditions contained in its memorandum of association, then no sanction of the Court is necessary,"

and, as such, no sanction ought to be accorded. In the result he dismissed the application of the company. The company has come up in revision to this Court.

A preliminary objection has been raised to the hearing of this application by the learned counsel for the opposite party on the ground that the order of the Court below cannot be revised by this Court. He has formulated his objections on the following three alternative grounds: (1) That this Court has no jurisdiction to revise orders passed by a District Court under the Indian Companies Act, (2) that a district Court exercising jurisdiction in company matters is not a Court subordinate to the High Court within the meaning of S. 115, Civil P. C., and (3) that the Court below had jurisdiction to hear and decide the application before it and it did not exercise its jurisdiction illegally or with material irregularity.

So far as the third objection is concerned it is really not in the nature of a preliminary objection. It is on the other hand an objection touching the merits of the revision application before us. A preliminary objection is one that challenges the competence of a Court to hear and decide a particular cause before it and the third objection noted above far from doing so necessitates the consideration by this Court of the question whether or not the Court below exercised its jurisdiction illegally or with material irregularity. This is tantamount to the consideration of the revision application on its merits. It is one thing to say that this Court has no jurisdiction to entertain an application in revision against a particular order passed by a particular Court, and it is quite another thing to say that though this Court can entertain the application in revision it ought to reject the same as in passing the order sought to be revised the Court below did not assume jurisdiction that it did not possess, or failed to exercise a jurisdiction that it did possess, or acted in the exercise of its jurisdiction with material irregularity. All that is necessary to bring into play the revisional jurisdiction of this Court under S. 115, Civil P. C., is that: (1) there be a case decided, (2) the decision be of a Court subordinate to this Court, and (3) the decision be not appealable.

If these conditions are satisfied this Court has undoubtedly the revisional jurisdiction conferred on it by S. 115, Civil P. C., and is vested with the discretion to exercise that jurisdiction provided the case falls within Cl. (a) or Cl. (b) or Cl. (c), S. 115, Civil P. C. But the moment this Court proceeds to consider whether a particular case does or does not fall within either of those clauses it necessarily considers the revision application on its merits. We therefore propose to consider the third objection of the learned counsel while dealing with the merits of the application before us.

In support of the first two objections noted above the learned counsel has argued that the Indian Companies Act is a self-contained Act containing detailed provisions as to the procedure

to be adopted by a Court while exercising jurisdiction under that Act, and as revisional jurisdiction is not conferred by that Act on this Court, the present application in revision cannot be entertained. In support of this contention reference has been made to Ss. 202 and 246 of the Act, S. 202 provides about appeals from certain orders made in the matter of the winding up of the company and S. 246 vests the power in this Court to make rules with the Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for the winding up of a company in the High Court and in the Courts subordinate thereto, and for giving effect to the provisions contained in the Act as to the reduction of the capital and the sub-divisions of the shares of the company. It is contended that as provisions for appeals from certain specified orders passed under the Act are made in the Act and there is no provision in the Act conferring revisional jurisdiction on this Court, this Court has no power to revise the order passed by the Court below in the present case. It is further argued that the district Court of Cawnpore is not a Court subordinate to this Court within the meaning of S. 115, Civil P. C., and, as such, the present application in revision cannot be entertained.

In our judgment there is no force in these contentions. The words "the Court" are defined by the Companies Act as meaning the Court having jurisdiction under the Act and it is provided by S. 3 that the Court having jurisdiction under the Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate. The High Court is therefore normally the Court having jurisdiction under the Act, but there is a proviso to S. 3 to the effect that the Local Government may, by notification in the local official gazette, and subject to such restrictions and conditions as it thinks fit, empower any district Court to exercise all or any of the jurisdiction by the Act conferred upon the High Court and:

"in that case such district Court shall, as regarded the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the District."

The registered office of the applicant company is in the district of Cawnpore, and the Local Government in exercise of the powers vested in it by the proviso to S. 3 of the Act, has, by a notification dated 24th September 1914, empowered the district Court of Cawnpore to exercise all the jurisdiction conferred by the Act upon this Court. The learned counsel is therefore right in contending that the District Judge of Cawnpore has exclusive original jurisdiction to decide all matters arising under the Companies Act with reference to the companies the registered offices of which are within the district of Cawnpore. It follows that this Court cannot exercise jurisdiction under the Companies Act with reference to the companies mentioned above. But the exclusive original jurisdiction conferred on the district Court of Cawnpore can in no way oust the revisional jurisdiction that is conferred on this Court by S. 115, Civil P. C., unless that jurisdiction is either expressly or impliedly ousted by the Companies Act or the district Court of Cawnpore, while exercising jurisdiction under that Act, is not subordinate to this Court within the meaning of S. 115.

There is nothing in the Companies Act either expressly or impliedly ousting the revisional jurisdiction of this Court. In the absence of such a provision the limits of the revisional jurisdiction of this Court must be ascertained by reference to S. 115, Civil P. C. The view that we take finds some support from the decision of their Lordships of the Privy Council in 1917 P C 71 (1), in that case it was held by their Lordships that the High Court has jurisdiction under S. 115, P. C., 1908 to revise an order of the District Judge made under S. 10, Religious Endowments Act, 20 of 1863. It is conceded that by that Act exclusive original jurisdiction in the matters dealt with by the Act is conferred on the District Judge and there is no provision in that Act either conferring upon or ousting the revisional jurisdiction of the High Court. It is true that the point whether or not the absence of any express provision in the Religious Endowments Act conferring revisional jurisdiction on the High Court could be impliedly taken to oust the revisional jurisdiction of the High Court was not argued before their Lordships. But the fact remains that their Lordships approved of the exercise of the revisional jurisdiction by the High Court in a case that was by the special enactment referred to above within the exclusive jurisdiction

1. Balakrishna Udayar v. Vasudeva Ayyar, 1917 P C 171=40 I C 650=44 I A 261=40 Mad 793 (PC).

of the District Judge and whose orders under the Act were not appealable. Similarly in the Full Bench decision of this Court in 1934 All 260 (2) this Court exercised revisional jurisdiction in a case decided by the District Judge under the Land Acquisition Act. That Act contains detailed provisions as regards the procedure to be followed by the Court (the District Judge) on a reference made by the Collector and S. 54 of the Act provides for appeals from the orders of the Court, but there is no provision in that Act authorising this Court to revise the decision of the District Judge. Notwithstanding this omission in the Act, and notwithstanding the provision as to appeals contained in the Act, this Court held that it could revise the order of the District Judge and that its jurisdiction was not impliedly ousted. This case in our judgment covers the case before us.

The learned counsel for the opposite party has in support of his argument relied on the decisions of this Court in 1916 All 266 (3) and 1918 All 14 (4). In these cases it was held that no revision lay to this Court against an appellate decree of the District Judge in suits filed in the Revenue Court under the Agra Tenancy Act (Act 2 of 1901). In the Tenancy Act of 1901, apart from the provisions as regards appeals from decisions under that Act, specific provision was made as regards revisions by S. 185 of that Act. By that section the Board of revenue was empowered to exercise revisional jurisdiction in cases decided by subordinate Revenue Courts except those cases in which the decree of the Revenue Court was appealable under S. 177 of the Act to the District Judge. The omission of the legislature, while making provision about revisions, to vest this Court with revisional jurisdiction was significant. Apart from this the provision of S. 167 of the Act itself was impliedly taken to bar the revisional jurisdiction of this Court. It was provided by S. 167 of that Act that:

"all suits and applications of the nature specified in Sch. 4 of the Act shall be heard and determined by the Revenue Court, except in the way of appeal, as hereinafter provided, no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such application might be brought or made."

It was observed by one of the learned Judges in 1916 All 266 (3), that it would be doing violence to the words of the last clause of S. 167 of the Act if this Court were to entertain applications in revision against the appellate decree of the District Judge in suits filed in the Revenue Court. These decisions are of no help to the opposite party for the simple reason that in the Companies Act no provision is made as regards revisions and there is nothing like Ss. 167 and 185, Tenancy Act, either expressly or impliedly ousting the jurisdiction conferred on this Court by S. 115, Civil P. C.

This brings us to the consideration of the question whether the district Court of Cawnpore, exercising jurisdiction under the Companies Act to the exclusion of the High Court, is a Court subordinate to this Court within the meaning of S. 115, Civil P. C. It is argued on behalf of the opposite party that as the very jurisdiction that is conferred on this Court by the Companies Act has, by the notification referred to above, been taken away from this Court and vested in the district Court, that Court can in no sense be regarded as a Court subordinate to this Court while exercising the exclusive jurisdiction so conferred on it. In short, it is suggested that the district Court of Cawnpore exercising jurisdiction in company matters stands in the shoes of the High Court and it therefore can in no way be described as subordinate to the High Court.

The answer to this contention is furnished by S. 3, Civil P. C., which provides that "for the purposes of this Code, the district Court is subordinate to the Court....." It is true that by reason of the notification by the Local Government the district Court of Cawnpore is empowered to exercise original jurisdiction in company matters to the exclusion of this Court, but the jurisdiction so exercised by that Court is in the capacity of a district Court and not of a High Court, and, as such, that Court is in view of the provisions of S. 3 of the Code subordinate to this High Court within the meaning of S. 115, Civil P. C. It is conceded that the order sought to be revised in the present case fulfils the the other requirements of para. 1, S. 115, viz., that a case has been decided

2. Makan Lal v. Secy. of State, 1934 All 260=148 I C 617 (FB).
3. Parbhu Narain v. Harbans Lal, 1916 All 266=35 I C 279.
4. Jamna Prasad v. Karan Singh, 1918 All 14=46 I C 338=41 All 28.

by the district Court and that the order is not appealable. That being so, for the reasons given above, we overrule the preliminary objection and hold that we have jurisdiction to entertain this application. On the merits we have come to the conclusion that the order of the district Court of Cawnpore cannot be sustained and that in rejecting the application filed by the applicant company that Court exercised its jurisdiction with material irregularity.

We have already observed that the Court below came to the conclusion that what the company proposed to do was "fair and equitable" and that the scheme "should be sanctioned on the merits." It was pointed out by the learned counsel for the opposite party that, in the event of the company making very large profits, the removal of the distinction between the rights and privileges of the ordinary and deferred shareholders and consolidation of those classes of shares would be to the disadvantage of the deferred shareholders. This assertion may well be true, but the figures supplied to us by the learned counsel for the applicant company show that even in years when the profit of the company exceeded Rs. 32,00,000 no dividend could be paid to the deferred shareholders. The company has been doing business since the last 14 years. In 9 out of those 14 years no dividend could be paid to the deferred shareholders. It also appears by reference to the chart supplied to us by the counsel for the applicant that the profits have been declining from the year 1928 and even in the last year the profits amounted to only Rs. 12,96,000 which was sufficient only to pay dividend to the preference shareholders. Having regard to all the circumstances it may safely be said that there is little prospect of any dividend being paid to the deferred shareholders for some years to come, and, as such, the extraordinary resolutions passed by the company on 2nd August and 11th October 1933, are manifestly not to their disadvantage. Similarly in the event of large profits being made in the future the ordinary shareholders also stand to gain by the scheme carried out by the resolutions noted above. In considering the scheme we cannot overlook the fact that the resolutions in question were passed by the various classes of shareholders unanimously in extraordinary general meetings, which were convened after due notice, and were attended by a large number of shareholders of different classes either in person or by proxy. We must therefore approach the consideration of the case on the assumption that the scheme is fair and equitable and for the benefit of the two classes of shareholders concerned.

The question however remains whether the Court below was right in holding that the resolutions of 2nd August and 11th October should be read together. If those resolutions are to be read together and considered as a whole, there can be no doubt that they have the effect of modifying the conditions contained in the memorandum of the company so as to reorganize its share capital by consolidation of shares of different classes, and they have further the effect of interfering with the special privileges attached to either ordinary or deferred shares. It follows that if the Court below is right, in holding that the resolution of 11th October cannot be considered a part from the resolution of 2nd August, the case falls within the purview of S. 54, and, as those resolutions were not passed by such majority in number of shareholders as is required by the proviso, the Court could not confirm the resolutions under S. 54. We are however of the opinion that the Court below was wrong in holding that the two resolutions must be read and considered together.

Paragraph 8 of the memorandum of association clearly provided that the rights for the time being attached to several classes of shares may be modified or dealt with in the manner provided by Cl. 7 of the Articles, and, that that article shall be deemed to be incorporated in the memorandum and have effect accordingly. By the resolution of the end of August the company consolidated the deferred shares and gave to the shares so consolidated the same rights and privileges as those attached to the ordinary shares. The consolidation was done in the manner provided by Cl. 49 of the Articles, and, it is not suggested that there was any illegality in the procedure adopted by the company for such consolidation of deferred shares. It is also not disputed that the rights attaching to the deferred shares were modified and dealt with in accordance with Cl. 7 of the Article. It is clear then, that what the company did on 2nd August was in strict conformity with the provisions of the memorandum and articles.

But it is argued that notwithstanding the provisions contained in the memorandum as to the modification of the rights and privileges attached to various classes of shares, those rights and privileges could not be altered except in accordance with the provisions of the Act. It is urged that the provisions of para. 8 of the memorandum being in conflict with the provisions of Ss. 10 and 54 of the Act, the resolution of 2nd August was invalid and of no effect. S. 10 of the Act provides that a company shall not alter the conditions in its memorandum except in the cases and in the mode and to the extent for which express provision is made in the Act itself. The contention is that inasmuch as the resolution of 2nd August had the effect of altering the terms of the memorandum as regards the rights and privileges attaching to ordinary and deferred shares, the alteration could only be done in accordance with the provisions of the Act. This argument proceeds on the assumption that what was done by the company on 2nd August, amounted to an alteration in the memorandum of association, but in our judgment this assumption is not well founded.

S. 6 of the Act prescribes the matters that must be stated in the memorandum of a company limited by shares, and, so far as those matters are concerned, no alteration in the memorandum can be made even if power in that behalf is expressly reserved by the memorandum itself: vide (1904) 1 Ch D 87 (5), per Stirling, L. J., (at p. 89). The provisions as regards the rights and privileges attaching to particular class of shares are not required by Statute to be inserted in the memorandum of a company, but if they are stated in the memorandum without the reservation of the power to modify or alter those rights and privileges, they cannot, in view of the provisions of S. 10 of the Act, be altered except in the mode and to the extent for which express provision is made in the Act: See (1885) 30 Ch D 376 (6).

In the case before us, however we find that the rights and privileges of the ordinary and deferred shareholders were conditionally stated in the memorandum, and could, in accordance with para. 8 of the memorandum read with Cl. 7 of the Articles be varied, abrogated, or affected. The exercise of the power vested by para. 8 did not amount to an alteration of those rights and privileges, as those rights and privileges were subject to this important condition that they could at any time be altered in accordance with para. 8 of the memorandum and Cl. 7 of the Articles. In other words, in the case before us, the rights and privileges attaching to different classes of shares defined by the memorandum were not rights and privileges for all time, but only for such time as they remained unaltered by any special resolution as provided by Cl. 7 of the Articles. Indeed in Cl. 8 they are stated to be the rights "for the time being." In other words, they were not unconditional rights of the shareholders, but rights subject to variation from time to time by special procedure laid down in the memorandum and Articles.

The question of the validity and effect of clauses in the memorandum and articles similar to the clauses in the present case was considered. (1904) 1 Ch D 87 (5).

In that case it was held by the English Court of Appeal that the rights and privileges of the various shareholders could validly be changed by the resolution as provided in the memorandum and articles and that such resolution did not require the sanction of the Court. The case of (1885) 30 Ch D 376 (6) cited above was distinguished upon the ground that in that case the privileges and rights attached to different classes of shares were unconditional, whereas in (1904) 1 Ch D 87 (5) they were given conditionally and were subject to modification or alteration. To vary the conditional rights and privileges given to various classes of shares by the memorandum does not amount to an alteration of the conditions contained in the memorandum, because one of the conditions in the memorandum is that the rights and privileges are subject to variation. To hold otherwise would be to ignore the condition in the memorandum providing for variation in the rights for the time being attaching to particular classes of shares. In order to ascertain the rights attaching to particular classes of shares, the memorandum must be read and given effect to as a whole, unless any particular provision of the same violates an express provision of the

5. In re : Welsbach Incandescent Gas Light Co., Ltd., (1904) 1 Ch D 87=73 L J Ch 104=89 L T 645=52 W R 327=11 Manson 47=20 T L R 122.
6. Ashbury v. Watson, (1885) 30 Ch D 376=54 L J Ch 985=54 L T 27=33 W R 882.

Statute, in which case, that particular provision will be treated as invalid.

The learned counsel for the opposite party tried to distinguish the case of (1904) 1 Ch D 87 (5), on the ground that at the time it was decided there was no provision in the English Companies Act analogous to the provisions of S. 54, Companies Act. It is true that provisions similar to S. 54 of the Indian Act were for the first time incorporated in the English Companies' Act in the year 1908, but this fact in no way shakes the authority in (1904) 1 Ch D 87 (5). The question that was directly and specifically in issue in that case was whether or not the variation in the rights and privileges of different classes of shareholders amounted to a modification or alteration of the memorandum when power to modify those rights and privileges was given by the memorandum itself, and the same is the question before us. We may note in passing that in England (1904) 1 Ch D 87 (5) is still treated as a good and binding authority by the Courts and by all the text-book writers, notwithstanding the introduction of the provisions of S. 54, in the English Companies' Act of 1908.

Reliance has been placed on behalf of the opposite party on the decision of the Bombay High Court in 1929 Bom 38 (7). That case is, in our judgment, clearly distinguishable as the facts in that case were very different from the facts in the case before us. In the Bombay case a procedure was provided in the Articles of Association for modifying or altering the preferential rights and privileges of certain classes of shares, but the preferential rights in the preference shares of the initial capital were, by the terms of the memorandum of association, made unalterable, and an attempt was made by means of the procedure prescribed by the articles to take away the privileges of the preference shares in the initial capital, and this the company clearly could not do. Further an attempt was made to vary the privileges attached to the ordinary shares, but the procedure laid down in the articles for such variation was not followed. Consequently the variation of the rights and privileges attached to these shares could only be effected in accordance with the provisions of the Act permitting such variations. In the case before us the procedure prescribed in the articles and memorandum of association for modification or variation of the rights and privileges attaching to various classes of shares has been strictly complied with.

The learned counsel for the opposite party has further argued that the resolution of 2nd August incorporated a compromise or arrangement between the company and its members within the meaning of S. 153, Companies Act, and therefore could only have been passed in accordance with the provisions of Cl. (1) of S. 153, and that to have binding effect it needed the sanction of the Court, which admittedly was not obtained. We are of the opinion that there is no force in this contention. By the resolution of 2nd August the company modified the rights and privileges attaching to deferred shares, not by means of a compromise or arrangement arrived at between the company and its members, but in exercise of the powers vested in the company by para. 8 of the memorandum which incorporated Cl. 7 of the Articles. We cannot differentiate the conditions contained in the memorandum before us from a case in which the memorandum provides that the rights of various classes of shareholders to participate in the annual profits of the company are such as shall be determined from time to time by the company. In such a case the mere fact that year after year the company, by appropriate means, varies the rights of different classes of shares cannot be tantamount to a compromise or arrangement between the company and its members or to a variation of the conditions in the memorandum of association.

As we have stated previously in this judgment the English Court of appeal in (1904) 1 Ch D 87 (5) held that a resolution similar in form to the August resolution in the present case was a valid one. Further, it is to be noticed that in that case it was not suggested that such a resolution required the sanction of the Court as a compromise or arrangement. When the case of (1904) 1 Ch D 87 (5), was decided the English Companies Act contained provisions analogous to S. 153, Companies Act (see S. 2, Joint Stock Companies Act, 1870, as amended by S. 24, Companies Act, 1900). Further the case of (1910) 1 Ch D

7. Re : E. D. Sassoon United Mills, Ltd., 1929 Bom 38=110 I C 649.

414 (8) makes it clear that after the passing of the English Companies Act of 1908, a resolution similar to the August resolution in the present case did not require the sanction of the Court, though S. 120, English Companies Act, 1908, was identical with S. 153 of the Indian Act.

Before we leave this point we must notice the decision in (1915) 2 Ch D 439 (9), which was relied upon by the learned counsel for the opposite party. In that case it was held that a scheme of arrangement which modifies the memorandum of association of the company in any way other than those specified in S. 45, Companies Act. 1908. (which corresponds to S. 54 of the Indian Companies Act), does not require a special resolution passed by the majority mentioned in that section, but may be validly effected under S. 120 of the Act (viz., S. 153 of the Indian Act). That case is distinguishable on the broad ground that the scheme proposed in that case modified the terms of the memorandum of association of the company, whereas in the case before us, in our opinion. the August resolution did not in any way modify the terms of the memorandum. On the contrary the resolution was in strict conformity with the terms of the memorandum. In short, the scheme proposed in (1915) 2 Ch D 439 (9) could only be carried out by a compromise or arrangement between the company and its members, whereas in the case before us the provision was made in the charter of the company itself for variation from time to time of the special privileges and rights attaching to the various classes of shares.

For reasons given above we hold that the Court below was wrong in proceeding on the assumption that the resolution of 2nd August required the sanction of the Court and as such sanction was not obtained, the resolution was invalid. We further hold that the Court below was wrong in holding that the resolution of 11th October could not be considered apart from the August resolution.

The August resolution was, in our judgment, a perfectly valid resolution and did not require the sanction of the Court for its validity. That resolution had the effect of sweeping away the rights and privileges attaching to the ordinary and deferred shares and left those two classes of shares with precisely the same rights. That being so, all that the company proposed to do by the October resolution was to consolidate the ordinary and deferred shares, and in so doing did not in any way interfere with the preference or special privileges attaching to either of those classes of shares, for the simple reason that no such preference or special privileges attached to either of those classes of shares at the date of the October resolution. The proviso to S. 54 had therefore no application to the present case. The October resolution however needed confirmation by the Court as by that resolution the share capital of the company was being reorganised by the consolidation of the ordinary and deferred shares and such consolidation did modify the conditions contained in para. 5 of the memorandum of the company.

It was contended that if the August resolutions validly took away the special rights and privileges attaching to the ordinary and deferred shares, the ordinary and deferred shares could not therefore be regarded as different classes of shares and as such required no consolidation and therefore S. 54 had no application. We cannot agree with this contention. The shares still remained as ordinary and deferred shares though the special rights and privileges attaching to each class had been swept away. In our judgment, even after the August resolution, a deferred share could not have been sold as an ordinary share and it follows therefore that a proposal to make these two classes of shares into one class did involve a consolidation of the different classes of shares.

It is manifest from the observations made above that the decision of the Court below is erroneous and that the application filed by the company was wrongly rejected by that Court.

But it is contended on behalf of the opposite party that however erroneous in law the decision of the Court below may be, we cannot interfere with the same, as the Court below had undoubtedly jurisdiction to entertain and decide the application and, in the exercise of that jurisdiction, it has not acted illegally or with any material irregularity. It is settled by the decision of their Lordships of the Privy

8. In re : Australian Estates and Mortgage Co. Ltd., (1910) 1 Ch D 414=79 L J Ch 202=102 L T 458=17 Manson 63.
9. In re : J. A. Nordberg, (1915) 2 Ch D 439=84 L J Ch 830=113 L T 988=59 S J 717.

Council in 11 Cal 6 (10) and 1917 P C 71 (1), that:

"Section 115 applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it"

and that:

'the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.''

It follows that if a Court has jurisdiction to decide a question, and in deciding that question arrives at an erroneous decision on a question of fact or of law, it cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction. In other words, a mere error of law in deciding a case by a Court having jurisdiction cannot be said to be an illegal or irregular exercise of jurisdiction possessed by that Court, vide 1933 All 86 (11) and 1933 All 557 (12).

The question that we have to decide is whether or not in the present case the Court below exercised its jurisdiction illegally or with material irregularity and, after giving our best consideration to the point, we have come to the conclusion that the question must be answered in the affirmative.

The Court below was invited by the application filed by the company to confirm the special resolution passed by the company for the consolidation of the two classes of shares. It however for the reasons assigned by it, refused to concentrate its attention on that resolution alone, and wrongly assumed that that resolution could not be considered apart from the August resolution. Having arrived at this erroneous conclusion it proceeded to consider the validity of the resolution of 2nd August, and wrongly decided that that resolution was invalid. It then proceeded to consider both the resolutions together and decided that those resolutions taken together fell within the purview of the proviso to S. 54 and, as the majority in number of shareholders required by the proviso had not passed those resolutions, it could not confirm the same. In other words, the Court below did not judicially consider what it ought to have considered, and decided something that it was not called upon to decide. Indeed the Court below deprived itself of the jurisdiction that it undoubtedly possessed under S. 54 by taking an erroneous view of the law as regards the validity or otherwise of the August resolution which was a matter wholly foreign to the proceedings before it. This in our judgment amounted to a material irregularity in the exercise of its jurisdiction by the Court below. The case before us is not a case in which the Court below has taken an errroneous view of the law as regards the matter in controversy before it, but is a case in which the Court below has denied to itself the jurisdiction to confirm the October resolution by erroneously assuming that it could not do so unless it was also competent to confirm the resolution of 2nd August. This irregularity committed by the Court below led it to the conclusion that it could not confirm the October resolution, and, as such, the case falls within the purview of Cl. (c) to S. 115, Civil P. C.

For the reasons given above we allow this application, set aside the order of the Court below and grant the application filed by the company in terms of the reliefs contained in it. Having regard to all the circumstances of the case we direct the parties to bear their own costs both here and below.

K.S. *Application allowed.*

10. Amir Hasan Khan v. Sheo Baksh Singh, (1885) 11 Cal 6=11 I A 237 (PC).
11. District Board of Farrukhabad v. Ikhlaque Husain, 1933 All 86=143 I C 98.
12. Om Prakash v. Muhammad Ishaq, 1933 All 557=146 I C 838.

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Full Bench

KISCH, RACHHPAL SINGH AND BAJPAI, JJ.

In the matter of *H, a Vakil, Banda*

Misc. Case No. 479 of 1934, Decided on 28th September 1934.

High Court — Order under Legal Practitioners Act—High Court has inherent power to review it—Legal Practitioner.

Although there is no express provision for a review of an order made under the Legal Practitioners Act, there is inherent power in the High Court to restore a pleader whose name has been struck off the rolls. [P 322 C 1]

Tej Bahadur Sapru—for Applicant.

Govt. Advocate—for the Crown.

Judgment.—This is an application by T. H. who was on the roll of Vakils of this Court till he was disbarred on 25th June 1930. The applicant prays that in our exercise of the right of clemency we should order the restoration of his name to the roll of vakils. It was pointed out by a Bench of this Court in the matter of a pleader of Cawnpore that:

"it has been held in a number of cases that although there is no express provision for a review of an order made under the Legal Practitioners Act, there is inherent power in the High Court to restore a pleader whose name has been struck off the rolls,"

and several authorities were cited. In the present case the vakil was disbarred on 25th June 1930, because certain charges of professional misconduct were held to be established against him. The vakil applied for special leave to appeal to the Privy Council and while their Lordships refused to give leave they pointed out that it is desirable that where grave criminal charges are levelled against a legal practitioner criminal proceedings should precede the disciplinary action. The argument before us proceeds on the assumption that the decision of a Bench of this Court was correct and that at the present moment the applicant prays for clemency only. He has filed a number of certificates including those from the Commissioner of the Jhansi Division, the District Magistrate of Banda, the Sessions and Subordinate Judge of Banda and the Munsif of Banda. He has also filed several testimonials from members of the bar practising at Allahabad and at Banda, and all these testimonials suggest that the applicant has been leading an honourable life and that he is thoroughly repentant of his past action.

It was pointed out in the case of a vakil of Gorakhpur, that when such certificates are filed they should be verified before the District Judge, but as in that case the members of the Bench were able from their personal knowledge to identify the signatures of several persons they did not send back the certificate to the District Judge. In this case also we are able to identify the signatures of most of the persons who have given testimonials to T. H. and we think it will be a waste of time if we were to send the certificates to the District Judge.

It is true that T. H. was disbarred on a former occasion, but clemency was shown to him even then and he was permitted to practise after a couple of years. We think that even now the vakil has been sufficiently punished and we hope he will lead an honourable life in future. We therefore allow this application, permit the vakil to resume his practice, and direct that he should be restored to the roll of vakils of this Court.

K.S. *Application allowed.*

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MUKERJI AND BENNET, JJ.

Collector of Etah—Appellant.

v.

Rani Gulab Kunwar—Respondent.

First Appeal No. 455 of 1931, Decided on 7th May 1934, from decision of Sub-Judge, Etah, D/- 25th August 1931.

Government of India Act (1915), S. 101, Cl. 4—High Court falling short of one barrister Judge for sufficient reasons — Other Judges are competent to carry on work.

Section 101, Cl. 4, Government of India Act, no doubt, provides that at least one-third of the Judges of the High Court shall be barristers. But this does not mean that if on account of certain reasons a vacancy occurs, the other Judges of the High Court shall be deemed incompetent to carry on the work of the High Court till the vacancy has been filled up, for otherwise there should have been some provision in the Government of India Act which should have said that the High Court should not function till the appointment had been made : 9 *All* 625, *Ref.*

[P 322 C 2 ; P 323 C 1]

Muhammed Ismail—for Appellant.

Baleshwari Prasad and *M. Chaturvedi*—for Respondent.

Mukerji, J.—When this appeal came up for hearing, Mr. Baleshwari Prasad, one of the learned counsel for the respondent, raised the objection that this High Court was not today properly constituted, and therefore the appeal could not be heard by us. The basis of his argument is that Young, J., has gone away and has been appointed the Chief Justice of the Lahore High Court, and therefore this High Court is short by one barrister Judge. His further argument is that under S. 101, Government of India Act, at least one-third of the Judges of the High Court should be barristers and, as that rule has not been complied with, the High Court is not properly constituted.

Of the two arguments the first is a question of fact. We have not got any evidence before us that Young, J., is not yet a member of this Court. He went away on leave. Till he takes over charge in the Lahore High Court, he continues to be a member of this Court. We are asked to take judicial notice of the fact that Young, J., has taken over charge of the Lahore High Court. But no judicial notice can be taken of a fact like this. The second argument is, in our opinion not sound. S.. 101, Cl. (4) no doubt provides that at least one-third of the Judges of the High Court shall be barristers. But this does not mean that if on account of certain reasons a vacancy occurs the

other Judges of the High Court shall be deemed incompetent to carry on the work of the High Court till the vacancy has been filled up. For reasons which may occur without any previous intimation, for example, if a Barrister Judge or a Civilian Judge happens to die suddenly, there is bound to be a vacancy and, if the argument of Mr. Baleshwari Prasad be good, the other Judges cannot work legally till the vacancy has been filled up. Now, it will take sometime for the Local Government to secure a suitable appointment. If the argument of Mr. Baleshwari Prasad had been sound, we should have expected some provision in the Government of India Act, which should have said that the High Court should not function till the appointment had been made.

An occurrence like the one which has been made the basis of this argument must be happening very often, having regard to the fact that we have seven High Courts in India. If the argument were at all sound, some provision against the argument would have been provided for by the Legislature. We may mention here that a similar objection, though not exactly in these terms, was raised before this High Court in the year 1887. The objection there related to the number of Judges. At that time the number of the Judges, who were functioning, was short by one, and the argument was raised that the High Court was not properly constituted. A Full Bench of this Court decided otherwise: vide, 9 All 625 (1). In our opinion, the objection has no force and is hereby overruled.

The counsel for the parties are agreed that in view of our judgment in the connected appeal No. 361 of 1930, this appeal should be remanded and the Court below should calculate the amount of mesne profits in view of our findings in that judgment, this appeal having arisen out of an application for assessment of mesne profits due during the pendency of the suit. We accordingly direct that a copy of our judgment in First Appeal No. 361 of 1930, be sent down to the Court below the decree of the Court below be reversed and that it be asked to reassess the mesne profits in accordance with the findings arrived in First Appeal No. 361 of 1930. Costs will be at the disposal of the Court below. The court-fee paid on the memorandum of appeal will be refunded to the appellant under S. 13, Court-fees Act.

v.s. *Case remanded.*

1. Lal Singh v. Ghansham Singh, (1884) 9 All 625=1884 A W N 154 (FB).

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THOM AND AHMAD, JJ.

Mohammad Yunis—Defendant — Appellant.

v.

Tilok Chand and *others* — Plaintiffs—Respondents.

First Appeal No. 381 of 1930, Decided on 10th October 1934, from decision of Sub-Judge, Muzaffarnagar, D/- 17th April 1930.

(a) Limitation Act (1908), S. 14 — Decree for sale in terms of compromise—Default in payment of instalments—Execution application — Objection that execution cannot be made unless final decree was obtained overruled by executing Court but upheld by High Court — Subsequent application for final decree — Held period spent in proceeding with execution should not be excluded.

On 5th September 1916 a decree for sale in terms of a compromise entered into by the parties was passed in favour of the plaintiffs against the defendant. The compromise that was embodied in the decree provided that the defendant:

"will pay the entire amount claimed and the costs of the suit, with an instalmentary payment of Rs. 1,000 a year with interest at the rate of 6 annas per cent per mensem. In case a default is made in respect of two consecutive instalments, the entire decretal amount will be paid in a lump sum with interest at the rate of 8 annas per cent per mensem. The plaintiffs will be entitled to get the entire property sought to be sold by auction noted in the petition of plaint, sold by auction.... The first instalment will stand payable on 31st July 1917, and in the same way each instalment will fall due on 31st July, of every year until the entire decretal amount is paid. Hence it is prayed that decree under O. 34, R. 4, may be passed with the above mentioned instalmentary payment and conditions."

Some of the instalments were duly paid by the defendant, but default was made in the payment of the instalments that fell due on 31st July 1924 and 31st July 1925, and thus, in accordance with the terms of the compromise decree, the entire remaining decretal amount became payable in a lump sum on 31st July 1925. The plaintiff decree-holders then filed an application for execution of the decree on 6th July 1927. The defendant-appellant objected to the application for execution, inter alia, on the ground that the compromise decree, being a preliminary decree for sale, was not capable of execution, and that the plaintiff decree-holders could not apply for execution without having a final decree prepared. On 22nd March 1928 the execution Court overruled the objection preferred by the appellant but, on appeal, the High Court, on 25th July 1929, gave effect to the objection of the defendant-appellant and dismissed the ap-

plication for execution. Then on 5th September 1929, the plaintiff-respondents filed an application for preparation of a final decree under O. 34, R. 5, Civil P. C.

Held: that time began to run against the plaintiffs from the date of the default in the payment of two consecutive instalments, viz., from 31st July 1925, and the application for the preparation of final decree filed by the plaintiffs was barred by limitation.

Held further: that the plaintiff could not claim to exclude even the period between the date on which the execution Court allowed the application and the date on which the High Court dismissed the application, as the plaintiffs had the right to file an application for a final decree during the period mentioned above. The decree passed in their favour was in terms a decree under O. 34, R. 4, Civil P. C. They were therefore entitled under the law to ask for the preparation of a final decree and the erroneous order of the execution Court dated 22nd March 1928, could not be a bar to the preparation of a final decree on an application being made for the purpose: 1916 *P C* 96; 1929 *All* 677 and 12 *M I A* 244, *Dist.* [P 327 C 1]

(b) Limitation Act (1908)—Construction—Provisions of Act and Schedule are exhaustive—If suit or application does not fall within one of sections prescribing about exclusion of time time must be computed from date prescribed in third column of schedule irrespective of resulting injustice to parties.

The Limitation Act is a self contained and exhaustive Code on the law of limitation. The time from which the period for instituting a suit, preferring an appeal or making an application begins to run is laid down by the 1st, 2nd and 3rd divisions respectively of the Sch. 1 to that Act. The period of limitation for all sorts of conceivable suits and applications has been prescribed by that schedule and, in order to make the schedule exhaustive, the legislature has prescribed periods of limitation of Arts. 120 and 181 of that Schedule for such suits and applications for which no period of limitation is provided elsewhere in that Schedule. But the third column of the Schedule that provides the 'time from which period begins to run' is subject to the provisions of Ss. 4 to 24 of the Act and in computing the period of limitation a plaintiff or an applicant is entitled to exclude such time as is provided for by any one of those sections, provided the case comes within the purview of a particular section. Like the Schedule the provisions of the Limitation Act as regards the exclusion of time are exhaustive, and it is not permissible to supplement or to add to those provisions. If a suit or an application does not fall within any one of the sections that prescribe about the exclusion of certain period in the computation of the period of limitation, the time must be computed from the date prescribed by the third column of the 3rd Schedule, and no principle outside the Limitation Act can be appealed to as a justification for the exclusion of any time. There is no sanction in law to invoke in aid principles of equity to enlarge the period of limitation by excluding some time in computing the period of limitation, for which no authority is to be found within the four corners of the Limitation Act. When the law is clear, it is the duty of the Court to give effect to it irrespective of the fact that the result leads to some injustice to one party or the other. [P 325 C 2; P 326 C 1]

(c) Practice—Precedents — Judicial decisions should not be applied by analogy to cases having different facts.

The attempt to apply judicial decisions by analogy to cases the facts of which are different results in confusion and must be deprecated. [P 328 C 2]

A. M. Khwaja and *K. C. Mital* — for Appellant.

K. N. Katju and *R. N. Gurtu* — for Respondents.

Judgment.—This is a defendant's appeal against a final decree in a mortgage suit passed by the Court below under O. 34, R. 5, Civil P. C., and the sole question for consideration in the case is whether or not the application for the preparation of the final decree presented by the plaintiffs-respondents in the Court below was barred by limitation. The Court below overruled the plea of limitation raised by the defendant and held that "under the peculiar circumstances of this case" the application was within time.

The Court below was right in observing that the circumstances that led to the application for the preparation of the final decree filed by the plaintiffs were "peculiar," but this fact, in our judgment, was no justification for adding to or supplementing the provisions of the Indian Limitation Act as regards the computation of the period of limitation prescribed for such an application by that Act, as the Court below has done. The facts are undisputed and are as follows: On 5th September 1916, a decree for sale in terms of a compromise entered into by the parties was passed in favour of the plaintiffs against the defendant. The compromise that was embodied in the decree provided that the defendant:

"will pay the entire amount claimed and the costs of the suit, with an instalmentary payment of Rs. 1,000 a year with interest at the rate of 6 annas per cent per mensem. In case a default is made in respect of two consecutive instalments, the entire decretal amount will be paid in a lump sum with interest at the rate of 8 annas per cent per mensem. The plaintiffs will be entitled to get the entire property sought to be sold by auction noted in the petition of plaint, sold by auction. . . . The first instalment will stand payable on 21st July 1917, and in the same way each instalment will fall due on 31st July of every year until the entire decretal amount is paid. Hence it is prayed that decree under O. 34, R. 4, may be passed with the above mentioned instalmentary payment and conditions."

Some of the instalments were duly paid by the defendant but default was

made in the payment of the instalments that fell due on 31st July 1924, and 31st July 1925, and thus, in accordance with the terms of the compromise decree, the entire remaining decretal amount became payable in a lump sum on 31st July 1925. The plaintiff-decree-holders then filed an application for execution of the decree on 6th July 1927. The defendant-appellant objected to the application for execution, inter alia, on the ground that that compromise decree, being a preliminary decree for sale, was not capable of execution, and that the plaintiffs-decree-holders could not apply for execution without having a final decree prepared. On 22nd March 1928, the execution Court over-ruled the objection preferred by the appellant but, on appeal, this Court on 25th July 1929, gave effect to the objection of the defendant-appellant and dismissed the application for execution. This Court held that the decree passed in terms of the compromise was a decree under O. 34, R. 4, Civil P. C., and:

"The decree-holders therefore were obliged to apply for a final decree before they can proceed to execution and they were debarred from making an application for sale in an execution Court."

Then on 5th September 1929, the plaintiffs-respondents filed an application for preparation of a final decree under O. 34, R. 5 Civil P. C. In this application it was admitted that the right to apply for the preparation of final decree accrued to the plaintiffs on 31st July 1925, by which date default had been made by the defendant in the payment of two consecutive instalments. It would be noted that the application for the preparation of the final decree was filed more than three years after 31st July 1925, but the plaintiffs sought to bring the said application within limitation by alleging that they were entitled, in computing the period of limitation, to exclude the time during which the application for execution was pending in the Court below and in this Court, viz., from 6th July 1927, up to 25th July 1929.

The defendant-appellant resisted the application on the ground that it was time-barred. He maintained that the plaintiffs-respondents were not entitled to the deduction of any time in computing the period of limitation. The Court below held that there were two consecutive defaults on 31st July 1925 and that the time for filing an application for preparation of a final decree expired on 31st July 1928. It further held that, though the plaintiff-respondent had filed the application for execution in good faith, they were not entitled to the benefit of the provision of S. 14 (2), Limitation Act, as the application for execution was not "for the same relief" within the meaning of that section, for which the present application for the preparation of the final decree was filed. In this connection the Court below relied on the decision of this Court in 1929 All 677 (1), in which in similar circumstances it was held that:

"The relief claimed in the execution of the decree was for the realization of the decretal amount by the sale of the property mentioned, therein, and the application for the preparation of the final decree is not for execution but for the preparation of the final decree which would be the last decree capable of execution. The two reliefs being different S. 14, Cl. (2) is not applicable."

It however was of the opinion that the decision in 1916 P C 96 (2) was an authority for the proposition that: "where the plaintiff could not have sued for some relief which had been decreed to him by mistake, his right of action should be considered as suspended and that time during which this right was suspended should be deducted."

It therefore held that the time from 22nd March 1928, when the Court below had allowed the application for execution filed by the plaintiffs, to 25th July 1929, when this Court dismissed the application for execution should be deducted "as the applicants' rights for applying for preparation of final decree were under suspension" during that period. In this view of the matter the Court below granted the application filed by the plaintiffs and passed a final decree.

In our judgment the plaintiffs were not entitled to the exclusion of any period in the computation of the period of limitation, and the application for preparation of final decree filed by them was barred by limitation. The Indian Limitation Act is a self-contained and exhaustive Code on the law of limitation. The time from which the period for instituting a suit, preferring an appeal or making an application begins to run is laid down by the first-second and third divisions respectively of Sch. 1 to that Act. The period of limitation for all sorts of conceivable suits and applications has been prescribed by that schedule and, in order to make the schedule exhaus-

1. Maqbul Ahmad v. Pateshri Partab Narain, 1929 All 677=118 I C 670.
2. Nrityamoni Dassi v. Lakhan Chandra Sen, 1916 P C 96=33 I C 452=43 Cal 660 (P C).

tive, the legislature has prescribed periods of limitation of Arts. 120 and 181 of that Schedule for such suits and applications for which no period of limitation is provided elsewhere in that Schedule. But the third column of the Schedule that provides the "time from which period begins to run" is subject to the provisions of Ss. 4 to 24 of the Act and, in computing the period of limitation, a plaintiff or an applicant is entitled to exclude such time as is provided for by any one of those sections, provided the case comes within the purview of a particular section. Like the schedule the provisions of the Limitation Act as regards the exclusion of time are exhaustive, and it is not permissible to supplement or to add to those provisions. If a suit or an application does not fall within any one of the sections that prescribe about the exclusion, of certain period in the computation of the period of limitation, the time must be computed from the date prescribed by the third column of Sch. 3, and no principle outside the Limitation Act can be appealed to as a justification for the exclusion of any time. There is no sanction in law to invoke in aid principles of equity to enlarge the period of limitation by excluding some time in computing the period of limitation, for which no authority is to be found within the four corners of the Limitation Act. When the law is clear, it is the duty of the Court to give effect to it irrespective of the fact that the result leads to some injustice to one party or the other. When a Rule has been laid down by the legislature, it has to be followed, and it is not open to the Court to enquire into the reasons for that rule, and to attempt to supplement those rules on equitable grounds.

In particular there is no room for the introduction of equitable principles in the administration of the law of limitation. In every case in which a defendant successfully invokes a rule of limitation in bar of a plaintiff's claim who has, apart from the law of limitation, a right to get relief against the defendant with respect to the subject-matter of the suit, the decision must be unjust in the sense that the defendant has, because of the bar of limitation, succeeded in withholding from the plaintiff what in common honesty is due to him. In other words, the law of limitation does, in many cases, lead to injustice to the defeated party. But such injustice, or supposed injustice, cannot be made the ground for enlarging or restricting the scope of a Statute passed by a competent legislature. It is to be remembered that public policy requires that there should be speedy decisions of disputes and adjustments of conflicting claims and that stale claims, should, as far as possible, be discouraged. It is also of cardinal importance for the progress of a civilized society on healthy lines that title should not be left in doubt and the unsettling of apparently settled facts should not be the order of the day. The aims and objects of the law of limitation are to set at rest doubts about title as early as possible and, in the administration of such law, equitable consideration cannot be allowed to come into play. Provisions for the exception of time in the computation of the period of limitation for a particular suit or application must be sought within the four corners of the Act and not outside it. It is to be noted that the provisions of S. 3 of the Act that every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor, by Sch. 1 shall be dismissed, are mandatory and so are the provisions of S. 9 of the Act which lays down that where once time has begun to run, no subsequent disability or inability to sue stops it. It follows that, if there is no provision in the Limitation Act that allows the exclusion of any time in the computation of the period of limitation, the time must be computed from the date prescribed by Column 3, Sch. 1 to the Act. The view that we take is in consonance with the decision of their Lordships of the Privy Council in 35 All 227 (3), and the decision of this Court in 1927 All 446 (4). To the same effect are the decisions in 1926 Cal 65 (5), 1927 Mad 597 (6) and 1927 Lah 200 (7).

In the case before us the Court below has excluded the time between 22nd March 1928, when the objection of the defendant to the application for execution was disallowed by the execution Court and 25th July 1929, when this Court reversed the decision of the

3. Soni Lal v. Kanhaiya Lal, (1913) 35 All 227=19 I C 291=40 I A 74 (P C).
4. Ram Charan Sahu v. Goga, 1927 All 446=102 I C 96=49 All 565.
5. Sarat Kamini Dassi v. Nagendra Nath, 1926 Cal 65=89 I C 1000.
6. M. Satya Narayana Brahman v. M. Seethayya, 1927 Mad 597=100 I C 776=50 Mad 417.
7. Hari Singh v. Muhammad Said, 1927 Lah 200=102 I C 523=8 Lah 54.

execution Court and dismissed the application for execution. There is no provision in the Indian Limitation Act that warrants the exclusion of this time. Cl. 2, S. 14 of the Act had, as held by the Court below, no application to the case as the application for execution was not "for the same relief" within the meaning of that clause as was the present application for the preparation of a final decree. It may be that the words "the same relief, should be given a liberal and not a narrow interpretation, but in view of the Division Bench ruling of this Court reported as 1929 All 677 (1) we must hold that the Court below was right in holding that the case did not come within the purview of S. 14 (2). But the Court below excluded the time mentioned above on the ground that the plaintiffs had no right to apply for the preparation of a final decree between the date on which the execution Court allowed the application for execution and the date on which this Court dismissed the application for execution. We consider that the Court below was wrong in assuming that the plaintiffs had not the right to file an application for a final decree during the period mentioned above. The decree passed in their favour was in terms a decree under O. 34, R. 4, Civil P. C. They were therefore entitled under the law to ask for the preparation of a final decree and the erroneous order of the execution Court dated 22nd March 1928, could not be a bar to the preparation of a final decree on an application being made for the purpose. We hold therefore that time began to run against the plaintiffs from the date of the default in the payment of two consecutive instalments, viz., from 31st July 1925, and the application for the preparation of final decree filed by the plaintiffs was barred by limitation.

But it is contended by Mr. Gurtu, the learned counsel for the respondents that the view taken by the Court below is justified by various decisions of their Lordships of the Privy Council, and we now proceed to notice those decisions. The first case relied upon is the decision in 12 M I A 244 (8). In that case putnee talook of putneedars was sold for realization of arrears of rent due to the zamindar under Bengal Regulation 8 of 1819 and was purchased by a third person, and out of the sale price the rent due to the zamindar was satisfied. Thereafter the sale was, on a suit being filed by the putneedars against the zamindar and the auction purchaser, set aside on the ground of various irregularities in the proceedings relating to the sale, and it was ordered that possession of the talook be restored to the putneedars, and that the zamindar should return the purchase money with interest to the auction purchaser. After returning the purchase money, the zamindar brought a suit for the recovery of the rent due to him. The High Court decided that suit, not having been brought within three years from the time the rent first became due, was barred by S. 32 of the Act 10 of 1859. The decision of the High Court was reversed by their Lordships of the Privy Council. Their Lordships held that:

"Upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent: and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place."

This case, in our judgment, is clearly distinguishable. On the sale of the talook the claim of the zamindar for arrears of rent was satisfied, and when the sale was set aside and the zamindar had to refund the money realized by him, a new cause of action did, as held by their Lordships, arise for the recovery of the amount that the zamindar had to refund. That this is so is apparent from the fact that their Lordships dissented from the view of the High Court that the zamindar could have sued for the arrears pending the proceedings to set aside the sale and observed that until the sale had been set aside, the zamindar was in the position of a person whose claim had been satisfied and that her suit, if instituted, might have been successfully met by a plea to that effect. In the case before us the amount due to the plaintiffs for which they prayed for a final decree was not, on the application for execution being allowed by the execution Court, paid to them, and therefore their claim for the outstanding amount remained unsatisfied all through. In the case before their Lordships, there was no question about the exclusion of any time in computting the period of limitation after the period had begun to run.

The second case cited on behalf of the respondent is the decision in 11

8. Rauce Surnomoyee v. Shooshee Mokhee Burmonia, (1867-69) 12 M I A 244=2 Suther 173=2 Sar 424 (P C).

All 47 (9). The question for consideration in that case was whether a debt which at one time was due from the defendant to the plaintiff, and which had never been paid, had been extinguished by lapse of time. It appears that the defendant executed a sale deed of certain property belonging to him in favour of the plaintiff in consideration of the debt due to the plaintiff. But very soon afterwards the plaintiff found, or alleged, that the deed was not in accordance with certain conditions for which it had stipulated, and, declining to complete the purchase, demanded the amount that was due to him. The defendant insisted that the deed was in accordance with the contract between the parties and filed a suit for specific performance of the contract, praying that the deed might be registered. The suit of the defendant was decreed by the Subordinate Judge but dismissed by the High Court. The plaintiff then filed a suit for recovery of the debt due to him. The suit was filed more than three years after the debt had originally become due but within three years from the date of the decision of the High Court. The plaintiff claimed that the amount for which the defendant had given credit to him in the sale deed ought to be refunded to him. The defendant resisted the suit on the ground that it was time-barred. Their Lordships overruled the contention of the defendant and observed that the decree of the High Court in the suit for specific performance of contract "brought about a new state of things, and imposed a new obligation on" the defendant. They then observed that in view of S. 65, Contract Act, the defendant was bound to restore the advantage that he had received when the contract of sale was declared to be void by the High Court. The advantage received by the defendant under that contract was the retention of the debt due by him to the plaintiff and, accordingly, the cause of action for the recovery of that debt arose on the date of the decision of the High Court. Their Lordships also made reference to Art. 97, Limitation Act, (Act 15 of 1877) that provided for an action for money paid upon an existing consideration which afterwards fails. Their Lordships held that the consideration for the retention of the debt by the defendant failed on the date of the decree by the High Court and the suit, having been brought within three years from that date, was within time. In the case before us there is no question about an agreement having been discovered to be void or a contract having become void or of the failure of any consideration, and therefore the case is clearly distinguishable. Reliance is however placed on behalf of the respondents on the following observations contained in the judgment of their Lordships:

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in a particular mode can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all."

It is pointed out by the learned counsel that after the application for execution filed by the plaintiffs was allowed by the execution Court, it was useless for them to apply for the preparation of a final decree and it is accordingly contended that the time from that date till the High Court reversed the decision of the execution Court should be excluded in the computation of the period of limitation. The obvious answer to this contention is that the observations of their Lordships quoted above must be read with reference to the facts of the case before their Lordships and can have no application to cases in which the facts are essentially different. It is needless to observe that the attempt to apply judicial decisions by analogy to cases the facts of which are different results in confusion and must be deprecated.

Similarly the decision in 1916 P C 96 (2) is distinguishable. In that case the property in dispute belonged in equal shares to three persons. One of the co-sharers filed a suit for his one-third share and impleaded the remaining two co-sharers as defendants to the suit. The suit was contested by one of the defendants. The other defendant was pro forma and supported the plaintiff's claim and prayed that his one-third share should also be decreed to him. The trial Judge decreed the plaintiff's claim and declared that the pro forma defendant was also entitled to a decree for one-third share in the property. But, on appeal by the defendant who contested the suit, the portion of the decree, which gave relief to the pro forma defendant who had claimed his share in the property

9. Bassu Kuar v. Dhum Singh, (1889) 11 All 47= 15 I A 211=5 Sar 260 (P C).

was set aside on the ground, among others, that as the suit was one for ejectment and not a partition suit, relief could not be given as between two co-defendants. The pro forma defendant then commenced an action for declaration of his title to his share in the property and for possession. The suit was contested by the defendant on the ground that it was barred by limitation. The trial Judge gave effect to the plea of limitation and dismissed the suit. But on appeal a Bench of the Calcutta High Court decreed the suit. The Bench doubted the applicability of S. 14, Limitation Act, but held that as the decree of the trial Judge in the former suit, so long as it was not reversed on appeal, was capable of execution, the plaintiff (the pro forma defendant in the former suit) could not institute a fresh suit for the reliefs that he sought in the later suit and, accordingly, he was entitled to deduct the period that intervened between the decree of the trial Judge and the reversal of that decree by the appellate Court. On appeal by the defendant their Lordships of the Judicial Committee "concurred generally" with the reasons given by the appellate Court for overruling the plea of limitation and observed that limitation:

"would equally without doubt remain in suspense whilst the plaintiffs were bona fids litigating for their rights in a Court of Justice."

It is true that no reference to S. 14 (1), Limitation Act. was made by their Lordships in the course of their judgment, but the observations quoted above do indicate that their Lordships intended to hold that the plaintiff was entitled to the benefit of the provisions of S. 14 (1), Limitation Act. S. 14, however as observed above, has no application to the case before us. For the reasons given above, we allow this appeal, set aside the final decree passed by the Subordinate Judge, and dismiss the application for preparation of final decree filed by the plaintiffs with costs here and below.

K.S. *Appeal allowed.*

* A. I. R. 1935 Allahabad 329

SULAIMAN, C. J. AND BAJPAI, J.

Jagar Nath Gir—Appellant.

v.

Sher Bahadur Singh—Respondent.

First Appeal Nos. 153 of 1930 and 162 of 1931, Decided on 26th February 1934, from decision of Addl. Sub-Judge, Basti, D/- 9th December 1929.

(a) Hindu Law—Sanyasi — Essential ceremonies include prajapathiyesthi homan and viraja homan.

The mere fact that a person declares that he has become a sanyasi or that he calls himself or is described by others as such or wears clothes ordinarily worn by sanyasis would not be sufficient to make him a perfect sanyasi. The essential ceremonies in this connexion include the performance of prajapathiyesthi homan and the viraja homan : 1930 *All* 643, *Foll.* [P 332 C 1,2]

Where the necessary ceremonies had not been performed by a person and he was married and lived the life of a worldly man and was possessed of property :

Held : that he was grihast gosavin and not a nihang sanyasi. [P 332 C 1]

(b) Practice — Lower Court judgment on pure question of fact — Ordinarily appellate Court should not interfere — But if lower Court has not discussed evidence of witnesses, it may differ.

Ordinarily speaking where the judgment of the Court below is on a pure question of fact depending on the credibility of witnesses, it is not desirable that an appellate Court should differ, but where the lower Court has not discussed the plaintiff's witnesses at any length the appellate Court may differ. [P 333 C 1]

(c) Hindu Law—Interpretation of original texts — Modern notions should not be engrafted.

When the original text is being interpreted, the conditions prevailing in ancient times should be investigated and modern notions should not be engrafted unless justice, equity or good conscience so demand. [P 336 C 1]

*** (d) Hindu Law—Succession — Mother is entitled to succeed to her illegitimate child on principle of justice, equity and good consceince.**

On the principle of mutuality the mother should succeed to her illegitimate child by application of the principles of justice, equity and good conscience. An illegitimate child after the death of his putative father can look up to no one except his mother who brought him into the world, and an erring mother can rely only upon her child after the death of her paramour. The right of one to succeed to the property of another can therefore be based on the principles of justice, equity and good conscience, and there is no reason why the property should by escheat go to the Crown: *Case law discussed.* [P337 C2; P338 C1]

(e) Hindu Law — In absence of clear text and authority, principles of justice, equity and good conscience can be applied.

In the absence of clear text and authority a point can be decided by applying the principles of justice, equity and good conscience. [P 333 C 1]

K. N. Katju and *R. C. Ghatak* — for Appellant.

P. L. Banerji, *Harnandan Prasad* and *Shimla Nandan Prasad* — for Respondents.

Bajpai, J.—This is an appeal by the defendant, Jagarnath Gir arising out of a suit brought by the plaintiff Sher Bahadur Singh, for possession of

zemindari property in two villages Gonijot known as Shankerjot, 16 annas and Kundaria Ganesh, 5 annas 4 pies. The plaintiff's allegations were that Onkar Bharthi was the absolute owner of the property in suit and that he died leaving behind him his widow Mt. Murat and his mother Mt. Lakhraji, defendant 2, that after the death of Onkar Bharthi Mt. Murat entered into possession of the property as a limited owner and on her death Mt. Lakhraji, the mother, became entitled to the property. The plaint then goes on to say that after the death of Mt. Murat there were disputes regarding mutation in the Revenue Court and, although the first Court decided in favour of Mt. Lakhraji, the appellate Revenue Court decided in favour of Jagarnath Gir, who however was not the chela of Onkar Bharthi nor was the property a math property and Onkar Bharthi had no right to initiate a disciple. It is then stated that Mt. Lakhraji the second defendant has executed a sale-deed dated, 13th February 1928, in favour of the plaintiff transferring the plaint property and all the rights appertaining thereto to the plaintiff.

Mt. Lakhraji supported the plaintiff, but Jagarnath Gir filed a written statement pleading that the property in suit was not the personal property of Onkar Bharthi, but belonged to the nihang gaddi of math Shankerjot and has, according to the custom of the gaddi, been devolving with the office of the mahant upon the chela initiated by the last holder of the gaddi. It was then said that Onkar Bharthi was like his predecessors a nihang sadhu and that Jagarnath Gir was initiated a chela by Onkar Bharthi, that Onkar Bharthi could not take a wife nor could Mt. Murat, even if she was married, get a right of inheritance. As regards defendant 2, Mt. Lakhraji, it was pleaded that she was neither the mother of Onkar Bharthi nor the wife of Oudh Bharthi, but was a fictitious person from whom the plaintiff had obtained a fictitious sale-deed without paying any consideration. In the alternative it was pleaded that Onkar Bharthi had executed a will in favour of Mt. Murat by virtue of which she had become the absolute owner of the property in suit, and she in her turn executed a will dated, 15th June 1923, in favour of Jagarnath Gir and the plaintiff was by no means entitled to get the property in dispute.

Upon these pleadings the following issues were framed by the Court of first instance: (1) Whether the property in dispute was the personal property of Onkar Bharthi or it was the property of math ? (2) Whether defendant 1 is the chela of Onkar Bharthi ? (3) Whether Onkar Bharthi belongs to the class of nihang sadhus ? If so, what is its effect on the suit ? (4) Whether there is any special custom in the Shankerjot math about the devolution of the math property ? If so, what is its effect ? (5) Whether defendant 2 is the mother of Onkar Bharthi and wife of Oudh Bharthi, and if so, can she legally transfer the property in suit ? (6) Whether Onkar Bharthi executed any will in favour of Mt. Murat and whether she had become absolute owner of the property in suit ? (7) Whether Mt. Murat executed a will, dated 15th June 1923, in favour of the defendant, and if so, what is its effect on the suit ? (8) Whether the plaintiff is entitled to any relief ?

The Court of first instance has decided all the issues in favour of the plaintiff and has therefore decreed the plaintiff's suit. The defendant has filed the present appeal in which he challenges the findings of the Court below.

The first point that we have got to decide is whether the property in suit is endowed property dedicated to Shankerjot math or is the personal property of Onkar Bharthi. There is no document on the record to prove that the disputed property is endowed property nor is it so entered in any Revenue Record. In the wajib-ul-arz of 1860 Oudh Bharthi, the predecessor of Onkar Bharthi, described the property as his personal property. In the year 1902 one Mahadeo Bharthi brought a suit against Oudh Bharthi for possession of this very property on the allegation that the property was math property and Oudh Bharthi had lost his right of being a mahant by reason of his misconduct. In that suit it was decided by the trial Court as well as by the District Judge that the property in suit was not endowed property and that Oudh Bharthi was the full owner of the property. Oudh Bharthi in his written statement filed in the above suit said that there was no property appertaining to any math out of the property in question and the entire property exclusively belonged to the defendant who was the sole owner thereof. Later on there was another litigation in the year 1922 when Mahant Durga Bharthi brought a suit against Mt. Murat in which again a

claim was made by the then plaintiff that the property was math property. The High Court discussed the evidence adduced in the case and dealing with the kaifiat mahtavi and kaifiat sherista nizamat, which were produced in that suit, held that those documents clearly proved that the property was the ancestral zemindari property which had been acquired by the predecessors of the defendant in the suit. The learned Judges held that the plaintiff of that suit had failed entirely to prove that the property was ever dedicated to any math of Shankerjot and that the suit property was the personal property of Onkar Bharthi. Mt. Murat, the original defendant, died during the pendency of the appeal in the High Court and Jagarnath Gir, the present defendant, along with certain other persons were brought on the record in her place. These two reports have been filed in the present suit as well as we have come to the conclusion that they establish that the property in suit was the personal property of Oudh Bharthi and Onkar Bharthi. A number of plaintiff's witnesses deposed that Onkar Bharthi was the owner of the suit property whereas none of the defendant's witnesses had the courage to say that the disputed property was endowed property. The will by Onkar Bharthi in favour of Mt. Murat and the will by Mt. Murat in favour of Jagarnath Gir produced by the contesting defendant are disputed by the plaintiff, but it is worthy of note that in both these deeds the property is mentioned to be the personal property of the executants. Finally, there is no evidence on the record to prove the existence of any math. We are therefore in agreement with the Court below that the suit property was the personal property of Onkar Bharthi and not the property of any math.

The Court below after a discussion of the evidence and the circumstances in the case came to the conclusion that defendant 1, Jagarnath Gir, was not the chela of Onkar Bharthi. This finding was not specifically challenged in the grounds of appeal to this Court, unless it be considered that the challenge was implied in ground No. 4 of the memorandum of appeal which is to the effect that:

"It was proved that the property in suit devolved from guru to chela, which was in fact and in law endowed property and was not the personal property of Onkar Bharthi."

We are of the opinion that if the appellant wanted to contest this finding he should have said so specifically in the grounds of appeal. Under the circumstances, it is sufficient to say that we are in perfect agreement with the Court below and hold that it has not been proved that Jagarnath Gir is the chela of Onkar Bharthi. The next point that we have got to determine is whether Onkar Bharthi was a nihang sadhu. The Court below has come to the conclusion that Onkar Bharthi was not a nihang sadhu, but a grihast goshain. The only circumstance to which reference has been made by the learned counsel on behalf of the appellant on this point is that Oudh Bharthi in his will of November 1901, said that he had initiated a disciple named Onkar Bharthi who was then of tender age. There is also some evidence to the effect that Onkar Bharthi was shaved when he was initiated. This shaving ceremony took place when Onkar Bharthi was about 16 months old, as was deposed to by Mt. Lakhraji, when she gave her evidence on 3rd March 1903, in the litigation between Mahadeo Bharthi and Oudh Bharthi. We may therefore take it that the initiation took place about 1901. Bhaonath Pandey, Bhagwan Datt, Hubba, Guptar and a number of other witnesses produced on behalf of the plaintiff proved that Oudh Bharthi died when Onkar Bharthi was about 7 or 8. This would show that the ceremonies which are necessary for the initiation of a person as a nihang could not have been performed and Onkar Bharthi could not have been made a nihang. In 2 I C 385 (1), it was held that according to the custom of the dasnami sanyasis to which class the nihang goshain belongs:

"Every aspirant for entrance into the order has to pass through a period of probation which may extend to months or even years, and during which period it is open to the chela to revert to his natural family. It is not till the performance of the final ceremony or the Biraja Homa that the aspirant is irrevocably attached to the sect and completely severed from his family. It is therefore essential that the Biraja Homa should have been duly performed. It is not usual to whisper the mul mantras into the ears of the novice at the time of the first initiation though some mantras may be recited on such an occasion."

The Biraja Homa can be performed only:

"When the chela has reached the years of discretion so as to be able to realize for himself the full significance of the final act of the renouncing of the world."

1. Gossain Ramdhan Puri v. Gossain Dalmir Puri, (1909) 2 I C 385.

This case was followed by this Court in 1930 All 643 (2), in which it was held that:

"The mere fact that a person declares that he has become a sanyasi or that he calls himself or is described by others as such or wears clothes ordinarily worn by sanyasis would not be sufficient to make him a perfect sanyasi. The essential ceremonies in this connexion include the performance of prajapathiyesthi homan and the viraja homan.'

There is a very interesting note by Warden printed as Appendix B at p. 433 in Steel's: "Customs of Hindu Caste" giving the origin of the sanyasis and the ceremonies that are essential for initiation according to that note also the celebration of the viraja homan is essential. In Crooke's book. "The Tribes and Castes of the North-Western Provinces and Oudh," Vol. 2. p. 470, there is a quotation from Mr. Sherring who describes the mode of initiation as follows:

"The candidate is generally a boy, but may be an adult. At the Sivaratri festival water brought from a tank in which an image has been deposited is applied to the head of the novitiate, which is thereupon shaved.

The guru or spiritual guide whispers to the disciple the sacred text (mantra). In honour of the event, all the goshains in the neighbourhood assemble together, and give their new member their blessing, and a sweetmeat called laddu, made very large, is distributed among them. The novitiate is now regarded as a goshain but he does not become a perfect one until the vijaya homa has been performed at which a goshain famous for religion and learning gives him the original mantra of Siva. The ceremony generally occupies three days at Benares. On the first day, the goshain is again shaved, leaving a tuft on the head (chundi sikha). For that day he is considered a Brahmin and is obliged to beg at a few houses. On the second day he is held to be a Brahmachari and wears coloured garments and also the sacred cord (janeu). On the third day the janeu is taken from him and the headlock cut off. The mantra of Siva is made known to him and also the rudri gayatri (not the usual one daily pronounced by Brahmins). He is now a full goshain or vanaprasta, is removod from other persons and abandons the secular world. Henceforth he is bound to observe all the tenets of the goshains. The complete goshains who have performed the ceremony of the vijaya homa are celebates. It is customary therefore for men not to perform it until they are 40 or 50 years of age as it involves the abandonment of their wives and families."

At the same page Crooke says that "goshains are both ascetics and family men. The former are generally known as kutichar, ashandhari or mathdhari, and the latter grihast."

At p. 471 he has stated that:

"Among the trading goshains the mahant of Mirzapur who belongs to the Giri section was for a long time notorious among the merchants of Northern India. Such goshains have practically abandened all claim to living a religious life and exercise no priestly functions."

There is no evidence on the record of this case to show that any of these ceremonies were performed or that Onkar Bharthi had reached the years of discretion when he could understand the significance of the mul mantras and of the fact that he was irrevocably renouncing the world. Reference has been made to the fact that he was buried, but this circumstance alone is not sufficient to show that Onkar Bharthi had become a sanyasi or nihang. Janki Nath a witness on behalf of the defendant, Jagarnath Gir stated:

"Onkar was married to Mt. Murat. The mahant who is not married is called nihang mahant. Onkar was married to Murat and so I cannot say whether he was grihast or nihang. The Court knows it. I am grihast. I cannot tell what is the difference between me and Onkar on the point of grihast."

Every circumstance points in favour of Onkar being a grihast goshain and not a nihang sanyasi. The necessary ceremonies had not been performed in his case; he was married and lived the life of a worldly man and was possessed of property. We therefore agree that Onkar Bharthi was a grihast gossain. The finding that the disputed property was the personal property not dedicated to any math and that Onkar Bharthi was not a nihang sanyasi naturally obviates the necessity of finding whether there is any special custom in Shankerjot math about the devolution of the math property, because the ordinary Hindu law would govern the inheritance. Para. 7 of the wajib-ularz of 1860 subscribed by Oudh Bharthi runs as follows:

"In the village, I have been appointed as a lambardar. After me my eldest son, if he be fit, should be appointed as lambardar. If he be unfit then any other son who may be fit should be appointed as lambardar. If my heirs be minors then some of my relations shall be appointed as sarbarahkar to look after and protect the property of my son."

The above citation from the wajib-ularz also shows that the line of sucession is not governed by any special custom, that is; the devolution from guru to chela as is alleged by Jagarnath Gir, but by the ordinary Hindu law. It was also contended in the Courts below that Onkar Bharthi had executed a will dated, 29th October 1918. in favour of Mt. Murat making her the absolute owner of the property and that Mt. Murat in her turn had executed a will dated, 15th June 1923. bequeathing the property to the defendant and by virtue of these two deeds

2. Baldeo Prasad v. Arya Priti Nidhi Sabha, 1930 All 643=124 I C 761=52 All 789.

the defendant is in rightful possession of Onkar Bharthi's estate. The Court below has held against the genuineness of these wills. A half-hearted argument was advanced before us in this connexion, but it is not necessary for us to say more than that we are in perfect agreement with the Court below that the evidence produced by the defendant to prove the will of Onkar Bharthi is entirely worthless, and so far as Mt. Murat's will is concerned, Bhuleshar Lal, the scribe himself says that Mt. Murat died early on the morning of 15th June 1923, and the will was written out four days after her death.

The next question that we have got to decide is whether Mt. Lakhraji, who is impleaded as defendant 2, is the mother of Onkar Bharthi. The learned Additional Subordinate Judge has recorded a finding that defendant 2 is Lakhraji, mother of Onkar Bharthi. It has been strenuously contended on behalf of the defendant-appellant that this finding is wrong. Although the judgment of the Court below is not satisfactory on this point we have also come to the same conclusion independently and without deriving any assistance from the reasons given by the learned Additional Subordinate Judge. Ordinarily speaking where the judgment of the Court below is on a pure question of fact depending on the credibility of witnesses, it is not desirable that an appellate Court should differ, but in the present case the Additional Subordinate Judge has not discussed the plaintiff's witnesses at any length. Indeed in his judgment he does not mention the witnesses by name, but only by numbers which is not a proper method of mentioning witnesses. (After discussing the evidence, and coming to the above conclusion His Lordship proceeded). The next question that we have got to decide is whether Mt. Lakhraji and through her, her representative is entitled to succeed to the property in dispute after the death of Mt. Murat, as the mother of Onkar Bharthi who was the last male owner of the property. The plaintiff's case is that Mt. Lakhraji was the wedded wife of Oudh Bharthi and Onkar Bharthi was her legitimate son. An issue was struck by the learned Additional Subordinate Judge on this point, but he has not recorded a finding on the same because he was of the opinion that even if Onkar Bharthi was the illegitimate son, Mt. Lakhraji was entitled to succeed. We regret that the learned Judge left this point undecided and if we disagreed with him on the question of law that we shall discuss presently, we might have thought it desirable to remit an issue on the point upon the evidence already on the record. We shall consider the question on the assumption that there was not a legal marriage as understood in the present times between Mt. Lakhraji and Oudh Bharthi and that Onkar Bharthi was an illegitimate son according to the present acceptation of the term. It is not denied that Onkar Bharthi was the son of Mt. Lakhraji and we have held before that the present Mt. Lakhraji is that mother. What is however strenuously argued on behalf of the appellant is that the mother is not entitled to succeed to her illegitimate son. It is said that this is the logical result under the Hindu law as it stood before Manu and even after it underwent some changes in the times of Yajnavalkya and Vijnaneswara and was further modified by Judges in the present times. The contention of the respondent however is that upon a correct appreciation of the original texts and after paying due regard to the decided cases, there is no warrant for excluding the mother from inheriting her illegitimate son's property. We shall first mention the line adopted by the appellant in his argument. Reference was made at the very outset to Sarvadhikari's Hindu Law of Inheritance (Tagore Law Lectures, 1880), p. 281, where the learned author says:

"If we carefully read the extracts from Manu which we have given in another place we come to the irresistible conclusion that the line of succession after sons, father, brothers, the nearest of kin, the remote kinsmen, the preceptor or the pupil has entirely closed and there is no room for further admission. No, Father Manu cannot silence the qualms of his conscience. For a long time he talks of a great many other things to divert his attention from the disagreeable subject, but the shadow repeatedly crosses his path, and he can no longer keep silence. He gives a start, stamps his foot upon the ground and the fiat goes forth :

Of a son dying childless, the mother shall take the estate, and the mother also being dead, the paternal grandmother shall take the heritage. As soon as his judgment is pronounced, the great sage turns aside his face, and thinking that the painful duty was at last done, talks volubly of other matters and tries to forget that he has insulted the memory of veteran legislators by declaring women as heirs."

It is therefore said that Manu could not have intended to allow a mother to succeed to the estate of her illegitimate child when it was only for the first time declared by him that she should be one of the heirs to her son. There can however be no doubt that

by the time of Yajnavalkya it was fully established that a mother was an heir and that a son was an heir both to his father and his mother and in the Mitakshara also the mother is recognized as an heir and comes even before the father. It is however contended that throughout the Mitakshara wherever a son is mentioned it is a legitimate son who is intended and similarly wherever a father or mother is mentioned one connected by a recognized form of marriage is intended. Coming to the decided cases it was held in 2 All 134 (3) and in 22 All 191 (4), that an illegitimate son of the three higher classes is not an heir to the father according to the Hindu law and this view has also been taken by the Madras High Court in 1915 Mad 63 (5). It is said that in 1918 Mad 1346 (6), the learned Judges of the Madras High Court have extended the principle laid down by their Lordships of the Privy Council by holding that the sudra father of a son from his concubine would, on the principle of reciprocity or justice, equity and good conscience, inherit the estate of her illegitimate son and Sadashiva Aiyer, J., was of the opinion that he might possibly inherit collaterally. Commenting on 18 Cal 151 (7), the learned counsel for the appellant argues that although when it was laid down that two illegitimate sons might succeed to each other, their Lordships did not intend to extend the scope of what they had laid down previously, but simply intended to hold that they would succeed to each other as brothers by survivorship on the ground that they were members of a joint Hindu family, that is to say, on the principle of the formation of a joint Hindu family and not as a matter of inheritance. Citing the original text of Manu to the effect that to the next sapinda the inheritance belongs, it was said on behalf of the appellant that it was laid down by their Lordships of the Privy Council in 1914 P C 1 (8), that sapindaship must be mutual and that the sapindas must be so related to each other that they should be sapindas of each other, and it was contended that an illegitimate son cannot be the sapinda of his mother, conversely the mother cannot be the sapinda of her illegitimate son, and therefore she cannot be an heir. It is argued that although the mother is not specifically mentioned she is still treated as a sapinda, and it has been made clear in 21 All 99 (9) and 1929 Mad 545 (10), that sapinda relationship depends on a lawful marriage. Coming to the time of Yajnavalkya in Chap. 2, S. 2, it is stated that both parents (pitarau) will succeed to the estate of their son after certain prior heirs have been exhausted. The Benares school has made it clear that between the two parents the mother takes precedence. It is however pointed out that the word pitarau must mean parents who are legally married, and in this connexion reliance is placed on the use of the same word in Chap. 1, S. 3 of Yajnavalkya, where it is stated that sons divide equally both the effects and debts after their two parents (pitrau), which it is said must mean parents who are legally married. When the texts of Yajnavalkya say that:

"of heirs dividing after the death of the father let the mother also take an equal share"

and that

"if he (father) makes the allotments equally, his wives to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions"

then it was meant that the lady should be legally married. It is then pointed out that the case of 8 M I A 400 (11), proceeded more on general principles of justice, equity and good conscience rather than on Hindu law and in 8 M I A 400 (11), their Lordships of the Privy Council implied that in the absence of a custom or usage having the force of law an illegitimate child cannot inherit the estate of his mother. Finally, it is contended that although there is an exception which allows an illegitimate son of a sudra father to succeed to the estate of his father and although on the principle of reciprocity or justice, equity and good conscience the father might succeed to his illegitimate son, there is no text which allows the illegitimate son to succeed to the estate of his mother, much less is there any text which al-

3. Sarasuti v. Mannu, (1878) 2 All 134:
4. Roshan Singh v. Balwant Singh, (1900) 22 All 191=27 I A 51=7 Sar 642 (PC).
5. Meenakshi v. Muniandi Panikkan, 1915 Mad 63=25 I C 957=38 Mad 1144.
6. Subramania Ayyar v. Rathnavelu Chetty, 1918 Mad 1346=42 I C 556=41 Mad 44 (FB).
7. Jogendra Bhupati Hurrochandra Mahapatra v. Nityanand Man Singh, (1891) 18 Cal 151=17 I A 128=5 Sar 596 (PC).
8. Ramchandra Martand v. Vinayak Venkatesh, 1914 P C 1=41 I A 290=42 Cal 384 (PC).
9. Shome Shankar Rajendra v. Rajesar Swam Jangam, (1898) 21 All 99=1898 A W N 170.
10. Rathinasabapathi Odayar v. Gopala Odayar, 1929 Mad 545=121 I C 126.
11. Mayna Bovee v. Ootaram, (1859-61) 8 M I A 400=2 WR 4=1 Suth 452=1 Sar 797=2 M H C R 196 (PC).

lows a mother to succeed to the estate of her illegitimate son. So far as Judge-made law is concerned, strength is sought from the case of 34 Bom 553 (12), wherein it was held that the stridhan of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse.

On behalf of the respondent, the line of argument adopted by his learned counsel is that there is no text which prevents an illegitimate son from succeeding to the estate of his mother in any caste, nor the mother to succeed to her illegitimate son and there is no justification for holding that the mother should be married according to the present conception of marriage. It is said that the old Hindu lawgivers recognized eight forms of marriages (some of which received the approbation of the lawgivers and some did not, but all were recognized as legal) and twelve kinds of sons, and therefore there was very little room for what is now known as an illegitimate son. It was also ordained that a man of a superior caste could marry a woman of an inferior caste and provision was made for the sons from the wives of different castes in different proportions at the time of partition. It was however not open for a woman of a higher caste to marry a man of an inferior caste when probably she would become an outcaste. Mr. Shastri, however at p. 665 of his book stated that a woman living in adultery with a man of equal or superior caste did not become an outcaste. The only restriction therefore in marriage apart from questions of consanguinity was that marriage between woman of a superior caste and a man of an inferior caste was not permissible. One of the recognized forms of marriage was the gandharb form of marriage which is described as:

"the voluntary union of a maiden and her lover which springs from desire and has sexual intercourse for its purpose"

and this in modern times would be called mere concubinage. The son of such a marriage in the olden days would be a legitimate son and indeed would be the principal kind of son, namely, the aurasa. There were, as stated before, twelve kinds of sons, the first of whom was called the principal (aurasa); the remaining eleven were secondary and ancient Hindu law prescribed various devices for obtaining sons, even to the extent of a child being begotten by another person, namely, by a sagotra (this was kshetraja son) or of a child being born to an unmarried damsel while she was in her father's house (this was the kanina son). But it must be understood that in these cases the putative father must be of the same caste. Here again it would appear therefore that the only restriction was that the caste of the procreator must not be lower. It is therefore difficult to imagine of an illegitimate child provided there was no degeneration on the part of the woman so far as the caste was concerned. The recognition of twelve kinds of sons in the ancient times is due to the fact that great spiritual benefit was expected from the son. He is a putra, the deliverer of the soul of the father, from the torments of hell (put), and there was therefore an inordinate desire amongst the Hindus of old that a son should be born who would be capable of performing this act of deliverance. Manu gives full expression to this longing when he says:

"By a son a man obtains victory over all people; by a son's son he enjoys immortality and afterwards by the son of that grandson, he reaches the solar abode."

Various kinds of marriages were recognized on principles of morality because it was considered sinful for a man to have carnal connexion with a female and not make a decent woman of her, by insisting that under whatever circumstances the connexion takes place a marriage must be deemed to have taken place. It is contended that if Onkar Bharthi had been born in the days of yore, he would have been considered legitimate or principal child (aurasa) of Oudh Bharthi and Mt. Lakhraji would be deemed to have been married according to the gandharb form of marriage. The only exception that was made formerly was in the case of a son begotten on a female slave, that is a dasiputra and there it was declared that a son begotten by a sudra on a female slave may take a share by the father's choice, but the son begotten by a man of a regenerate class on a female slave was not held to be entitled to a share even by the father's choice, but only to maintenance if he was docile. All forms of marriages, excluding the Brahma where the saptapadi is performed and the asur which in rituals is allied to the Brahma with the exception that the bridegroom pays consideration for the bride, are now obsolete. We, of course, leave here marriages permitted

12 Jagannath Raghunath v. Narayan Lal Shethi, (1910) 34 Bom 553=7 I C 459.

by custom out of consideration. All kinds of sons except the aurasa (ordinarily understood as legitimate) and dattaka (ordinarily understood as adopted) are also obsolete and slavery, too, has been abolished. It therefore perhaps follows that an illegitimate child according to Hindu law as at present understood would be the offspring of concubinage and that is the reason why their Lordships of the Privy Council have said that an illegimate child as distinguished from a dasiputra would not succeed to a father of a regenerate class, but would only succeed to a sudra father. The contention of the respondent therefore is that there is no justification for extending the principle any further. It is said that the rule of English law regarding illegitimate children does not apply to Hindus. He is not a filius nullius as regarded in English law and this was held in 30 All 508 (13). The original text being that a mother succeeds to her son, it would follow that the mother could not obviously mean married only according to the Brahma or the asur form of marriage, and the submission of the respondent's counsel is that when the original text is being interpreted the conditions prevailing in ancient times should be investigated and modern notions should not be engrafted unless justice, equity or good conscience so demand. We feel inclined to agree with this argument, inasmuch as it is based on the scheme of the Mitakshara and when there is no express text forbidding an illegitimate child from succeeding to the estate of his mother and vice versa and when it finds support from modern writers on Hindu law of great repute and by certain decided cases. Mr. Jogindra Chandra Ghosh in his principles of Hindu Law, Vol. 1, Edn. 3, p. 69, quotes a text of Vrihatparasara which is as follows:

"The son begotten by one of equal caste (the illegitimate son) is the offerer of pinda of his mother and is in every respect (a son to her), but he is nothing to the begetter, as he is born of lust."

At p. 369 he says:

"We have already seen that according to the rule of Vrihatparasara illegitimate as well as legitimate children inherit the estate of a woman and if it is stridhan there is no reason to suppose that the ordinary rule of Hindu Law will not apply."

At p. 765 he discusses the status of an illegitimate son and at the top of p. 766 says:

"However that may be, illegitimate sons are heirs of their mothers according to the smritis, and the English Rule that illegitimate children have no rights whatsoever can have no application to Hindus . . . . . Considerations of public policy and morality ought to determine the question of inheritance in these cases irrespective of the old fictions and superstitions. I have shown at p. 369 that the illegitimate sons offer pindas to their mother and are thus related according to law to her and to one another and have thus also rights of inheritance to the estate of the mother and also of one another . . . . The law which makes every erring woman and her poor innocent children outcastes and denies them all rights of inheritance even among themselves, cannot be considered as consistent with common humanity and natural justice."

Mr. Ghosh therefore would uphold the rights of illegitimate children to the estate of their mother on the original text as well as on grounds of natural justice and common humanity. Mayne in his book on Hindu Law, Edn. 9, p. 808, when speaking of illegitimate sons says:

"It is also to be remembered that, as the English Rule which prevents bastards tracing to their father has no existence in Hindu Law, so the fact of illegitimacy does not prevent batsard brothers claiming to each other . . . . . still less is there any absence of heritable blood as between bastards and their mother."

Trevelyan in his book on Hindu Law, Edn. 3, at p. 500, says:

"Illegitimacy is not a bar to the succession of children to their mother's property, but in a competition between legitimate and illegitimate children the rights of the former prevail."

Sir Hari Singh Gour in his Hindu Code, Edn. 3, p. 1586, says as follows:

"Neither unchastity, as distinct from prostitution nor illegitimacy disqualifies an heir to a stridhan; the reason for the lone is the absence of any express disqualifying text, while the other is supported by express texts in its favour quoted under the next section . . . . . It will be seen that under the Mitakshara Law of inheritance to males, only the unchaste widow is disqualified from inheriting to her husband, though under the Dayabhag, such disqualification is more general. But so far as regards inheritance of the stridhan this qualification is generally absent whether the heir is subject to the Mitakshara or Dayabhag Law."

Again at p. 1587 he says:

"Abundant texts (Manu-IX 35, 38) exist in the early smritis recognizing one's natural offspring and there is no authority against the existence of heritable blood between the woman and her offspring."

Coming to the decided cases, the first case which was relied on by the respondent was the case of 8 M I A 400 (11). This was a decision by the High Court of Madras on the remand of the case by the Privy Council. Certain passages from the judgment in this case support the plaintiff's con-

13. Ram Kali v. Jamna, (1908) 30 All 508=5 A L J 629=1908 A W N 229.

tention. At p. 201 (of 2 M H C R) the learned Judges say as follows:

"Certainly there are many passages of the text writers which recognize the relationship of the son, irregularly begotten, to his mother's family."

Yajnavalkya quoted in the Vivada Chintamani, p. 283:

"A damsel's child is one born of on unmarried woman; he is considered as the son of his maternal grandsire. This passage clearly recognizes the mother and her son irregularly begotten, as cognate, and the Mitakshara quoting Manu (Ch. 1, S. 11, Cl. 7) points out that, if the girl is married, the child, although not begotten by the husband, becomes his son. The authorities already referred to, as to the son of concealed origin, also bear upon this point, and seem to show clearly that the Hindu Law, although for obvious reasons not recognizing as the husband's son one got by a man of unequal class, nevertheless gives no ground whatever for supposing, that the circumstance of birth from illicit connexion severs the union between the mother and her son, so as not to admit of heritable blood between them . . . . . All the passages to be found in the text books have reference to the right of inheritance ex parte paterna. That from the younger Macnaghten, quoted in the Privy Council, is of that character, and it is wholly unnecessary to consider whether his opinion is well or ill-founded. The doctrine of Strange, J., in S. 363 of his Manual is fully borne out by a dictum in the case quoted : 7 Sadr Dew Ud 273 (14). It was a suit by the daughter, born in wedlock of a mother who afterwards lapsed into prostitution, to recover from the daughters born in prostitution the property of the mother. The Court held the plaintiff's title not made out, because the conduct of the mother had entirely severed her from her natural family, so that the plaintiff, the daughter born in wedlock, could not succeed to her. There is also the dictum that the prostitute daughters are entitled to succeed, but the plaintiff's case failing this was not actually necessary to the decision. In Madras, too, it has never been doubted that the children of the prostitute succeed to the property of their mother . . . . . Our reasoning therefore is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring."

The next case that was cited by the respondent was the case of 14 O C 234 (15), in which the learned Judicial Commissioners held:

"that property acquired by an unchaste widow from the brother of a man with whom she had lived for years as his concubine is not her stridhan in the sense in which the expression is used in the Hindu Law and further that the property so acquired by the widow goes to her illegitimate child and not to the members of her husband's family upon whom the widow had no claims whatever after she began to live with her paramour."

The third case cited by the respondent is the case of 1918 Mad 1346 (6), decided by the Full Bench of that Court in which the learned Judges held that:

"where an illegitimate son who if he had survived his putative father would have inherited his estate either alone or along with others dies leaving no issue, widow, or mother his putative father is entitled to succeed as his heir."

Although this case is a direct authority on the right of the putative father to succeed to the estate of his illegitimate son, but there is a very full discussion in the judgment on the question of illegitimate children generally and the view that has been approved of is that of the cognition between the mother and her offspring there exists no doubt whatever. The last case that was cited on behalf of the respondent was the case of 1920 Nag 196 (16), in which the Judicial Commissioners of the Nagpur Court after a review of the original texts and the decided cases came to the conclusion that according to the Hindu law an illegitimate daughter even among the twice born classes inherits the property of her mother in preference to trespassers. It will thus be seen that, although the cases cited by the appellant do not negative the right of Hindu mother to succeed to her illegitimate child, the cases cited by the respondent favour the proposition that there is heritable blood between the mother and her illegitimate offspring, and the Oudh case quoted above is a direct authority for the contention that the illegitimate son succeeds to her mother, and we are of the opinion that on the principle of mutuality the mother should succeed to her illegitimate child. The original text is that the mother (not the wife of the father) succeeds to her son.

In the absence of clear authority it has been held that the principles of justice, equity and good conscience can be applied in cases under the Hindu law. In 2 M H C R 196 (11), already quoted the learned Judges says at p.. 199:

"This seems to be the rule of equity and good conscience, which, by our Charter, we are bound to apply where no positive provision of law exists."

In 14 O C 234 (15), at p. 237, the learned Judicial Commissioners say:

"The present case being one to which no express provision of the Hindu Law can be made applicable, the Court must decide according to the principles of justice, equity and good conscience."

14. Tara Munnee Dassea v. Motee Buneanee, 7 Sadr Dew Ud 273.
15. Maharani v. Thakur Prasad, (1911) 14 O C 234=12 I C 778.
16. Kasturi v. Lote Major, 1920 Nag 196=56 I C 952=16 N L R 221.

In 13 All 573 (17), the learned Judges say:

"We cannot find amongst the authorities and texts cited to us any sure principle to guide us in this case. Under these circumstances, we must act on the principles of equity and good conscience."

There is abundant authority therefore in the decided cases for the contention that in the absence of clear text and authority we can decide a point by applying the principles of justice, equity and good conscience. There may be some obscure texts which preclude an illegitimate son from claiming rights of collateral succession and this may also be justified by equity and good conscience, but an illegitimate child after the death of his putative father can look up to no one except his mother who brought him into the world, and an erring mother can rely only upon her child after the death of her paramour. The right of one to succeed to the property of another can therefore be based on the principles of justice, equity and good conscience, and there is no reason why the property should by escheat go to the Crown. For the reasons given above, I would uphold the decision of the Court below and dismiss this appeal with costs.

Sulaiman, C. J.—I agree with my learned brother, and would like to add only a few words on the right of a mother to inherit her illegitimate son's estate under the scheme of inheritance as given in the Mitakshara.

If for a moment we confine our attention to the old law, without taking into account the subsequent rulings, the position is perfectly clear. Illegitimacy, in the sense in which it is now understood was not at all recognized under the ancient Hindu law. It could only come in if there was a legal impediment to marriage or the order of the castes was infringed by a woman of a higher caste marrying a man of a lower caste. So, as the man and the woman belonged to the same caste and there was no legal impediment to marriage, either on account of blood relationship or on account of the woman being already married, any union between the two was recognized as a valid marriage. Indeed, besides eight different forms of marriage there were numerous other forms of marriage, rendered valid by custom like karao, sagai, etc. To these may now be added marriages recognized by statute. Four of these were approved forms of marriage and the remaining four disapproved forms. But all the same, even the latter were recognized as good marriages. They included the forcible capture of a woman as also the keeping of a woman raped while asleep or intoxicated: see 1926 All 1 (18). Six out of the eight recognized forms of marriage are now obsolete, unless they are sanctioned by custom. The recognition of these various forms merely implied that the performance of marriage ceremonies was not absolutely essential, and that even in the absence of such ceremonies sexual union would amount to marriage provided there was no legal impediment on account of relationship or caste. With the progress of time the need for such ceremonies was felt and marriages without such ceremonies ceased to be recognized and so such forms became absolete.

Coming to sons, there were no less than 12 varieties (in reality 13) of sons that were recognized. The reason for the anxiety to recognize all sorts of sons was the spiritual efficacy which the existence of a son conferred on the father:

"Because the son delivers his father from the hell called put therefore he has been called putra deliverer from put, by the self Existent One Himself: (Manu 9. 138)."

The hell consisted of the cutting off of one's line; and inasmuch as the son restored the line, he was the deliverer from hell (Dayabhag). The issue from any of the eight forms of marriage was the aurasa or legitimate son, being born of a legal wife. A woman of equal caste, espoused in lawful wedlock is a legal wife: and a son begotten (by a husband) on her, is a true and legitimate son; and is chief in rank (Mitakshara, Chap. 1, S. 11, pl. 2). The other varieties of sons were not born from both husband and wife, and included the son of an appointed daughter, the son of two fathers, a son begotten by a Sagotra (kinsman) or by any other (person not of lower caste) and the son of hidden origin, when secretly brought forth in the husband's house, provided that the father, though his identity be not ascertained, must have belonged to the same caste. Pl. 7 of this S. 11, is of particular importance:

"A damsel's child (kanina) is the offspring of an unmarried woman by a man of equal class (as restricted in the preceding instance): and he is son of his maternal grandfather, provided he be unmarried and abide in her father's house. But,

17. Radha Kishan v. Raj Kuar, (1891) 13 All 573 =1891 A W N 157.

18. Kishun Dei v. Sheo Paltan, 1926 All 1=90 I C 358=48 All 126.

if she be married, the child becomes the son of her husband."

It is not necessary to mention the remaining varieties. The rest were the adopted son, the son purchased, the self-given son, the son accepted while yet in the womb and received with the bride and a deserted son forsaken by his parents (pl. 1). It is accordingly clear that if an unmarried girl had connexion with a man of equal class and gave birth to a son, he was regarded as the son of the mother's father. Although according to present notions he would be an illegitimate child, yet he was regarded in the Mitakshara as the son of his maternal grand-father and a fortiori the son of his own mother who gave birth to him.

It would therefore seem that with these numerous varieties of marriages and still more numerous varieties of sons, there was no question of any illegitimacy unless there was a legal impediment to marriage on account of relationship or infringement of the rule of caste. Manu recognized that the first six sons were both heirs and kinsmen, while the last six were only kinsmen and not heirs (Mitakshara, Chap. 1, S. 11, pl. 30). Pl. 39 recognized the damsel's son, the son of hidden origin, the son received with the bride and the son by a twice-married woman as being of like class through their natural father. Pl. 40 laid down that issue procreated in the direct order of castes were comprehended under legitimate issue. Pl. 41 went even further and recognized the son by a sudra wife as legitimate, though he was entitled to only a tenth part of the estate. S. 12 laid down the rights of a son by a female slave (dasi putra) born of a sudra father. He was allowed a share by the father's choice, and if the father be dead, he would get a share by right. But it was made clear that the son begotten by a man of a regenerate class on a female slave did not obtain a share even by the father's choice.

Thus the main principle was that the rule of caste should not be broken. It was only in the case of a female slave born of a man of a regenerate class that the child was not entitled to a share in the father's estate. Chap. 2, S. 3, pl. 1, recognized the right of the two parents (pitarau) to succeed to the property. The mother was even given preference. Thus, under the strict Hindu law, as laid down in the Mitakshara, there could be no manner of doubt whatsoever that the mother of a child born of a person of her own caste, even though both man and woman were regenerate, was entitled to succeed to her son's estate. Indeed, in such a case the union was one of the recognized forms of marriage and the son was a legitimate son, and in fact came within the category of the aurasa sons, the chief in rank. But the position has been considerably modified in view of the fact that many forms of marriage and varieties of sons are absolete, in the sense that, unless allowed by custom, they are not recognized by law. The question of legitimacy has therefore come into prominence and the issue born of an unrecognized connexion cannot be regarded as a legitimate son at all. The son of a permanent concubine would therefore now be an illegitimate son. Another change that has been brought about by modern conditions is the abolition of slavery. There can no longer be any dasi putra in the strict sense of that word.

Now, coming to the case law, their Lordships of the Privy Council have laid down in unmistakeable terms that illegitimate children begotten by a regenerate man are not entitled to inherit the father's estate, but are entitled to maintenance only, 7 M I A 18 (19) and 22 All 191 (4). It is therefore clear that there is now no legal tie and no relationship recognized by law between an illegitimate son and his father. A Full Bench of the Madras High Court in 1918 Mad 1346 (6), has ruled that where an illegitimate son who, if he had survived his putative father, would have inherited his estate either alone or along with others dies leaving no issue, widow or mother, his putative father is entitled to succeed as his heir. I should like to reserve my opinion on this point which does not arise in the case before us.

Their Lordships of the Privy Council have not ruled that there is no relationship between the illegitimate son and his mother. In the case of the father when there is no legal marriage, there is no presumption of paternity. Accordingly there is an amount of uncertainty as to the parentage. But the birth of the child from the womb of her mother can be ascertained with certainty. It would therefore seem that even if the illegitimate child does not succeed to the estate of his father, it does not necessarily follow that he

19. Chouturya Run Murdun Syn v. Sahub Parhulad Syn, (1857-59) 7 M I A 18=4 W R 132 =1 Suther 313=1 Sar 591 (PC).

should not succeed to the estate of his mother. As a female slave no longer exists and concubinage cannot now be recognized as marriage, their Lordships of the Privy Council have held that the son of a sudra by a kept mistress of the one of the lower castes, in permanent or continuous concubinage, must now come in the category of a son of a sudra born of a female slave, within the provisions of Chap. 1, S. 12 of the Mitakshara. Such a person is treated in all respects as if he were born of a female slave; and his mother, a permanent concubine, is treated as such. In other words, a dasi (female slave) is now taken to include avarudha who is, strictly speaking, a mere concubine. Of course, when the concubinage is not permanent or continuous, there would be no analogy between a concubine and a female slave. Even in the case of a female slave it was necessary that she should live in the house with the family. The case of a permanent concubine, though living in a separate house, is not dissimilar.

But as the only question before us is whether a mother can succeed to her illegitimate child, I should like to confine myself strictly to this one point. I would answer the question in the affirmative for the following reasons: (1) Chap. 11, S. 3, pl. 1 of the Mitakshara is general in its terms and gives the right of succession to parents. It does not confine inheritance to the mother who has been lawfully married to the father. The regenerate father is now cut off under the Privy Council rulings, but the mother has not been so cut off. The only serious difficulty is that the word pitarau (two parents) used in the section, is also used in the Chapter dealing with partition where a mother also gets a share. In that chapter the mother must necessarily be a legally wedded wife and not a mere concubine or kept mistress.

(2) There is no express text in the Mitakshara laying down that a mother should not succeed to her illegitimate child. Distinctions were drawn in Chap. 1, Ss. 11 and 12, between the son born of a sudra wife and the son born of a female slave, so far as the inheritance to the father's estate is concerned; but no such distinction is attempted to be drawn in Chap. 11, S. 3, where the parent's right to succeed is mentioned.

(3) Under the old Mitakshara Law the mother would undoubtedly have succeeded to her son born in the circumstances in which we would now regard him as an illegitimate son. The son referred to in S. 3 would have included issue born out of any of the eight varieties of marriage.

(4) Some forms of marriage, unless recognized by custom, have become obsolete. But the relationship of the legitimate child with his own mother who gave birth to him is not extinct. The law does not recognize any relationship between the regenerate father and his illegitimate son; but the same cannot be said as to the relationship between the mother and her illegitimate son.

(5) Their Lordships of the Privy Council have not expressly ruled that the mother is also disqualified from inheriting the estate of her illegitimate son.

(6) There are some Indian authorities in support of the converse right of the illegitimate child to succeed to his mother's estate, and there is no direct authority negativing the right of the mother to succeed to her illegitimate son.

(7) And lastly, the succession of the mother to her illegitimate son is not only in consonance with the scheme of inheritance under the Mitakshara Law, but is also in accordance with the principles of justice, equity and good conscience. The erring mother had after all given birth to the child and bred and brought him up. She was the only person on whom the son, while a minor, was dependent, and she might well in return expect support from him in her old age; and therefore also succeed to his estate if she survived him. The English Common Law doctrine of treating an illegitimate son as filius nullius is not applicable to Hindus. On the other hand the inheritance of a mother to an illegitimate child is not unknown in India. Where such a custom exists a Hindu mother and her illegitimate son would be heirs to each other. Although the point has no bearing on the question, it may not be altogether out of place to mention that under the Sunni Law, although an illegitimate child and his father are not related in law and are therefore incompetent to inherit from each other the mother and her illegitimate offspring are competent to do so.

I would therefore hold that even if Oudh Bharthi and Mt. Sukhraji, both being goshains, were not sudras, or even if sudras, she was not his permanent concubine. Onkar Bharthi being her illegitimate child by Oudh

Bharthi, she is entitled to succeed to the estate of Onkar Bharthi.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 341

SULAIMAN, C. J. AND BAJPAI, J.

Har Narain and *others*

v.

Hoshiar Singh and *others*

Criminal Ref. No. 370 of 1934, Decided on 11th December 1934, from order of Sess. Judge, Meerut, D/- 20th March 1934.

Criminal P. C. (1898), Ss. 195 and 164 — Magistrate recording statement under S. 164 is "Court"—Offence committed under S. 193, I. P. C., cannot be taken cognizance of without complaint in writing — Penal Code (1860), S. 193.

A Magistrate recording statements under S. 164, Criminal P. C. is a Court within the meaning of S. 195, Criminal P. C. Hence cognizance of the offence punishable under S. 193, I. P. C. when it was alleged to have been committed in the proceeding under S. 164 in the Court of a Magistrate cannot be taken without a complaint in writing of such Court or some other Court to which it was subordinate: 1926 *All* 30 and 1925 *All* 737, *Rel. on.* [P 342 C 1]

Order.—In this case complaints were filed under S. 193, Penal Code, against the applicants in respect of previous statements made by them under S. 164, Criminal P. C., before a Magistrate. The Magistrate had not himself filed any complaint. The accused took objection that the Court had no power to take cognizance of the offence without such a complaint, but his objection was rejected summarily on the ground that S. 195, Criminal P. C., had no application. The learned Sessions Judge is of the opinion that the prosecution of the applicants is barred by the provisions of S. 195, Criminal P. C. As no direct case on this point was cited before the learned Single Judge, the case has been referred to a Division Bench.

Section 195 (1) (b) provides that no Court shall take cognizance of any offence punishable under S. 193, Penal Code, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint, in writing of such Court or of some other Court to which such Court is subordinate. Then Sub-S. (2) provides that the term "Court" includes a civil, revenue or criminal Court, but does not include a registrar or sub-registrar under the Indian Registration Act, 1877. The main question therefore is whether the recording of the statement under S. 164, Criminal P. C., before the Magistrate was a proceeding in a Court within the meaning of the section.

Now the word "Court" has not been defined in the Code, nor in the General Clauses Act. There is a definition in S. 3, Evidence Act, where Court includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence. But this definition cannot directly apply to the word "Court" used in the Criminal Procedure Code though it may be some guide. S. 6 of the Code lays down that Magistrates constitute one of the classes of criminal Courts. Even a Bench Magistrate, who is invested with first class powers, has the ordinary powers of a Magistrate of the first class as enumerated in Sch. 3, which include power to record statements under S. 164.

It is significant that S. 195 (1) (b) refers to "any proceeding," and is not confined to a judicial proceeding. It is therefore not necessary for its application that the Court should be engaged in a judicial proceeding. It is also clear from Sub-S. (2) that the term "Court" in this section is used in a very wide sense. The word "includes" indicates that there may be Courts other than civil, revenue or criminal Courts. That the use of the word "includes" is deliberate is obvious from the circumstance that the legislature has by amendment substituted this word for the old word "means" which was much narrower in scope. Again, from the fact that it was thought necessary to exclude a registrar or sub-registrar from the scope of the term "Court," and a special exception has been made, it follows that the legislature considered that, but for such an exception, a registrar or sub-registrar would be included in the term "Court." In 1926 All 30 (1) and 1925 All 737 (2), it was held that the term "Court" has a wider meaning.

Now a Magistrate under S. 164, Criminal P. C., does not act mechanically merely as a ministerial officer. He can record a statement or confession made to him in the course of an investigation as well as before the commencement of an enquiry or trial. The statements are to be recorded in the manner prescribed for recording evidence.

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1. Kanhaiya Lal v. Bhagwan Das, 1926 All 30=89 I C 1053=26 Cr L J 1485=48 All 60.
2. Bilas Singh v. Emperor, 1925 All 737=89 I C 630=47 All 934.

The Magistrate has not only to warn the person making a confession, but is prohibited from recording such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily. He has also to make a memorandum that he believes that the confession was voluntarily made. The Magistrate is therefore to exercise his judgment and has to be satisfied that the confession is voluntary.

In these circumstances it is very difficult to hold that a Magistrate recording statements under S. 164, Criminal P. C., is not a Court within the meaning of S. 195, Criminal P. C. It is not necessary to decide in this case whether the proceeding before him is a judicial proceeding, for S. 193 applies both to a judicial and to "any other case." We are therefore of opinion that the Special Magistrate who has convicted the accused had no authority to take cognizance of the offence punishable under S. 193, Penal Code, when it was alleged to have been committed in the proceeding under S. 164 in the Court of a Magistrate without a complaint in writing of such Court or some other Court to which it was subordinate. We accordingly set aside his order dated 22nd February 1934.

K.S. *Order set aside.*

A. I. R. 1935 Allahabad 342

BENNET, J.

Ram Charan Das—Defendant 1—Applicant.

v.

Mt. Nazeeran and *another* — Plaintiff and Defendants—Opposite Parties.

Civil Revn. No. 365 of 1934, Decided on 12th December 1934, against order of Asst. Collector First Class, Moradabad, D/- 31st August 1932.

(a) Agra Tenancy Act (1926), S. 220 — Theka for certain period—Sale by zamindar of right to receive Theka money for future period — Suit by assignee lies in revenue Court.

Where a zamindar has made a Theka and subsequently he executes a sale deed assigning his right to receive the Theka money for a future period and assignee sues for arrears, the effect of the sale deed and of the theka is that the plaintiff is the person to whom the thekedar's rent is payable for the particular period and accordingly the plaintiff is in the position of a lessor for those years and entitled to bring a suit against the thekedar in the revenue Court in accordance with S. 220 of the Act.

[P 343 C 1]

(b) Transfer of Property Act (1882), S. 6 (e) —Transfer of right to receive theka rent for future period is not invalid.

The transfer by the zamindar of his right to receive rent for future period is not merely of the right to sue but of the right to receive the theka rent. If that rent is not paid, then no doubt the transferee has a right to sue. The transfer is not merely of the right to sue and is not invalid under S. 6 (e) of the Act.

[P 343 C 1]

S. C. Das—for Applicant.

Shabd Saran—for Opposite Parties.

Order.—This is an application in civil revision in which the only ground argued was one of jurisdiction the allegation being that the trial Court had no jurisdiction to entertain the suit. I should have thought that the relief asked would be the usual one that the plaint should be returned under these circumstances to the plaintiff for presentation to the proper Court but the relief asked in this revision is that this Court will dismiss the suit. That would be impossible if this Court agreed that the trial Court had no jurisdiction. Another point to be noted is that the decree in question was passed by an Assistant Collector dismissing the suit of the plaintiff and directing the parties to bear their own costs. The plaintiff has not brought this application in revision but the application in revision is brought by Ram Charan Das, defendant, and he again asks the Court to do what the lower Court has already done, that is, to dismiss the suit. The trial Court had found that the deed of sale was executed prematurely and before the theka money had fallen due. This finding, I am told, has been reversed by the District Judge in first appeal and the District Judge has remanded the suit to the trial Court for rehearing. The object of this revision apparently is to get a decision from this Court that the District Judge was wrong in his order although that order of the District Judge cannot be the subject of a revision by this Court and is not now before this Court. The circumstances are that a theka was made for ten years beginning with 1332 Fasli by defendant 2 to defendant 1, the applicant in revision. Defendant 2 the zamindar at a later date on 1st November 1930 executed a sale deed assigning the right to receive the theka money for the two years 1338 and 1339 Fasli to the plaintiff.

The plaintiff has brought a suit for arrears of theka money. The question

was whether such a suit would lie in the Revenue Court. S. 220, Agra Tenancy Act, lays down that a suit by a lessor against a thekadar will lie in the Revenue Court. It is contended for the applicant that the applicant is not the lessor. S. 3 (6) explanation states that where the word "landholder" is used with reference to a thekedar it means the person to whom the thekedar's rent is payable. I consider that the effect of the sale deed and of the theka is that the plaintiff is the person to whom the thekedar's rent is payable for the two years 1338 and 1339 Fasli and accordingly that the plaintiff is in the position of a lessor for those years and entitled to bring a suit against the thekedar in the Revenue Court in accordance with S. 220, Agra Tenancy Act. Some further argument was made that the sale deed would be contrary to the provisions of S. 6 (e), T. P. Act, because the sale deed was executed before the theka money for the years 1338 and 1339 fell due. Learned counsel argued that in these circumstances this was a transfer of a mere right to sue. I consider that the transfer was not merely of the right to sue but of the right to receive the theka rent. If that rent was not paid then no doubt the transferee had a right to sue. But the transfer was not merely of the right to sue and was not invalid under S. 6 (e), T. P. Act. No ground has been shown for interference in this revision. I dismiss the application with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 343

KISCH AND RACHHPAL SINGH, JJ.

Messrs. Radha Kishen Beni Prasad — Applicant.

v.

Messrs. P. L. Jaitly & Co. and *others*— Opposite Parties.

Civil Revn. No. 342 of 1934, Decided on 11th December 1934, against order of Sub-Judge, Budaun, D/- 31st May 1934.

(a) Civil P. C. (1908), O. 21, R. 58—Third party cannot object to attachment being made before attachment is actually made.

The only method by which a third person can object to an attachment is to file objections after the attachment has been made. He can come to Court and file objections under the provisions of R. 58, O. 21. There is nothing in the Civil Procedure Code which allows a third party to come forward with objections before an attachment has been made. [P 344 C 2]

(b) Civil P. C. (1908), S. 115 and O. 21, R. 58 — Court disallowing decree-holders prayer to attach property of judgment-debtor without adequate reasons by allowing objections of third party before attachment is effected — High Court should interfere in revision.

A decree-holder has a right to ask that the property of the judgment-debtors should be attached in execution of his decree; and where without any adequate reason whatsoever the Court below has disallowed the prayer and allowed the objections of a third party before the attachment is made, the matter is not purely technical and the High Court should interfere in revision. [P 345 C 2]

K. Verma and *Jwala Prasad Bhargava* —for Applicant.

B. E. O'Conor, S. N. Sen, N. P. Asthana, Shiva Prasad Sinha, Ram Nama Prasad and *A. M. Gupta* — for Opposite Parties.

Rachhpal Singh, J.—This is a revision application by the decree-holders arising out of execution proceedings. The decree-holders obtained a decree against Messrs. P. L. Jaitly & Co., and the Budaun Electric Supply Co., for a sum of Rs. 54,211-10-9. This decree was passed by the Calcutta High Court. The decree-holders got the decree transferred to Budaun District and then put in an application for execution in the Court of the Subordinate Judge of Budaun. The prayer was that the property owned by the Budaun Electric Supply Co., mentioned in a list attached to the application for execution should be attached. The Court ordered that notices should be issued to both the judgment-debtors. It appears that one Mr. Raghunath Prasad Tandon came forward and filed objections and pleaded that the property of the Budaun Electric Supply Co., should not be attached for the reasons given by him in his application. The decree-holders opposed this application. The plea taken by the decree-holders was that as no attachment had taken place. Mr. Tandon was not entitled to file any objection and therefore those objections were premature. The learned Subordinate Judge allowed the objections on the ground that it was a peculiar case and the circumstances were somewhat extraordinary. Against that order the decree-holders have preferred this revision application.

Before we proceed to discuss the question about the correctness or otherwise of the order passed by the Court below, it is necessary to state here very briefly the circumstances under which Mr. Tandon came forward with his objections. It appears that Messrs. Jaitly

& Co. made an application to the Local Government asking that they should be granted a license for supplying electric energy to the town of Budaun. This application was granted and a license was issued to Messrs. Jaitly & Co. This firm started a company styled "The Budaun Electric Supply Co. Ltd." Messrs. Jaitly & Co., became its managing agent. Somehow or other the plant could not be received in Budaun within time, and therefore the Government revoked the license which had been issued by them. The firm of Messrs. Jaitly & Co., made certain representations to the Government asking that the license should be renewed, but in that attempt they were unsuccessful. Under some arrangements the firm styled "Messrs. Kishore Chand Shiva Charan Lal" advanced a large sum of money and undertook to carry on the business of the Electric Supply Co. This arrangement was made by this firm with Messrs. Jaitly & Co., under which a large sum of money was advanced. Eventually the Government decided that the license should be granted to the firm of Messrs. Kishore Chand Shiva Charan Lal. Negotiations are still going on and the proposed sale of the assets of the Budaun Electric Supply Co., has not yet been made in favour of the firm of Kishore Chand Shiva Charan Lal. Mr. Raghunath Prasad Tandon had been appointed the local manager of the Budaun Electric Supply Co. by Messrs. Jaitly & Co. With the permission of the Government he is now carrying on the business there. As no sale has been made as yet in favour of the firm Messrs. Kishore Chand Shiva Charan Lal, their position is that of creditors of the company to whom they have advanced some money.

The question for our consideration is whether the learned Subordinate Judge was right in allowing the objections of Mr. Tandon. We have heard the learned counsel on both sides and we are clearly of opinion that the view taken by the learned Subordinate Judge is not correct. Admittedly the decree-holders obtained a decree against the Budaun Electric Supply Co., and they were entitled to execute that decree. They had made an application asking for the attachment of the property belonging to one of their judgment-debtors, that is, the Budaun Electric Supply Co. The Court was bound to allow this prayer and to attach the property. If the property did not belong to the judgment-debtor, then it was open to the person claiming to be the owner of the property to come forward and file objections. The only method by which a third person can object to an attachment is to file objections after the attachment had been made. He can come to Court and file objections under the provisions of R. 58, O. 28, Civil P. C. There is nothing in the Civil Procedure Code, which allows a third party to come forward with objections before an attachment has been made. The reason is very obvious. So long as an attachment has not been made, no one can come forward and say that anything has been done which gives him a cause of action to come to Court. It is only after the property has been attached in pursuance of an application for attachment made by the decree-holder that a third party would have the right to come forward and say that the property should not have been attached on the ground that it belonged to him and not to the judgment-debtor. At this stage it is altogether unnecessary to consider what the position of the opposite parties is. They might be mortgagees or they might be debenture-holders or they might be purchasers of the assets of the Budaun Electric Supply Co. This question can only be determined after an attachment has been made. If then the objectors come forward, they will be required to show what their title is and then the applicants will have the right to show on what ground they seek to enforce the attachment against the attached property. Then the matter will be judicially determined. In the present case as no attachment had been made, the learned Subordinate Judge was clearly wrong in permitting objections to be filed. They should have been thrown out on the ground that there had been no attachment and therefore the objectors had no locus standi to come forward and make an application to the Court. The learned Subordinate Judge, as would appear from his order, was aware of this difficulty. In his order he states that it is true that

"ordinarily an objector is to come to Court after the attachment of the property has taken place, but the present matter is not so ordinary."

The rule of law is, as we have already explained, that objections can only be filed after an attachment has taken place and we have not been shown any law or decided cases in which it might have been laid down that in certain cases it may be open to an objector to come and file his

objections before an attachment has taken place. The reason which led the learned Subordinate Judge to allow the objections is mentioned by him in his judgment and it is that nobody can work the undertaking who is not permitted to do so by the Local Government. He remarks that if the attachment were made:

"it might be that the undertaking would have come to a standstill thus causing great inconveinence to the general public."

We do not think that he was right in taking this view. Nobody suggests in this case and no occasion has arisen as yet for making a suggestion of this kind that the decree-holders should be permitted without the permission of the Local Government to carry on the business of the Budaun Electric Supply Co., nor is there any question of public suffering or any inconvenience by the attachment. This question may arise when the property has been attached and the decree-holders ask for the sale of the property. But unless an attachment has been made, no such question can arise. It may not eventually be at all necessary for the decree-holders to put the property to sale. But they can insist that their interest should be safe-guarded against any subsequent dealings by the judgment-debtors and apply for an order of attachment. If an order of attachment is passed, it protects their interest and therefore the decree-holders are certainly entitled to ask that the property should be attached. S. 28, Electricity Act (9 of 1910), does not in any manner affect the application before us. It lays down that:

"no person other than a licensee shall engage in the business of supplying energy except with the previous sanction of the Local Government and in accordance with such conditions as the Local Government may fix in this behalf and any agreement to the contrary shall be void."

No occasion for the application of this section has arisen. It is quite possible that after the attachment the decree-holders may successfully obtain permission from the Government to carry on the business. It is equally possible that they may ask the Court below to appoint the firm of Messrs. Kishore Chand Shiva Charan Lal, to act as receivers in the case. That would, in no way, interfere with the work of the company and at the same time the interest of the decree-holders would be protected. There is also the third possibility that after the attachment the parties may come to an agreement under which their differences may be settled. However all these questions can only arise after the attachment and we are therefore of opinion that the Court below should have passed an order of attachment.

The learned counsel appearing for the respondents has strongly urged before us that we should not interfere with the order passed by the Court below in revision. He has relied on certain authorities cited by Mulla in his Civil Procedure Code, Edn. 10. p. 391, and has contended that this Court should not interfere merely because the Court below has acted with some irregularity or where the order of the Court below is only technically wrong. If the matter had been merely technical, we would have certainly agreed with his contention, but in our opinion the question is not purely technical. It affects substantially the rights of the decree-holders. A decree-holder has a right to ask that the property of the judgment-debtors should be attached in execution of his decree and without any adequate reason whatsoever the Court below has disallowed that prayer. It cannot be said that the matter is purely technical. Then we find that the procedure adopted by the Court below in allowing the objections of a third party before the attachment had been made was altogether wrong and ultra vires. In our opinion the case is one in which we should interfere in revision.

We wish to make it clear that in our opinion the attachment of the property alleged to be the property of the judgment-debtors would not in any way, be contrary to the provisions of the Electricity Act. Nor do we wish to decide the question as to whether the objectors as debenture-holders, have any right in the property, the attachment of which is sought by the decree-holders. For the reasons given above, we allow this application in revision, set aside the order passed by the Court below and send back the case to it with directions that the prayer of the decree-holders for attachment should be granted and then the execution should proceed according to law. The decree-holders will get their costs from the objectors Messrs. Kishore Chand Shiva Charan Lal. The injunction issued by this Court is discharged.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 346 (1)

BENNET, J.

Hukum Chand—Applicant.

v.

Shambhu Nath—Opposite Party.

Civil Revn. No. 396 of 1934, Decided on 14th December 1934, against order of Second Sub-Judge, Saharanpur, D/- 28th April 1934.

(a) Evidence Act (1872), Ss. 91 and 92 — Receipt — Evidence that no money was paid is admissible.

Sections 91 or 92 does not bar evidence to show that the receipt is a ficticious document in the sense that no money was paid. [P 346 C 2]

(b) Agra Tenancy Act (1926), S. 15 (1) — Ex-proprietary tenant can surrender his rights.

An ex-proprietary tenant may legally surrender his rights under the Tenancy Act. [P 346 C 2]

N. Upadhiya—for Applicant.

G. S. Pathak—for Opposite Party.

Order.—This is an application in civil revision by a judgment-debtor asking that the order of the lower Court refusing to certify a payment of Rupees 410 as made in satisfaction of a decree should be set aside. The judgment-debtor was a judgment-debtor under two decrees in favour of Shambhu Nath and there was also a mortgage executed by the judgment-debtor in favour of Shambhu Nath and on 7th February 1934 the judgment-debtor executed a sale deed in favour of Shambhu Nath of a half share in certain zamindari. On the same date Shambhu Nath executed a receipt for Rs. 410 stated to have been paid by Hukam Chand, who is the judgment-debtor. It is not stated in the receipt that the payment was on behalf of the decrees. The allegation of the judgment-debtor was that the payment was made towards the decretal amounts. On the other hand the decree-holder said that the receipt was not for payment of money but was a document executed by the decree-holder and deposited with one Jagat Prasad to be given eventually to Hukam Chand, applicant, in case Hukam Chand allowed arrears of rent to run against him as an exproprietary tenant of sir land and allowed himself to be ejected from that exproprietary tenancy. He further alleged that Hukam Chand obtained the receipt from the person with whom it had been deposited by deceit. The lower Court held that the story for the decree-holder was correct and refused certification. In revision it is urged that the evidence of the plaintiff was inadmissible under S. 91, Evidence Act, and S. 92, and that as the extinction of exproprietary rights was against the policy of the Tenancy Act the Court was wrong in giving effect to agreements with that object. I do not consider that S. 91, or S. 92 bar evidence to show that the receipt was a fictitious document in the sense that no money was paid. In proviso (1), S. 92 it is stated that the failure of consideration may be proved and also any fact which would invalidate any document. As regards the third ground the agreement was not to prevent exproprietary rights arising but was to secure a surrender of those rights. An exproprietary tenant may legally surrender his rights under the Tenancy Act. Moreover the question is not whether any agreement between the parties should be carried out which is contrary to law. The question is merely whether it is proved that a payment has been made towards the decretal amount. It is open to the plaintiff to produce evidence on this point of the kind that he has produced. For these reasons I find no merits in this revision which I dismiss with costs.

K.S. *Revision dismissed.*

A. I. R. 1935 Allahabad 346 (2)

HARRIES AND RACHHPAL SINGH, JJ.

Girja Prasad Singh and *others* — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 700 of 1934, Decided on 19th November 1934, from order of Sess. Judge, Benares, D/- 14th August 1934.

(a) Penal Code (1860), S. 111 — Probable consequence is one which is likely or which can reasonably be expected to follow — Held stabbing cannot be deemed to be probable consequence of instigation to thrash.

A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such an act. An unusual or unexpected consequence cannot be described as a probable one. When the consequence of an act is such that a reasonable man could not be expected to foresee that it would follow from such an act, such consequence cannot be described as a probable one. On the contrary it can only properly be described as an unexpected, unlikely or improbable consequence. [P 349 C 1]

Where the act instigated was only thrashing but stabbing was done resulting in the murder: [P 349 C 1]

Held: the act of stabbing being a different act from the act of thrashing which was the act instigated, the prosecution must show not only that the act of stabbing was committed under

the influence of the instigation but also that it was a probable consequence of the instigation to thrash. [P 349 C 1]

(b) Interpretation of Statutes — Statute creating criminl offence.

Words in a statute creating a criminal offence must be construed strictly. [P 349 C 1]

(c) Criminal Trial — Person unknowingly assisting is not guilty of crime or of aiding or abetting.

A person who unknowingly assists in the commission of a crime is not himself guilty of that crime or of aiding or abetting it. [P 349 C 2]

(d) Criminal Trial — Servant committing offence at master's instructions— Though no defence, it is mitigating circumstance.

Where a servant commits an offence by carrying out his master's instructions, though this circumstance affords no defence, it is a mitigating circumstance. [P 350 C 1]

S. N. Sen and *K. O. Carleton*—for Appellants.

Govt. Advocate—for the Crown.

Judgment. — The appellants, Girja Prasad and Bhagwati, were charged before the learned Sessions Judge of Benares, under S. 302, Penal Code, with the murder of a youth named Barka alias Adit Prasad at the village of Marwi on 16th May 1934. The appellant Bishnath was charged with aiding and abetting the murder on the infliction of grievous hurt on Barka contrary to S. 114, Penal Code, read with S. 302 and S. 325, Penal Code. All the appellants were convicted, Girja Prasad being sentenced to death whilst Bishnath and Bhagwati were sentenced to transportation for life. Against these convictions and sentences all the appellants have preferred appeals to this Court.

There can be no doubt that the deceased Barka met his death by violence. The post mortem report and the unchallenged evidence of Major Culhane, the Civil Surgeon of Benares, prove conclusively that the death was due to a stab in the abdomen. The only issues for the decision of this Court are, who stabbed the deceased, and the parts played by the various appellants in the incident. The case for the prosecution can be stated shortly as follows: The deceased was a youth of about 17 years of age who lived with his father Shiam Narain, P. W. 7, in the village of Marwi. With them lived Shiam Narain's cousin Udai Narain, P. W. 8, who, it is suggested, held a grove of mango trees jointly with Shiam Narain. The appellants Girja Prasad and Bishnath are brothers who also lived in the village and in their service was the appellant, Bhagwati.

On 16th May 1934, a few hours after sunrise it is alleged that the deceased Barka surprised Bhagwati stealing mangoes from the grove already referred to. Barka protested and demanded the mangoes, but Bhagwati refused to hand them over to him. Bhagwati made off towards the house of his master closely followed by Barka. Outside the house were the appellants, Girja Prasad and Bishnath, and there a further altercation ensued and it is to be noted that at this time Girja Prasad was wearing a kurta and was holding in his hand a danda or lathi. The altercation seems to have angered Bishnath who shouted to the others "maro sale ko tab i manega." Upon these words Bhagwati and Girja Prasad ran towards the deceased Barka who promptly fled. He was caught by Bhagwati who held him when Girja Prasad came up. The latter when he reached Barka suddenly whipped out a spear head about 8 or 9" long from the pocket of his kurta and drove it into the abdomen of the unfortunate deceased, and therupon all of them fled.

To support the case for the prosecution a number of eye-witnesses were called. The principal witness was Basdeo, P. W. 1, who deposed to the theft of mangoes by Bhagwati, the protest by Barka and the subsequent altercation. He further deposed to hearing Bishnath's shout of "maro sale ko" and saw the pursuit of Barka and the fatal stab. His evidence was corroborated by Hirde Narain, P. W. 2, Baldeo Singh, P. W. 3, Santoo, P. W. 4, Khannu, P. W. 5 and Janki, P. W. 6. These witnesses did not see the theft which gave rise to the quarrel, but all heard Bishnath shouting and saw the pursuit, the capture and the stabbing. This evidence, if believed, clearly establishes that the deceased Barka was stabbed by Girja Prasad and that Bishnath and Bhagwati played important parts in the incident. It has been urged however before us that the story told by these witnesses is a highly improbable one and should be rejected. (His Lordship after considering evidence proceeded). Giving full weight to the very forcible and able arguments which were addressed to us by Dr. Sen on behalf of the appellants, we cannot accept this version of the affair and in our judgment it is established beyond all reasonable doubt that the version of the affray given by the prosecution is the true one. That being so, it is necessary to consider sepa-

rately the part played by each individual appellant in order to ascertain what offence, if any, was committed by each of them.

Girja Prasad.—This appellant dealt the fatal blow in circumstances which did not justify him in using any force whatsoever towards the deceased Barka. He used a lethal weapon, viz., a spear head and directed the blow at the deceased's abdomen which he must have known was a vital part of the human body. As death resulted from this stab, it is clear that he is guilty of murder under S. 302, Penal Code, and his learned counsel very frankly admitted that if the version of the prosecution was held to be true he could not contend otherwise. We therefore affirm the conviction of Girja Prasad for murder. The murder however was not a premeditated one, but was the result of anger and passions engendered in a sudden quarrel and therefore in our view it is not a case where a sentence of death is necessary in the interests of justice. We are of opinion that a sentence of transportation for life is adequate to meet this case and we therefore substitute that sentence for the sentence of death passed upon this appellant. To this extent only the appeal of Girja Prasad is allowed.

Bishnath.—This appellant was found guilty of abetment of murder and sentenced to transportation for life. The learned Sessions Judge held that the words used by this appellant, viz., "maro sale ko" were an instigation or incitement to Girja Prasad to commit murder or at least to inflict such injuries as might in the ordinary course of nature cause death. We find it impossible to agree with this view. The words "maro sale ko" addressed by this appellant to Girja Prasad and Bhagwati did not, in our view, amount to an instigation to murder or cause grievour injuries in the circumstances in which they were used. They were an instigation to chastise or inflict corporal punishment on the deceased Barka and no more. The words in certain circumstances may be capable of a more serious meaning, but we are satisfied that in the circumstances of this case they were nothing more than an instigation to chastise or thrash a youth whom Bishnath thought was being impertinent and offensive.

In consequence however of Bishnath's words Bhagwati and Girja Prasad did pursue and catch Barka and whilst the latter was being held by Bhagwati he was fatally stabbed by Girja Prasad with a spear head which up to the moment it was used had been concealed in the pocket of his kurta. There is absolutely no evidence to show that Bishnath knew that Girja Prasad had this spear head on his person at that particular time and indeed the evidence in the case points to the contrary. At the time that Bishnath addressed the words to his co-appellants, Girja Prasad was holding a danda or lathi in his hand and the probabilities are that Bishnath intended Girja to use that danda or lathi to chastise or thrash Barka. It was for this reason that the learned Sessions Judge held Bishnath guilty of abetment of murder. A lathi, according to him, is a lethal weapon and inciting a person to beat another with a lathi is an instigation to murder where death ensues. In certain circumstances it may well be so, but upon the facts of this case as we find them to be, the instigation was only to chastise or thrash with a lathi or other similar instrument and not to cause death or serious injuries. In any event a lathi was not used by the person instigated, but a far more dangerous weapon, the existence of which, we hold, was not known to the instigator Bishnath. The reasons therefore given by the learned Sessions Judge for convicting Bishnath of abetment of murder cannot be supported. Holding as we do that the instigation was merely to chastise or thrash, can it be said that Bishnath is liable for abetment of murder merely because murder was committed within a few moments by one of the persons to whom the inciting remark was addressed.

The act of stabbing with a spear head was a very different act from the actual act which Bishnath contemplated and instigated. At the highest he incited no more than a thrashing with a lathi, yet Girja Prasad, the person incited, committed murder by stabbing the deceased with an obviously deadly weapon. By reason of S. 111, Penal Code, an abettor may be liable for a different act than the one he instigated provided the different act was a probable consequence of the abetment and was committed under the influence of the instigation. Had Girja Prasad used the lathi which he held in his hand at the time Bishnath shouted "maro sale ko" and killed Barka with it, it might be argued that Bishnath is liable for abetment of an offence under S. 302 or 304, Penal Code, by reason of the provisions of S. 111,

Penal Code, but as a lathi was not used the point does not arise for decision in this case. Instead of a lathi a very different and far more dangerous weapon was used and at the time of the instigation to thrash the deceased, Bishnath was wholly unaware of its existence. In our judgment Bishnath can only be convicted for abetment of murder if the use of the spear head was a probable consequence of the shout "maro sale ko" and that the blow was struck under the influence of the instigation. Having regard to the fact that the stab with the spear head followed immediately after Bishnath's shout "maro sale ko", it might well be argued that the act of stabbing was committed under the influence of the instigation, but even so that is not enough to make Bishnath liable. The act of stabbing being a different act from the act of thrashing which was the act instigated, the prosecution must show not only that the act of stabbing was committed under the influence of the instigation, but also that it was a probable consequence of the instigation to thrash.

A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such an act. An unusual or unexpected consequence cannot be described as a probable one. When the consequence of an act is such that a reasonable man could not be expected to foresee that it would follow from such an act, such consequence cannot be described as a probable one. On the contrary it can only properly be described as an unexpected, unlikely or improbable consequence. It is a well established rule of construction that words in a statute creating a criminal offence must be construed strictly. In our judgment a wider meaning to the phrase "probable consequence" in S. 111, Penal Code, should not and cannot be given, otherwise it would be impossible to fix any limits to an abettor's liability. When the act done is different from the act instigated, an abettor, in our view, is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation. In this view we are supported by a Single Judge decision of this Court in the case of 6 All 491 (1). In that case two appellants connived at a robbery to be committed by a third appellant. In the robbery excessive violence was used which resulted in the death of the person robbed. Straight, J., whilst upholding the conviction of the third appellant for murder held that the other two appellants were not guilty of abetment of murder, but only of the offence of abetment of robbery on the ground that the excessive violence used was not a likely consequence of the instigation, but on the contrary it was a most unexpected one and one which the two appellants could not reasonably have been expected to foresee.

In our judgment the use of the spear head by Girja Prasad was not a probable consequence of anything said or done by Bishnath, but a most unexpected and unusual consequence and therefore his conviction for abetment for murder cannot be sustained. What he did was to instigate an offence under S. 352, Penal Code, viz., an assault on the deceased Barka and though something wholly unexpected and far more serious was done, his liability is for instigating that offence and that offence alone. We therefore set aside the conviction and sentence of transporation for life passed on this appellant and convict him of the offence of abetment of an assault contrary to Ss. 109 and 114, Penal Code, read with S. 352, Penal Code, and sentence him to three moths' rigorous imprisonment. To this extent the appeal of Bishnath is allowed. The sentence of three months will run from the date of conviction which means that this appellant has already served the period and must be released forthwith.

Bhagwati.—The appellant, Bhagwati actually assisted in the commission of murder, but it does not follow that he is guilty of murder or of aiding or abetting it. A person who unknowingly assists in the commission of a crime is not himself guilty of that crime or of aiding or abetting it.

It must be remembered that Bhagwati was a servant of Bishnath and Girja Prasad and therefore when Bishnath shouted "maro sale ko" it was, as far as Bhagwati was concerned, an order to chastise or beat the deceased. In obedience to that order Bhagwati pursued Barka, caught him and held him for a beating by Girja Prasad. The latter however did not beat him, but suddenly produced the spear head from his pocket and plunged it into the deceased. Had Bhagwati been aware that Girja Prasad had this spear head

1. Queen-Empress v. Mathura Das, (1884) 6 All 491=1884 A W N 251.

in his possession and was likely to use it he might properly be held liable for murder or for abetment of murder. There is however no evidence whatsoever which suggests that Bhagwati knew that Girja Prasad had this weapon in his clothing or that when he caught and held the deceased he knew that Girja Prasad was about to do anything more than to beat the unfortunate Barka. Further, there is no evidence to suggest that Bhagwati held the deceased a moment after he realized that Girja Prasad had this spear head and was about to use it. The whole incident happened in a moment of time and in our judgment it is highly probable that Bhagwati knew nothing of the spear head until it was actually used and then it was too late for him to do anything. In these circumstances therefore it cannot be said that Bhagwati knowingly held the deceased Barka for any purpose other than chastisement. He abetted Girja Prasad to commit an assault, but the latter actually committed a wholly different act, viz., a murderous attack. In our judgment Bhagwati is not guilty of the abetment of that murderous attack, but is only guilty of abetment of an ordinary assault punishable under S. 352, Penal Code.

The learned Sessions Judge convicted Bhagwati because of the construction he placed on the words "maro sale ko" and if those words had, in the circurstances, actually amounted to an instigation to kill it would not matter whether the actual killing was done with a lathi or with a spear head. However having regard to the view we take of the meaning of the phrase "maro sale ko" in the circumstances in which it was used and of the law as we have stated it this conviction of Bhagwati for murder cannot be sustained. Bhagwati is however guilty of abetment of an assault, but in our view his degree of guilt is less than that of Bishnath. He was a servant carrying out his master's instructions and though that affords no defence, it is, in our view, in this case, a mitigating circumstance. We therefore set aside the conviction and sentence of transportation for life passed on this appellant and convict him of abetment of assault contrary to S. 109 and S. 114, Penal Code, read with S. 352, Penal Code, and sentence him to one month's rigorous imprisonment. To this extent the appeal of Bhagwati is allowed. The sentence of one month's rigorous imprisonment will commence from the day of his conviction which means that Bhagwati has already served that period and must be released forthwith.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 350

MUKERJI AND RACHHPAL SINGH, JJ.

(*Firm*) *Har Prasad Kailash Chand*—Applicant.

v.

L. Kedarnath and *others* — Opposite Parties.

Civil Revn. No. 198 of 1933, Decided on 17th November 1933, against order of Dist. Judge, Agra, D/- 4th February 1933.

Civil P. C. (1908), S. 24 (4)—District Judge can transfer small cause suit from Small Cause Court to another Court not exercising small cause powers.

The District Judge can transfer a Small Cause Court suit from the Court of Small Causes to another Court not exercising Small Cause Court powers.

Where two suits were filed one in Small Cause Court and another in the Munsif's Court and the Hundis and transactions in both formed parts of same transaction and defendant was also same, the order transfering the Small Cause Suit to Munsif's Court was proper : 1918 *Oudh* 160, *Diss from.* [P 351 C 1]

Jagadish Swarup—for Applicant.

S. N. Seth and *S. B. L. Gaur* — for Opposite Parties.

Order.—This is an application to revise an order of the learned District Judge of Agra by which he directed that the suit instituted by the applicant before us, being suit No. 4050 of 1932, should be transferred from the Court of Small Causes at Agra to the Court of the Additional Munsif of that District. The first ground is that the learned District Judge did not issue notice to the applicant and therefore he was without jurisdiction in his order of transfer. Supposing that this contention is right, we need not interfere unless we are satisfied that the transfer of this suit will prejudice the plaintiff.

This takes us to the merits of the application. It appears that the defendants to the applicant's suit are also defendants in another suit instituted by a firm styled Firm Moti Lal Raghubar Dayal, in the Court of the Additional Munsif, Agra. The defendants in both the suits pleaded that the hundis and other transactions on which the two suits had been brought formed parts of the same transaction.

The learned District Judge thought this defence could only be very well established in one Court which must bar both the suits and it would be disastrous, if two Courts tried the same question and came to contrary decisions. We think that in the circumstances, the District Judge was right in exercising his power to transfer the plaintiff's suit to the Court of the Additional Munsif at Agra. The learned counsel has also argued that the District Judge was not authorised under the law to transfer a Small Cause Court suit from the Court of Small Causes to another Court, not exercising Small Cause Court powers. He takes his stand on a decision of the Lucknow Judicial Commissioner's Court, 1918 Oudh 160 (1). With all respect, we are unable to accept the view taken there, as correct. The learned Judges themselves recognised the fact that this Court had in many cases held that cases transferred from the Court of Small Causes to regular Courts continue to possess their Small Cause Court nature and the decisions were not open to appeal. These decisions clearly recognised the fact that the transfer orders were valid.

In our opinion Sub-S. (4), S. 24 is a clear authority for the District Judge to make an order of transfer like the one in question. There will be no sense in enacting that a Court of ordinary jurisdiction, to which a Small Cause Court case has been transferred shall be regarded as a Court of Small Causes, for certain purposes, if it was not open to the District Judge to make such a transfer. We do not think that we should interfere with the order of the District Judge and we dismiss the application with **costs.**

K.S. *Application dismissed.*

1. Baijoo v. Tulsha, 1918 Oudh 160=43 I C 314 =20 O C 350.

A. I. R. 1935 Allahabad 351

NIAMATULLAH, J.

Mt. Katori—Defendant—Appellant.

v.

Om Prakash and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 926 of 1931, Decided on 6th April 1934, from decision of Sub-Judge, Etah, D/- 30th March 1931.

(a) Civil P. C. (1908), S. 11 — Decision against mortgagor is not res judicata against mortgagee if latter is not party to suit — Mortgage.

Any decision obtained against a mortgagor after the execution of a mortgage-deed cannot operate as res judicata against the mortgagee, if he (the mortgagee) was not a party to the suit. Much less will a decision between a transferee of the mortgagor and a third person operate as res judicata between the mortgagee and such transferee when the same question arises in a subsequent suit. The mortgagee cannot be considered to be litigating under the same title in the subsequent suit as the mortgagor did in the earlier suit. Nor can he be said to be litigating under the same title as the transferee of the mortgagor:1916 *Bom* 204, *Rel. on.* [P 352 C 2; P 353 C 1]

(b) Civil P. C. (1908), S. 100—Finding that *A* is son of *B* is one of fact.

The finding arrived at by the lower Courts that *A* is a son of *B* is one of fact and must be accepted as conclusive in second appeal. [P 353 C 1]

(c) Evidence—Recitals in sale-deed regarding boundaries — They are admissible to show ownership of boundary lands though document is between strangers—Deed, Recitals.

The recitals in the sale-deed, though they are between third parties, are some evidence of the fact that a person is the owner of the property indicated as boundary. [P 353 C 1]

Benod Behari Lal—for Appellant.

Panna Lal and *N. A. Sherwani* — for Respondents.

Judgment.—This is a second appeal by the defendant from the decree passed by the learned Additional District Judge, Etah, upholding in appeal the decree passed by a Munsif of that District in a suit for possession brought by the plaintiff, Dhani Ram, who has since died and is now represented by his son Om Prakash. The suit was decreed by the trial Court. The defendant's appeal to the lower Court was unsuccessful.

The facts, so far as they are necessary for the purposes of this appeal, are no longer in dispute. The shop in dispute, together with a house, belonged to one Ganga Ram, son of Ishwar Das, of Kasganj, where the property in dispute is situate. There were many persons in Kasganj of the name Ganga Ram, and this fact has proved to be a fruitful source of litigation. The plaintiff Dhani Ram claimed title under a mortgage deed executed by Ram Chandar, son of Ganga Ram, alleged, to be son of Ishar Das, on 16th March 1921. The mortgage was in respect of the shop in dispute. Subsequently Ram Chandar sold the house and the shop in dispute to one Dal Chand. The latter

was resisted by Mt. Katoria, defendant-appellant, in taking possession of the house and the shop. She claimed to be the widow of Jai Dev, son of Ganga Ram, son of Ishwar Das. She denied that Ganga Ram, son of Ishwar Das, had another son Ram Chandar. Her case was that on the death of Ganga Ram, son of Ishwar Das, his interest in the house and the shop devolved upon her only son, Jai Dev, her husband, on whose death she obtained the entire property under a will executed by Jai Dev. It became necessary for Dal Chand to institute a suit for recovery of possession against Mt. Katoria. Accordingly he instituted such a suit against her. The principal question in the case was whether Ram Chandar, the vendor of Dal Chand, was the son of Ganga Ram, son of Ishwar Das. It does not appear to have been disputed that Jai Dev was the son of Ganga Ram, son of Ishwar Das. Dal Chand's case was that, on the death of Ganga Ram, son of Ishwar Das, property devolved upon his two sons, Jai Dev and Ram Chandar, and that on the death of Jai Dev his interest survived to Ram Chandar, so that he became the sole owner of the house and the shop. In this view, Ram Chandar was entitled to transfer the house and the shop in their entirety to Dal Chand. Ram Chandar was a party to that case, but Dhani Ram, the plaintiff of the present suit was not. He however gave evidence in support of Dal Chand's allegation that Ram Chandar was the son of Ganga Ram, son of Ishwar Das. It was held that Ram Chandar was not the son of Ganga Ram, son of Ishwar Das. Dal Chand's suit was accordingly dismissed finally by this Court on 29th March 1926. Dhani Ram then instituted a suit in 1927 for enforcement of his mortgage against Ram Chandar. He did not implead Mt. Katoria. It does not appear whether the suit was contested, but this fact is not material in view of the findings arrived at by the lower Court. A decree for sale was passed in due course. The property was sold and purchased by Dhani Ram himself. Formal delivery of possession was given to Dhani Ram; but he did not succeed in obtaining actual possession and had to institute against Mt. Katoria the suit which has given rise to this appeal.

The suit was resisted, inter alia, on the three grounds: (1) The decision in Dal Chand's suit operates as res judicata in the present litigation; (2) Ram Chandar is not, in fact, the son of Ganga Ram, son of Ishwar Das; and (3) Mt. Katoria has been in adverse possession of the shop in dispute. Both the lower Courts have found that the decision in Dal Chand's suit does not operate as res judicata, and that Ram Chandar, was the son of Ganga Ram, son of Ishwar Das. They also repelled the plea of adverse possession put forward by the defendant-appellant.

In second appeal the aforesaid pleas have been reiterated. It is obvious that if the decision in Dal Chand's suit operates as res judicata between Dhani Ram and Mt. Katoria, it is not necessary to consider the finding of fact, arrived at by the Courts below, namely, that Ram Chandar was the son of Ganga Ram, son of Ishwar Das. It may however be mentioned that the learned advocate for the defendant-appellant has challenged that finding on the ground that some inadmissible evidence has been relied on by the lower appellate Court and that some evidence adduced on behalf of the defendant has been ignored.

The learned advocate for the appellant argues that as Dhani Ram acquired part of the interest which he now claims to be vested in him after Dal Chand's litigation, the decision in Dal Chand's suit operates as res judicata so far, at any rate, as the equity of redemption is concerned, which became vested in Dhani Ram in 1927, several years after the decision in Dal Chand's suit. I do not think this contention is well-founded. Any decision obtained against a mortgagor after the execution of a mortgage deed cannot operate as res judicata against the mortgagee, if he (the mortgagee) was not party to the suit. Much less will a decision between a transferee of the mortgagor and a third person operate as res judicata between the mortgagee and such transferee when the same question arises in a subsequent suit. The mortgagee cannot be considered to be litigating under the same title in the subsequent suit as the mortgagor did in the earlier suit. Nor can he be said to be litigating under the same title as the transferee of the mortgagor. It is clear to me that in the earlier litigation Dal Chand did not represent the interest vested in Dhani Ram, nor can Ram Chandar, who was a defendant in that case, be said to represent the mortgagee's interest after the

mortgage. This view is supported by 1916 Bom 204 (1), and cases therein considered. The fact that the mortgage was enforced subsequent to the decree in Dal Chand's suit and the plaintiff purchased the shop in dispute after it, will, in my opinion, make no difference. Dhani Ram acquired his right to sell the mortgaged property in 1921 by virtue of his mortgage deed. Ram Chandar had parted with an interest in the property on execution of the mortgage deed, one of the incidents of which was that the mortgaged property was liable to be sold if the mortgage money was not paid within due date or when demanded by the mortgagee. After the mortgage the property in the hands of the mortgagor, Ram Chandar, was subject to the liability of being sold in enforcement of the mortgage. Mt. Katoria did not acquire the rights of Ram Chandar by virtue of the decree in Dal Chand's suit which merely created a bar against Dal Chand and those claiming under him. That bar does not operate against the plaintiff who can establish Ram Chandar's right. In this view, I am unable to accept the argument of the defendant's learned advocate that Dhani Ram acquired part of his present interest after the decree in Dal Chand's suit and therefore the decree affects the part so acquired.

As regards the question whether Ram Chandar was the son of Ganga Ram, son of Ishwar Das, the finding arrived at by the lower Courts is one of fact and must be accepted as conclusive in second appeal. It has been challenged on the ground that the learned District Judge relied on inadmissible evidence. It is said that the shop and the house in dispute are mentioned as belonging to Ram Chandar in certain sale deeds, which refer to them as one of the boundaries. The trial Court held that the recitals in the sale deeds, though they were between third parties, are some evidence of the fact that Ram Chandar was the owner of the house and the shop. The learned District Judge however has taken a different view. He thought that they were not admissible for the purpose of proving Ram Chandar's ownership, but he considered them to be relevant for the limited purpose of showing that Ram Chandar at least occupied the house as was stated by the plaintiff's witnesses. The defendant maintained that Ram Chandar had nothing to do with this family and never lived in this house. In my opinion the recitals in the sale deeds are admissible in evidence showing a recognition of Ram Chandar's right. They are also admissible. The question of value is however different. In my opinion the finding of the lower appellate Court is not vitiated by the fact that some reliance was placed upon the recitals in the sale deeds between third parties.

It is complained that the learned District Judge did not refer to some evidence produced on behalf of the defendant. The learned Judge says in arriving at his finding that he considered all the evidence in the case. It was not necessary for him to mention by name every document and every witness produced in the case.

The defendant's plea of adverse possession has no force. The mortgage in favour of Dhani Ram was a simple mortgage. He acquired his right to possession for the first time when he purchased the shop at the auction held in 1928 in execution of his own decree. The present suit was well within 12 years from that date. The result is that this appeal fails and is dismissed with costs. Leave to appeal under the Letters Patent is asked for. I do not think that this is a fit case in which leave should be granted. It is accordingly refused.

K.S. *Appeal dismissed.*

1. Ramchandra Dhondo v. Malkapa, 1916 Bom 204=36 I C 443=40 Bom 679.

A. I. R. 1935 Allahabad 353

NIAMATULLAH AND COLLISTER, JJ.

Rurmal Ram Nath—Plaintiff — Applicant.

v.

Kapil Man Misir and *others*—Defendants—Opposite Parties.

Civil Revn. Nos. 443 and 444 of 1933, Decided on 7th September 1934, against decree of Addl. Sub-Judge, Gorakhpur, D/- 14th July 1933.

(a) Civil P. C. (1908), S. 115 and O. 6, R. 17—Order refusing amendment is "case decided" within meaning of S. 115.

The lower Court's refusal to allow an amendment of the applicant's plaint is a case decided as contemplated by S. 115 : 1933 *All* 374 *Full*; *Case law discussed.* [P 356 C 2]

(b) Civil P. C. (1908), O. 6, R. 17 and S. 115—Suit on promissory note — Plaintiff finding his suit as such may fail, applying for amendment by falling back on original consideration—Amendment held should be allowed — Refusal is disregard of express provision of law.

The dealings between the parties culminated or merged in a note of hand; and when the

plaintiff found that his suit on the basis of the note of hand might fail, he very naturally wanted to fall back on his original consideration, and the real question in controversy was whether the balance of account as shown in the promissory note was or was not due from the defendant and the foundation of the claim was the account books.

Held: the lower Court ought to have allowed the desired amendment and by refusing to do so, it disregarded an express provision of law and failed to exercise a jurisdiction which was vested in it. [P 357 C 1]

(c) Civil P. C. (1908), S. 115 — 'Case decided' — Interlocutory order terminating proceeding started by application is case decided if such proceeding is distinct from suit.

An interlocutory order which terminates a proceeding started by an application should be considered to be the 'decision' of a 'case' within the meaning of S. 115, provided such proceeding is so far distinct from the suit itself that it can be separated from it as a collateral matter. [P 358 C 1]

(d) Civil P. C. (1908), S. 115 — In doubtful cases, Court should err on side of entertaining revision rather than refusing to do so.

The Court should err in doubtful cases on the side of entertaining a revision rather than refusing to do so, if it is found that the subordinate Court exercised a jurisdiction not possessed by it or failed to exercise its jurisdiction, or acted illegally or with material irregularity in the exercise of it. Greater importance is to be attached to the merits of the order questioned in revision, because if the ends of substantial justice do not require interference, the High Court can refuse to correct errors in the order challenged in revision, even though a 'case' might have been 'decided' and even though the subordinate Court's order was technically wrong. [P 358 C 1]

P. L. Banerji and *Shiva Prasad Sinha* —for Applicant.

Muhammad Ismail — for Opposite Parties.

Collister, J.—These are two applications in revision against an order of the Second Additional Subordinate Judge of Gorakhpur, rejecting a petition of the plaintiff-applicant to amend his plaint in a certain suit. The suit was for recovery of Rs. 11,000, odd on the basis of a note of hand which is alleged to have been executed by defendant 1, on 10th October 1932, the consideration for the said note of hand being the balance which was found to be due from defendant 1 upon an accounting between the parties. Execution of the note of hand was apparently denied and the document was sent to the Examiner of Questioned Documents. The latter's report was against the plaintiff and accordingly on 14th July 1933, the plaintiff applied for amendment of his plaint in such a manner as to base his claim alternatively on the bahi khata account. The application was rejected by the Court below on the ground that the amendment sought for would change the basis of the suit. A similar application was made by the plaintiff a month later and it, too, was rejected on 14th August 1933.

An objection is taken before us on behalf of the defendant-respondent that the order of the Court below does not amount to a "case decided" within the meaning of S. 115, Civil P. C. There are a number of reported cases of this Court in which the question as to what constitutes a "case decided" has been considered; but there is only one reported case—a Single Judge case—which deals directly with the refusal of a Court to allow an amendment of a plaint. I will discuss this latter ruling in its due place. In 1921 a Full Bench of five Judges in 1921 All 1 (1), considered the question whether the finding of a Court on an issue as regards jurisdiction could or could not be the subject of revision. The defendants in that case had raised a plea that the Court had no jurisdiction to try the suit and the Munsif tried this issue separately from the other issues and found that the suit was cognizable by his Court. Three of the learned Judges, Piggott, J., Ryves, J. and Gokul Prasad, J., were of opinion that no case had been decided within the meaning of S. 115, Civil P. C., and that the defendants had their remedy by way of appeal from the decree which might be passed in the suit if it were decided against them; but Rafiq, J., and Walsh, J., took a contrary view and held that the High Court had jurisdiction to entertain a revision from the Munsif's order. In 1929 All 144 (2), an arbitrator who had been appointed by the Court at the request of the parties refused to act and the defendant nominated certain other persons and prayed that any one of them be appointed as arbitrator. The plaintiff objected and prayed that the arbitration be superseded; but the Court appointed a certain person to act as arbitrator on payment to him of Rs. 100, which should be met by the parties in equal shares. The plaintiff refused to pay his share and the Court thereupon ordered that the amount be recovered by attachment of his property. The question before this Court

1. Buddhu Lal v. Mewa Ram, 1921 All 1=63 I C 15=43 All 564 (F B).
2. Jagannath Sahu v. Chedi Sahu, 1929 All 144 =115 I C 611=51 All 501.

was whether the lower Court's order was or was not a decision of a case within the meaning of S. 115, Civil P. C., and the Bench—consisting of my learned brother and Sen, J.—found in the affirmative. The Court observed as follows:

"On 29th May 1928, the controversy between the parties was whether the arbitration should be superseded or should be continued and another arbitrator appointed ..... as desired by the defendant. The Court settled that controversy by its order of that date which directed that the arbitration should continue and appointed B. Ganesh Prasad to act as arbitrator. The controversy thus terminated. We think that the order of the learned Subordinate Judge in that connexion was clearly an order deciding a case."

In 1929 All 581 (3), a mutawalli had applied to the District Judge for his permission to sell a certain property. Permission was granted, and the District Judge on a subsequent date accepted the offer of a certain person who wanted to buy the property; but thereafter and behind the latter's back he accepted the offer of another person and cancelled his acceptance of the offer of the first would—be purchaser. A Bench consisting of Mukerji, and Young, JJ., held that a case had been decided by the District Judge and that a revision therefore lay against his order and they observed that

"the words "a case decided by a Court" mean a matter which has been disposed of effectually by the Court and not merely for the time being."

In 1930 Allahabad 758 (4), the Court below had dismissed an application for leave to sue in forma pauperis on the ground that the case was weak on merits and that the Government pleader had intimated his intention to dispute the fact of pauperism. The case came before a Bench consisting of the present Chief Justice and my learned brother and they found that the order of the Court below amounted to a "case decided." The learned Judges discussed and analysed the Full Bench case of 1921 All 1 (1), and pointed out that in that case Ryves, J., although agreeing generally with Piggott, J. and Gokul Prasad, J., had confined his own judgment within very narrow limits and had only considered the question whether the decision of a single issue by a Subordinate Court in a suit which was still pending in that Court was a case decided, and the learned Chief Justice observed:

"As the opinion of Ryves, J., alone turned the scale, the Full Bench is the only authority for the proposition that no revision lies from a mere finding even though that finding may relate to the question of jurisdiction. That case is no authority for the broader proposition that no revision will ever lie from an order which is merely an interlocutory one. In 1922 All 1 (5), Piggot, J., himself did not consider that such a result necessarily followed from his judgment in the Full Bench case."

In this same case my learned brother in his judgment drew a distinction between the case of an application for permission to sue in forma pauperis being dismissed or rejected and the case in which a similar application is allowed. He observed:

"I do not express any opinion as regards the question whether if an application for leave to sue as a pauper is granted, a definite proceeding should be considered to terminate with the order granting such application so as to amount to a case having been decided; but if the application for leave to sue as a pauper is rejected, I entertain no doubt that a definite case should be deemed to have ended with the order of the Court rejecting the application to sue as a pauper, because if the court-fee is not paid subsequently, the claim of the pauper cannot be proceeded with and if a revision is otherwise entertainable, it cannot be contended that a case has not been decided."

In 1931 All 294 (6), a Full Bench of this Court held that an order setting an ex parte decree in defiance of the provisions of O. 9, R. 13, Civil P. C., was a "case decided" within the meaning of S. 115. The learned Judges observed:

"We have no doubt that we have before us a proceeding, distinct from the suit itself, which commenced by an application to set aside the ex parte decree and which terminated by an order discharging the said decree."

In that case, one of the questions before the Full Bench was whether an appeal indirectly lies under S. 105, Civil P. C., from an order setting aside an ex parte decree, and the Court found that no such appeal lay. In 1931 All 761 (7), the lower Court had appointed a certain person to act as arbitrator without having observed the formalities which are required by R. 5, Sch. 2, Civil P. C., and a Bench of this Court consisting of the present Chief Justice and my learned brother held that the Court's order amounted to a "case decided" so as to empower the High Court to interfere in revision. My learned brother in his judgment remarked:

3. Muhammad Abdul Wahid Khan v. Radha Kishen, 1929 All 581=121 I C 267=51 All 957.
4. Sumatra Devi v. Hazari Lal, 1930 All 758=126 I C 1=52 All 927.
5. Mahadeo Sahai v. Secy. of State, 1922 All 1=65 I C 255.
6. Radha Mohan v. Abbas Ali, 1931 All 294=133 I C 129=53 All 612 (F B).
7. Poran Lal v. Rup Chand, 1931 All 761=137 I C 514=53 All 778.

"To take any other view would be to put a premium on unnecessary proceedings in which a large number of witnesses may be examined by the parties and the award which the arbitrator might eventually make may be declared by the Court to have been made by the arbitrator who had been illegally appointed and had in consequence no jurisdiction."

In 1932 All 411 (8), the Court below had found that the word "assets" in S. 73, Civil P. C., meant assets realised by sale in execution of a decree, and a Bench of this Court held that revision lay against the order of the lower Court. The late Chief Justice, Sir Grimwood Mears observed:

"The position to-day with regard to revisions is that there is no hard and fast rule about the matter, and when it manifestly appears to be right and convenient and proper that this Court should decide a revisional application in preference to allowing the parties to embark on long and expensive litigation, it is within the competence of the Court so to decide the revisional application."

In 1933 All 350 (9), a Bench of this Court took the view that an order determining the question whether an additional court-fee should be paid or not marks the termination of a definite stage of the suit and settles the controversy between the parties on the particular point and is therefore an order deciding the case within the meaning of S. 115: but this view was overruled by a Full Bench in 1934 All 620 (10). The learned Chief Justice observed:

"The Court had jurisdiction to decide this point, and if it has taken an erroneous view of the law, it has committed no irregularity."

In 1933 All 374 (11), the question whether an order of a Court refusing to allow an amendment of the plaint was or was not a "case decided" came before a Single Judge of this Court. In that case, the plaintiff had sued for recovery of a sum of money. The defendant in his written statement pleaded that some of the items were time-barred and thereupon the plaintiff prayed for permission to amend his plaint in order to prove acknowledgment, but his application was rejected. Kendall, J., held that the effect of the order of the Court below was definitely to debar the plaintiff from proving a part of his claim and thus there was a final decision on that part of the case which would amount to a "case decided" under S. 115, Civil P. C.

The case reported in 1934 All 785 (12), was the converse of the above. The plaintiff had sued for recovery of possession of a half-share in a certain house. The defendant pleaded that the suit was not cognizable by the Munsif as the value of the share claimed was over Rs. 5,000. Thereupon the plaintiff applied for amendment of her plaint; she said that the defendant had considerably added to the house and all that the plaintiff wanted was that the house be restored to its original condition and the additions demolished. The Munsif allowed the plaint to be amended and a Bench of this Court held that no revision lay against that order. In that case, as pointed out by the learned Chief Justice the question of abandoning a part of the claim was a matter entirely depending on the option and choice of the plaintiff on which the trial Court was not called upon to make any judicial exercise of its own discretion. The question whether a refusal to amend the plaint would or would not amount to a "case decided" was not considered in that case, but I am of opinion that there is a distinction between an order allowing an amendment and an order refusing an amendment. Where a plaint is amended, the amendment appears on the face of the record and the suit proceeds accordingly; but when the amendment is refused, there is a termination of a "case" and, as it were, a chapter of the proceedings is closed. The plaintiff by claiming a right to amend his plaint lays a "case" before the Court and by the Court's order of refusal, the "case" is "decided", the plaintiff being thereby barred from pursuing that portion of his claim. In the Full Bench case of 1934 All 620 (10), to which reference has already been made, the Court observed that:

"Where the case is a proceeding which can be considered separate and distinct and is finally disposed of by an order which terminates it, it may well be considered to be a case decided, although the suit has not in one sense been completely disposed of;"

and I am of opinion that the matter which is now before us falls within this category. I agree with the reasoning of Kendall, J., in 1933 All 374 (11), and I am clearly of opinion that the lower Court's refusal to allow an amendment of the applicant's plaint was a "case decided" as contemplated

8. Sidh Nath v. Tegh Bahadur Singh, 1932 All 411=138 I C 106=54 All 516.
9. Lakshmi Narain Rai v. Dip Narain Rai, 1933 All 350=148 I C 152=55 All 274.
10. Gupta & Co. v. Kirpa Ram Brothers, 1934 All 620=149 I C 1183 (F B).
11. Kishen Lall v. Ram Chandra, 1933 All 374=145 I C 859=55 All 256.
12. Sundar Lall v. Razia Begam, 1934 All 785=152 I C 886.

by S. 115, Civil P. C. It is true that in an appeal from the decree, the lower Court's refusal to amend the plaint might be taken as a ground of objection under S. 105, Civil P. C., but the trend of opinion in this Court, as I have already shown, is that even where such an appeal may lie, an application for revision can be entertained by this Court if the effect of so doing will be to save time, money and labour. I have already quoted the remarks of this Court in 1931 All 761 (7) and in 1932 All 411 (8), and in 1933 All 374 (11), Kendall, J., observes:

"The view has been expressed more than once that, where the effect of allowing a revision, in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the Court will be inclined to interpret the provisions of S. 115 liberally and to interfere with an order which has been passed without jurisdiction or irregularly, illegally or with material irregularity in the exercise of its jurisdiction."

This is the view which has generally found favour with this Court. In the present case, the dealings between the parties culminated or merged in a note of hand; and when the plaintiff found that his suit on the basis of the note of hand might fail, he very naturally wanted to fall back on his original consideration. O. 6, R. 17, Civil P. C., provides that:

"All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The real question in controversy, in the present case is whether the balance of account as shown in the promissory note was or was not due from the defendant and the foundation of the claim was the account books. In my opinion this is a case in which the lower Court ought to have allowed the desired amendment and by refusing to do so it disregarded an express provision of law and failed to exercise a jurisdiction which was vested in it. I therefore hold the view that the application should be allowed and that the Court below be directed to amend the plaint as prayed by the applicant.

Niamatullah, J.—I am in entire agreement with the view expressed by my learned brother. The Full Bench case 1921 All 1 (1), had created an impression that no revision lies under S. 115, Civil P. C., except where a suit or a miscellaneous case equivalent thereto, arising under a special enactment, such as the Guardians and Wards Act, Insolvency Act, etc., has been finally disposed of. Observations to the effect that no revision is maintainable against an interlocutory order passed in a pending suit are to be found in certain cases. The trend of more recent decisions however unmistakably shows that this view is not now accepted in this Court and that revisions have been entertained against an interlocutory order, provided it is one which can be considered to amount to "decision" of a "case." It was permissible to take this view in spite of the Full Bench case above referred to, which was carefully analysed by a Division Bench of this Court in 1930 All 758 (4), in which it was pointed out that of the five Judges who constituted the Full Bench two maintained that a revision lay from a finding on an issue relating to the jurisdiction of the Court recorded during the pendency thereof. Two other learned Judges took a contrary view and made observations considerably narrowing the scope of a revision under S. 115, Civil P. C. The fifth learned Judge (Ryves, J.), concurred with the latter two only in the conclusion and did not commit himself to the view as regards the scope of S. 115, Civil P. C. As pointed out in the Division Bench case last referred to, the Full Bench case is an authority only for the proposition that no revision lies where the trial Court has merely recorded a finding on one of the issues arising in the case and was proceeding with the suit.

There are no less than two later Full Bench decisions of this Court in which it has been definitely held that a revision may lie from an interlocutory order passed in a suit: see 1931 All 294 (6) and 1934 All 620 (10). In both of these cases it was held that, where a proceeding "distinct" from the suit itself is finally terminated by an order which is interlocutory in its nature, a revision lies under S. 115, Civil P. C. To the same effect are several Division Bench rulings, some of which are referred to in the judgment of my learned brother. Indeed, in one case Mears, C. J., observed:

"that there is no hard and fast rule about the matter, and when it manifestly appears to be right and convenient and proper that this Court should decide a revisional application in preference to allowing the parties to embark on long and expensive litigation, it is within the competence of the Court so to decide the revisional application:" 1932 All 411 (8).

The question, which is sometimes one of nicety, is whether a particular interlocutory order can be said to decide

a "distinct" proceeding amounting to a "case." It seems to me that the word "case" is not a term of art. It has not been defined, and it is not possible to define it otherwise than in the manner indicated in the later Full Bench rulings mentioned above. On the one hand, it is not right to say that every controversy in a suit or proceeding should be considered to be a "case" in itself, as Walsh and Rafique, JJ., were inclined to hold in 1921 All 1 (1). On the other hand, to limit it to the final disposal of the whole proceeding (suit or proceeding equivalent thereto), is to deprive, S. 115 of a great deal of its utility. I am of opinion that an interlocutory order which terminates a proceeding started by an application should be considered to be the "decision" of a "case" within the meaning of S. 115, provided such proceeding is so far distinct from the suit itself that it can be separated from it as a collateral matter. I realise that the words "distinct" and "collateral matters", used by me, are as indefinite as the word "case" itself. I think it is not possible to give an exhaustive definition of the word "case" and that any attempt to define it, so as to embrace all revisable orders, is apt to give rise to complications and conflict of opinion. I would therefore consider each case on its own merits and find whether the rule accepted in the later Full Bench cases is applicable to it. In my opinion the Court should err in doubtful cases on the side of entertaining a revision rather than refusing to do so, if it is found that the Subordinate Court exercised a jurisdiction not possessed by it or failed to exercise its jurisdiction, or acted illegally or with material irregularity in the exercise of it. Greater importance is to be attached to the merits of the order questioned in revision, because, if the ends of substantial justice do not require interference, this Court can refuse to correct errors in the order challenged in revision, even though a "case" might have been "decided" and even though the Subordinate Court's order was technically wrong.

Coming to the merits of this particular case, I think the lower Court decided a "case" when it rejected the plaintiff's application for amendment of his plaint. I have examined the plaint and find that the plaintiff claimed a certain sum of money on the allegation that the parties had dealings for a number of years, and that in the plaintiff's account books there were debit and credit entries, which were examined by the parties who agreed on a certain date that a certain amount was due to the plaintiff for which the defendant executed a promissory note. The plaint, as it originally stood, made the promissory note as the basis of the suit though past dealings leading to the execution of the note were recited. The application for amendment sought to make the original consideration, disclosed by the account books and referred to in the plaint, as an alternative basis of the plaintiff's claim. In refusing the plaintiff's application the lower Court should be considered to have disposed of the proceeding started by the application for amendment. That proceeding, though it relates to the suit, is yet distinct and separable from it such that, if all traces of it are removed from the record, the suit itself cannot be affected by it. It is quite correct to say that the plaintiff, who was apprehensive of his suit based on the promissory note, started by his application for amendment, a proceeding with the object of having it determined whether he should be allowed to have in that suit, so to say, a second string to his bow. The Court finally disposed of the proceeding thus started by holding that the plaintiff could not be allowed to have a second string to his bow. The episode was finally closed so far as that Court was concerned. The suit proceeded as it originally stood without any reference to what had happened on the plaintiff's application for amendment. Assuming that the order of the Munsif is one which is, on the face of it, erroneous, and assuming that he failed to exercise his jurisdiction or acted illegally or with material irregularity in the exercise of his jurisdiction, and the order is one which will, in all probability, be set aside in appeal if the plaintiffs suit is dismissed, it is highly expedient that such order should be revised to avoid unnecessary delay and expense to the parties.

I agree with my learned brother in holding that the order of the lower Court contravenes the provisions of O. 6, R. 17, Civil P. C. The whole object of that rule is to prevent multiplicity of proceedings; and a Court is therefore bound to allow such amendment to be made as may be necessary for the purposes of determining the real question in controversy between the parties. The real controversy between the parties is whether the amount claimed by the plaintiff was due from

the defendants on account being taken between them. I fail to see why the slight change "in the frame of the suit" disentitles the plaintiff to the amendment he desired to make. In my opinion the Munsif acted illegally and, at least with material irregularity in the exercise of his jurisdiction. In taking the view which I have done in this case I am not acting contrary to the view expressed in 1934 All 785 (12), in which it was held that no revision lay from an order allowing amendment of a plaint. It was not held in that case that an order allowing amendment of a plaint is not the "decision" of a "case." The ratio of that case appears to me to be that the Court had jurisdiction to allow amendments and that it did not act illegally or with material irregularity in the exercise of that jurisdiction. It is true that incidentally the question whether a case was decided was referred to; but I find no definite expression of opinion on that question.

An order allowing amendment stands, in my opinion, on a different footing from the one refusing to allow it. Assuming that the order allowing amendment amounts to a "decision" of a "case" it can, but rarely be successfully challenged in revision, as the Court cannot be said to have acted without jurisdiction or to have failed to exercise a jurisdiction or to have acted illegally or with material irregularity in the exercise of its jurisdiction. In a vast majority of cases it will be found that the Court has merely acted in the exercise of its discretion which the law gives it or in obedience to the provisions of O. 6, R. 17, Civil P. C. In all such cases nothing more than wrong exercise of discretion can be ascribed to it; but where the Court refuses to allow amendments, where O. 6, R. 17, provides that it must be made for the purposes of finally determining the real question in controversy between the parties, the order of refusal proceeds on an illegal or irregular exercise of jurisdiction. For the reasons explained above I concur in the order proposed by my learned brother.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 359

NIAMATULLAH AND RACHHPAL SINGH, JJ.

Chandra Shekhar and *another* — Decree-holders & Defendants—Appellants.

v.

Manohar Lal and *others* — Judgment-debtors—Respondents.

Execution First Appeal No. 401 of 1933, Decided on 19th December 1934, from decree of Sub-Judge, Cawnpore, D/- 2nd September 1933.

Execution—Decree for costs against plaintiffs—Father shown in decree as party only so far as next friend of minors—Decree cannot be executed against him.

The Court executing the decree cannot go behind the decree. Where a decree was passed against the minor plaintiffs and their father is not shown as a party except so far that he appeared as the next friend of minors, the decree-holders cannot execute their decree for costs against him, who is not shown in the decree as a party. [P 360 C 1]

G. S. Pathak—for Appellants.

A. P. Pandey—for Respondents.

Judgment.—This is an appeal by the decree-holders, who were defendants in the suit in which a decree was passed in their favour for costs against the plaintiffs. The latter were minors and were sued with their father, Manohar Lal as a next friend. The suit was for recovery of a certain sum of money alleged to be due to the plaintiffs. It was dismissed, and the defendants were decreed costs incurred by them in the suit. They took out execution of the decree for costs and attempted to attach a house belonging to Manohar Lal, who objected on the ground that he was no party to the decree and that the decree-holders could not therefore proceed against property belonging to him personally. This objection found favour with the lower Court which dismissed the application for execution. The decree-holders have preferred the present appeal.

It is pointed out by the appellants' learned advocate that Manohar Lal stated in his statement in pleadings that the money which was the subject-matter of the suit was his property and that it had been deposited with the defendants in the name of his minor sons, the plaintiffs. The decree however does not show Manohar Lal as a party except so far that he appears as the next friend of the minor plaintiffs. The contention put forward before us is that the sons were merely benamidars, the beneficial interest in the subject-matter of the suit being

vested in Manohar Lal, the father, who must be held to be liable to pay the costs of the decree against the plaintiffs. It seems to us that the right of the decree-holders to obtain satisfaction of their decree for costs against Manohar Lal rests on facts which cannot be ascertained except by an inquiry. The Court executing the decree cannot go behind the decree which, on the face of it, is against the minor plaintiffs. Manohar Lal is not made liable by the terms of the decree to the costs awarded to the successful defendants. It is clear that the Court executing the decree will materially alter the terms of the decree if it finds that the party really liable for costs is Manohar Lal. We think that the lower Court was right in holding that the decree-holders cannot execute their decree for costs against Manohar Lal, who is not shown in the decree as a party. In this view the appeal fails not only on the merits, but in limine as Manohar Lal's objection should be considered to be one under R. 58, and a decision adverse to him is not appealable. The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 360

BENNET AND BAJPAI, JJ.

L. Madho Ram and *another* — Executors—Appellants.

v.

Jai Chand Rai and *others* — Respondents.

First Appeal No. 135 of 1933, Decided on 20th April 1934, from order of Dist. Judge, Saharanpur, D/- 11th April 1933.

(a) Charitable and Religious Trusts Act (14 of 1920), S. 7 — Trustee of express or constructive trust created for public purpose can apply to civil Court for opinion or advice where any substantial part of property is situate.

A trustee of an express or constructive trust created or existing for a public purpose of a charitable or a religious nature can apply by petition to the civil Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon. [P 361 C 1]

(b) Practice—Duty of Court — Person applying for sale of property covered by will after obtaining probate — Application not specifically headed as one under S. 307, Succession Act — Court should see whether it has jurisdiction under any provisions of law—Succession Act (1925), S. 307.

Where a person who has obtained probate of a bill applies for sale of certain immovable property covered by the will but the application is not specifically headed as one under S. 307, Succession Act, it is the duty of the Court to find out whether it has jurisdiction in the matter of the application or not under any provision of law. [P 361 C 1]

Gopi Nath Kunzru—for Appellants.

G. S. Pathak—for Respondents.

Bajpai, J.—This is an appeal from an order of the District Judge, Saharanpur, dated 11th April 1933, by which he purported to dispose of two applications, one dated 28th November 1931 by Jai Chand Rai and others and the other dated 20th February 1933 by Col. D. P. Goyel. The facts of the case are that one Mt. Kasturi executed a will on 20th March 1920 by which she gave certain directions regarding her property. On 1st August 1931 Col. Goyel who had obtained probate of the will of his wife, Mt. Kasturi, applied for the sale of certain immovable property covered by the will. Permission was granted to Col. Goyel on 17th August 1931 and we have been informed that in pursuance of the permission the property was actually sold on 14th October 1931.

On 28th November 1931 Jai Chand Rai and others applied to the learned District Judge that:

"the order dated 17th August 1931 be set aside and proper directions for the due administration of the trust be ordered and the damages resulting from misfeasance of the trust be recovered from the security of the trustees or any other suitable order be passed."

This application was opposed by one Lala Madho Ram who was also mentioned as a trustee in the will of Mt. Kasturi. Later on Col. Goyel made an application on 20th February 1933 by which he prayed for permission to sell certain other properties mentioned in the will of Mt. Kasturi Bai. The learned District Judge considered these two applications on 11th April 1933 and came to the conclusion that the application of Col. Goyel was under S. 307, Succession Act, which section was not at all applicable inasmuch as "permission to transfer is not asked in this case in order to pay debts and legacies." He therefore refused the application of Col. Goyel dated 20th February 1933 and at the same time set aside the order of 17th August 1931 which he considered to be an ex parte order.

In this appeal it is contended before us that the learned District Judge had erred in holding that it had no ju-

risdiction to grant the permission sought for. It is true that it has been reiterated before us that S. 307, Succession Act, is applicable to the present case, but as arguments have proceeded before us on the assumption that the learned District Judge has got jurisdiction under other provisions of law to grant the permission sought for, we have got to see whether such jurisdiction exists in the District Judge or not. Our attention has been drawn to S. 7, Charitable and Religious Trusts Act, (14 of 1920) and there cannot be the slighest doubt that a trustee of an express or constructive trust created or existing for a public purpose of a charitable or a religious nature can apply by petition to the civil Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon. The Court below has not considered whether the application of Col. Goyel could be treated under S. 7 of the Act or not. It has confined its attention to a consideration of the applicability of S. 307, Succession Act, and on that consideration alone has failed to exercise jurisdiction. We make it clear that all questions arising under S. 7, Charitable and Religious Trusts Act, are open and Jai Chand Rai and others can agitate the point before the Court below. It must be mentioned that the application of Col. Goyel was not specifically headed as one under S. 307, Succession Act, and it was the duty of the Court to find out whether it had jurisdiction in the matter of the application or not under any provision of law.

It was then contended before us that Mr. Mundle, the District Judge, had no jurisdiction to set aside his previous order of 7th August 1931. It is argued that after having passed the order the learned District Judge was functus officio and his order could be set aside, if at all, by a superior authority. The contention of the respondents is that every Court has got inherent jurisdiction to recall an order passed without jurisdiction and reliance is placed upon the case of 1931 All 212 (1). The facts of that case are slightly different. A learned District Judge had passed certain orders giving permission to the trustees to sell certain properties and in pursuance of the permission properties had been sold and an application was made to the successor of the former District Judge to confirm the sales. The learned District Judge before whom the matter came up was of the opinion that S. 307, Succession Act, was not applicable and he therefore dropped the proceedings and refused to confirm the sale. It was held that: "where a Judge for the time being discovers that an order has been passed without jurisdiction either by himself or by his predecessor in office it is his duty to undo that order so far as it may lie in his power."

It was within the competence of the successor to refuse to confirm the sales which had been sanctioned by his predecessor and to that extent he could, if he thought that the order of his predecessor was without jurisdiction, undo the previous order. In the present case there is no question of undoing any previous order so far as it lies in his power. In the present case he has completely set aside his former order dated 17th August 1931 and as we stated before, in pursuance of this order a certain sale has already taken place. The case relied on by the respondents is therefore clearly distinguishable. At the same time we are not satisfied whether the order of the learned District Judge dated 17th August 1931 was passed under S. 7, Religious and Charitable Trusts Act, or under S. 307, Succession Act. It is also clear that that order was passed without reference to a previous order of Mr. Mundle wherein he had refused permission to sell the self-same property under the self-same circumstances. We are therefore of the opinion that it is desirable that the entire matter should be left open and the learned District Judge be asked to consider the application of 1st August 1931 after notice to all the parties concerned as if that were an application under S. 7, Religious and Charitable Trusts Act. We therefore allow this appeal, set aside the order of Mr. Mundle dated 11th April 1931 and send back the case to him to register it on its original number and dispose of it according to law bearing our observations in view. The matters which the Court below will consider are the applications of Col. Goyel dated 1st August 1931 and dated 20th February 1933 and the application dated 28th November 1931 of Jai Chand Rai and others. Parties

1. In the matter of Indrani, 1931 All 212=130 I C 498=53 All 422.

will bear their own costs of this appeal and costs in the Court below will abide the event. The appellant is entitled to a refund of court-fees in this Court.

K.S. *Appeal allowed.*

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THOM AND HARRIES, JJ.

Bharat Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No 473 of 1934, Decided on 17th September 1934, from order of Sess. Judge, Farrukhabad, D/- 12th June 1934.

Penal Code (1860), Ss. 149 and 302 — Number of persons armed with spears rushing at another and plunging spears into his body—Common intention is to kill victim.

If a number of men armed with spears rush at another and plunge their spears into his body, then there is only one inference in law, and indeed in fact, which can be drawn, and that is, that the common intention of the assailants was to kill their victim and all of them can be convicted under S. 302 read with S. 149.

[P 363 C 2]

B. S. Darbari—for Appellants.

Govt. Advocate—for the Crown.

Judgment. — Bharat Singh, Puttu Singh, Bishal Singh, Jhabbu Singh and Sarnam Singh were charged along with four others who were acquitted under Ss. 302/149, 147, 324/149 and 148, Penal Code. Bharat Singh and Puttu Singh were sentenced to death under S. 302 read with 149, Penal Code. Bishal Singh, Jhabbu Singh and Sarnam Singh under the same section were sentenced to transportation for life. Under S. 147 all the appellants were sentenced to two years' rigorous imprisonment and under S. 324/149 to one year's rigorous imprisonment. Puttu Singh, Bharat Singh and Sarnam Singh were sentenced to two years' rigorous imprisonment under S. 148, Penal Code.

The appellants were charged under the section already mentioned along with four others, namely, Chhotey Singh, Badshah Singh, multan Singh and Dip Singh. These four however were acquitted by the learned Sessions Judge. The charge against the accused was that on 21st May 1933, in the village Lilapur, District Farrukhabad, they formed an illegal assembly whose common object was to murder one Jhunni Singh, and in pursuance of this common object they attacked him armed with deadly weapons and murdered him, and further that they inflicted grievous injuries upon one Nathu Singh. There is no dispute about the fact that Jhunni Singh was murdered on 21st May 1933. The post-mortem examination disclosed that he had sustained seven punctured or incised wounds:

"(1) Incised and punctured wound ½" x ¼" deep down to chest in front of right chest 1" from the middle line above the level of nipple.

(2) Punctured and incised wound 1" x ½" deep down to abdomen on right side of abdomen on level with the 11th right rib.

(3) Punctured wound ½" x ½" and deep down to abdomen on right side between the ribs and iliac crest.

(4) Incised would 1" x ½" x 4" inner side of upper part of left thigh below the groin."

(5) Incised wound 2" x ½" x 1" centre of back of chest in middle line."

There were further two incised wounds, one on the middle of right middle finger in front and one on the centre of left middle finger in front. Death is certified by the Civil Surgeon, who conducted the post-mortem examination, to have been caused by puncture of right lung right kidney and abdomen. The injuries in his opinion were caused by some sharp-pointed weapon like a spear. It is beyond dispute further that Nathu sustained injuries on the same date. Nathu was examined on the 23rd May and he was found to have sustained five injuries, all of which were simple, with the exception of one punctured wound $1\frac{1}{2}" \times \frac{3}{4}" \times \frac{3}{4}"$ on the right buttock. All the injuries, with the exception of this grievous injury, were probably inflicted, according to the medical officer, with some blunt weapon.

The first information report of the murder of Jhunni Singh and the injuries to Nathu Singh was made on the 21st May, about 4 p. m., at the police station Rajapur, ten miles from the village of Lilapur. The report was made by one Dal Singh, a resident of the village of Lilapur. In this report Dal Singh states that about noon of that day, viz., the 23rd May, the deceased Jhunni Singh and Nathu Singh were weighing their wheat at the village threshing floor which was in a grove on the outskirts of the village. They were approached by the accused, one of whom, Bharat Singh, demanded that Jhunni should repay to him the Rs. 50 which were owing to him by the deceased. Jhunni replied that he was unable to pay at the time. Thereupon Bharat Singh demanded that he should be given wheat in lieu of the Rs. 50 which were due. Jhunni refused to accede to this suggestion, whereupon Chhotey Singh, one of the accused who has been acquitted, came

up, and when Bharat Singh told him that the deceased refused to pay his debt Chhotey Singh shouted, "beat the salas." The nine accused then rushed upon the deceased and Nathu, felled Nathu to the ground and inflicted upon Jhunni the injuries above referred to, to which injuries Jhunni immediately succumbed. In support of the prosecution case eight eye-witnesses were adduced. They all support the story told to the police in the first information report. It is unnecessary to consider the evidence of these witnesses in detail. They support each other in all material particulars. According to these witnesses six of the accused were armed with spears and three with lathis. It is clear also from the evidence of these witnesses that before the attack upon the deceased and Nathu there was an altercation and an exchange of abuse. The fact that there was an altercation is referred to in the first information report. All the witnesses in their evidence in the Sessions Court stated that there was an interchange of abuse. There is some doubt upon the evidence as to who struck the first blow. The witness Dhal Singh, who is a cousin of the deceased and a brother of Nathu, stated that the deceased Jhunni was the first to wield his spear and he struck the accused Puttu Singh. Puttu Singh did receive an injury and was medically examined on the 21st May. He was found to have a contused wound in front above the forehead with severe bleeding and inflammation on the right eye at the time of examination. Another prosecution witness, namely, Munshi Singh, stated in evidence that lathis were flying on all four sides. In our view therefore it is clear from the prosecution evidence that this unfortunate incident which resulted in the death of one and grievous injury to another, arose out of a quarrel over a trivial matter namely, the repayment of Rs. 50 due by the deceased to Bharat Singh.

Learned counsel for the appellants has contended that the evidence did not disclose any common object on the part of the accused either to murder Jhunni or to inflict grievous injury upon Nathu. There is no doubt that the accused acted on the spur of the moment, no doubt provoked to a certain extent by the abuse which was indulged in by Jhunni and Nathu. What their intention was however when they attacked Jhunni can only be gathered from what happened. It is true that according to the prosecution Chhotey urged the accused merely to beat Jhunni and Nathu. On the other hand, it is proved that six of the accused were armed with spears and that the deceased sustained no fewer than five spear injuries each one of which was a fatal injury. If a number of men armed with spears rush at another and plunge their spears into his body then there is only one inference in law, and indeed in fact, which can be drawn and that is that the common intention of the assailants was to kill their victim. We therefore hold that the appellants with the exception of Bihsal Singh, whose case we shall refer to in a moment, were rightly convicted under S. 302 read with S. 149, Penal Code. Learned counsel for the appellants has urged us to record a conviction, if we accept the evidence of the prosecution. under S. 304 and not under S. 302, Penal Code. We have given this contention of learned counsel very careful consideration. It is undoubtedly clear from the evidence that the killing of Jhunni was perpetrated without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. But we cannot hold that the offence committed comes within the terms of Exception 4 to S. 300, Penal Code. In view of the fact that there were at least five persons armed with spears and two with lathis on the accused's side and two on the others, that no grievous injury was inflicted either by Jhunni or Nathu,we cannot hold that Jhunni's assailants did not take undue advantage or that they did not act in a cruel and unusual manner. We therefore reject the contention that the offence committed by the appellants is covered by Exception 4 to S. 300, Penal Code. Their offence is clearly one under S. 302 and not under S. 304, Penal Code.

The learned Sessions Judge for reasons which upon the evidence we are entirely unable to appreciate, has distinguished between the cases of Bharat Singh and Puttu Singh on the one hand and the other three appellants upon the other. He has sentenced Puttu Singh and Bharat Singh to death under S. 302 read with S. 149, Penal Code, and the other three to transportation for life. The evidence against all the appellants is precisely the same. The testimony of the witnesses does not indicate that a more prominent part in the attack was taken either by Bharat Singh or Puttu Singh, and we have no hesitation in holding that the learned Sessions Judge was quite unjustified

in holding that Bharat Singh and Puttu Singh were in any degree more responsible for the death of Jhunni than the other three appellants. We are satisfied that the offence committed is one under S. 302, Penal Code, that it was committed as the result of sudden provocation and without premeditation and, in the circumstances therefore we are constrained to take the view that this is a case in which the Court may impose the lesser sentence.

The case of Bishal Singh stands in a different position from that of the other appellants. Bishal Singh, according to the evidence, struck Nathu Singh with his lathi. He is not accused of taking any part in the attack upon Jhunni. We have had the advantage of seeing Bishal Singh in Court. His right hand is completely useless. The hand is deformed and the arm is withered, and we are satisfied that he could not have wielded a lathi. It has been suggested that he might have wielded the lathi with his left hand, but we consider this suggestion a very doubtful one. We are not satisfied upon the evidence that Bishal Singh took any part in the attack either upon Jhunni or Nathu. In these circumstances he is entitled to an acquittal in respect of all the charges which were preferred against him. We see no reason to interfere with th econviction and sentences of Bharat Singh, Puttu Singh, Jhabbu Singh and Sarnam Singh under the other sections under which they have been convicted and sentenced.

In the result we allow the appeal of Bishal Singh. We set aside his convictions and sentences and direct that he be liberated forthwith provided he is not required by the authorities in connexion with any other charge. We dismiss the appeals of Bharat Singh, Puttu Singh, Jhabbu Singh and Sarnam, but in the cases of Bharat Singh and Puttu Singh we reduce the sentences of death imposed by the learned Sessions Judge to sentences of transportation for life. The sentences of transportation for life passed against Bharat Singh, Puttu Singh, Jhabbu Singh and Sarnam Singh will run concurrently with the sentences imposed by the learned Sessions Judge under the other sections.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 364

BENNET, J.

Thakur Prasad—Decree-holder — Applicant.

v.

Kasturi Narain Shukla — Judgment-debtor—Opposite Party.

Ex. First Appeal No. 227 of 1933, Decided on 29th October 1934, from decision of Sub-Judge, Gorakhpore, D/- 23rd January 1933.

(a) Res judicata — Simple money-decree and four minor decrees for different sets of costs in same suit—Execution of main decree —Agreement between judgment-debtor and decree-holder regarding methods of execution of decree—Subsequent application for execution of one of decree for costs contrary to agreement — High Court holding that agreement is binding on decree-holder—Application for execution of another decree for costs — Held previous order of High Court operated as res judicata — Single Judge cannot differ from law laid down by bench—Execution.

The decree-holder obtained a simple money decree and four minor deerees for different sets of costs in the same suit. During the course of the execution proceedings of the main decree, the judgment-debtor and decree-holder entered into an agreement limiting the methods of execution of the decrees. The judgment-debtor applied to have this agreement certified as an adjustment but it was held by the High Court that it was not so but simply dealt with the remedies for enforcing the decree. Meanwhile the decree-holder applied for execution of one of the decree for costs contrary to the terms of the agreement: on objection of the judgment-debtor the High Court upheld the lower Court's view that the agreement was binding on the decree-holder, though it was not an adjustment. Subsequently the decree-holder again applied for execution of another of the decree for costs.

Held : that an order of the High Court on the prior execution application of decree for costs was binding on the decree-holder as res judicata. [P 365 C 2]

Held further ; that even if it did not so operate, the order of the High Court in the former application set out the law to be applied and it was not open to single Judge to differ from the law as laid down by the Bench. [P 365 C 2]

(b) Civil P. C. (1908), S. 47—Questions regarding attachment of money and issuing of warrant of arrest are questions dealing with execution.

The questions as regards attachment of certain money and the issuing of a warrant of arrest are certainly questions dealing with the execution of a decree and therefore these questions must be determined by the execution Court and not in a separate suit. [P 366 C 1]

G. S. Pathak—for Applicant.

S. K. Mukerji—for Opposite Party.

Judgment.—This is a first appeal in execution by a decree-holder in the following circumstances:

The decree-holder brought a suit, in the Calcutta High Court against the judgment-debtor and obtained a simple money decree and four minor decrees for different sets of costs. The decree-holder took out execution in Cawnpore of the main decree. During the course of those execution proceedings on the 20th July 1928, the decree-holder gave a document to the judgment-debtor stating that the decree-holder would not take out execution against the person of the judgment-debtor and he would not attach the money due to the judgment-debtor from the B. & N. W. Railway on account of loading and unloading contracts. The judgment-debtor applied to the Court in Cawnpore to have this document certified as an adjustment of a decree. The Court held that it was not an adjustment of a decree because it did not state that any portion of the decree was satisfied, but merely dealt with the remedies which a decree-holder might enforce under his decree. On appeal by the judgment-debtor that view was upheld by a Bench of this Court on 4th February 1932. Meanwhile the decree-holder applied in a Court at Gorakhpur for execution of one of the decrees for costs by attachment of the money due from the B. & N. W. Railway for the loading and unloading contract. The judgment-debtor objected that the decree-holder was bound by his agreement in Cawnpore of 20th July 1928. The Gorakhpur Court on 21st February 1930, held that the agreement was binding on the decree-holder and dismissed the application for execution. The decree-holder made an appeal to the High Court. The High Court in the same order of 4th February 1932, considered this appeal also and it held:

"Coming to the Gorakhpur appeal we are of opinion that this appeal must also fail. The decree-holder did not raise the plea in the Gorakhpur Court that the agreement was part of a larger agreement. Further he never sought to prove that such was the case. That being so the agreement, dated 20th July 1928, was properly construed by the Court below and it was rightly held to be binding on the decree-holder."

That is, this Court held that although the agreement was not an adjustment of the decree which should be certified under O. 21, R. 2, still the agreement was binding on the decree-holder and the execution Court should recognize that agreement as binding on the decree-holder and refuse execution contrary to the provisions of the agreement. While the appeals were pending before the High Court on 2nd December 1930, the decree-holder applied in Gorakhpur for execution of another of the decrees for costs by attachment of the same money with the B. & N. W. Railway. The same objection was made of the agreement of 20th July 1928, and this was upheld by the Subordinate Judge by an order of 2nd February 1931, ordering the release of the money, but staying execution pending the decision in appeals. On 18th May 1931, the decree-holder made an application to continue his application for execution of 2nd Decmber 1930. On 23rd January 1933, the execution Court passed the present order under appeal in which the Court holds that the order of this Court dated 4th February 1932, is binding on the decree-holder and that it cannot go beyond that order.

Learned counsel contends that the order in appeal of this Court of 4th February 1932, is not binding as res judicata on the decree-holder because it was passed in an appeal from the execution of a different decree. Although the decree was different, the decree was passed in the same suit. The difference consists merely in that the two decrees were for different sets of costs. I consider that there is no force in this argument. Even if the order of this Court were not binding as res judicata still in my opinion the order of this Court sets out the law to be applied and it is not open to me as a Single Judge to differ from the law as laid down by a Bench of the Court. I may also add that there is no reason to differ. Learned counsel relied on a Full Bench ruling reported in 1932 All 273 (1), which he claimed would show that an agreement which did not amount to an adjustment would not be binding on the parties for the purpose of execution. I do not think that there is anything laid down by this Full Bench to that effect. The question before the Full Bench was whether an order passed by an executing Court substituting a compromise for the decree originally passed was an order which would give a fresh start for limitation as a subsequent order within the meaning of S. 48 (1) (b). It was held apparently that the order was not such a subsequent proceeding. That question appears to me to be an entirely different one from the question now before the Court as to whether the present com-

1. Gobardhan Das v. Dau Dayal, 1932 All 273=138 I C 583=54 All 573 (F B).

promise is binding on the parties. The compromise may be binding and yet the order passed to that effect may not give a fresh start for limitation. I may also note that the compromise in the present case is quite different from the compromise in the Full Bench ruling because the present compromise does not substitute anything for the decree originally passed, but merely deals with the limitation of the methods of executing that decree. It is further argued by learned counsel that the remedy of the judgment-debtor might be by a suit. I do not consider that that is so because S. 47, lays down that between the parties all questions arising in regard to the execution, discharge or satisfaction of the decree must be determined by the execution Court. The question as regards attachment of certain money and the issuing of a warrant of arrest are certainly questions dealing with the execution of a decree and therefore these questions must be determined by the execution Court and not in a separate suit.

For these reasons I consider that there is no force in the arguments for the appellant and I dismiss this appeal with costs.

Appeal dismissed.

K.S.

A. I. R. 1935 Allahabad 366

BENNET, J.

Alopi Din—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 854 of 1934, Decided on 10th December 1934, from order of Dist. Magistrate, Agra, D/- 16th July 1934.

(a) Criminal P. C. (1898), S. 494—Prosecuting Inspector stating that there was no case—Held it did not amount to withdrawal.

A withdrawal by a public prosecutor is a withdrawal from the prosecution of any person for any act or omission made punishable by any law; that is, the public prosecutor states that he does not want to prosecute for certain alleged acts or omissions [P 367 C 1]

Where there was no such statement by the prosecuting inspector but he merely stated that there was no case under S. 218, I. P. C.

Held: that he did not state that there were any acts or omissions for which he did not desire prosecution of the accused. He only gave his opinion that the evidence produced for the prosecution would not show a case under S. 218, I. P. C.; therefore there was no withdrawal by the public prosecutor in this case. [P 367 C 1]

(b) Criminal P. C. (1898), S. 494 (a), (b)—Withdrawal at beginning of case amounts only to discharge—Withdrawal after charge has been framed produces acquittal.

A withdrawal at the beginning of a case must come under S. 494 (a) and would only amount to a discharge of the accused and it would not come under sub-S. (b), a withdrawal after a charge has been framed, which produces the result of an acquittal. [P 367 C 1]

(c) Criminal P. C. (1898), Ss. 437 and 436—S. 437 is mainly intended to meet case where Magistrate wrongly considers that he has jurisdiction to try certain case.

Section 437 differs in important particulars from S. 436. S. 437 is mainly intended to meet the case where a Magistrate wrongly considers that he has jurisdiction to try a certain case and proceeds to try that case, and where the Sessions Judge or the District Magistrate considers that the facts alleged show a case triable exclusively by the Court of Session and that the inferior Court has improperly discharged an accused person. [P 367 C 2; P 368 C 1]

(d) Criminal P. C. (1898), S. 209—Case exclusively triable by Sessions Court—Magistrate should not weigh evidence or give benefit of doubt to accused—He should only see whether there is sufficent evidence to commit accused.

It is not for a Magistrate making an inquiry into a case triable exclusively by the Court of Session to weigh the evidence or to give the accused the benefit of the doubt. His duty in such circumstances is to see whether there is sufficient evidence to commit to the Court of Session, and if he finds that there is sufficient evidence then he should commit the case to the Court of Session. [P 368 C 1]

(e) Criminal P. C. (1898), S. 437—S. 437 covers case of discharge on any kind of charge and not merely discharge on charge for offence exclusively triable by Court of Session.

The language of S. 437 requires that the case should be triable exclusively by the Court of Session, but it does not go on to state that an accused person has been improperly discharged on such a charge. On the contrary the section merely says that it requires that an accused person has been improperly discharged by the inferior Court. These words are general and cover a discharge on any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Session. [P 368 C 2]

A. P. Pandey and *Rama Shankar Prasad*—for Applicant.

Assist. Govt. Advocate—for the Crown.

Order.—This is an application in criminal revision on behalf of one Pt. Alopi Din, secretary of the District Board of Banda, against an order of the District Magistrate, dated 5th September 1934, committing him for trial to the Court of Session along with three other persons Pt. Salig Ram, engineer of the District Board, Thakur Babu Singh, sub-overseer, and Suraj Prasad, a contractor, under Ss. 120-B, 420, 477 (a), Penal Code, in the case of all the accused, and S. 218, Penal

Code, in the case of Alopi Din and S. 218/109, Penal Code, in the case of the three other accused. There was a complaint by B. Damodar Prasad, junior vice chairman of the District Board, against these four accused persons and the police made an investigation into the complaint and the case was prosecuted. When the prosecution began the prosecuting inspector addressed the Court and the Court passed the following order:

"The Prosecuting Inspector in opening the case said that he wanted to prosecute all the accused under Ss. 420, 468 and 120-B, I. P. C. and that there was no case under S. 218, I. P. C. The procedure will therefore be that of a warrant case."

One of the points in revision is that this order shows that there was a withdrawal by the prosecuting inspector from the offence of S. 218, Penal Code. Under S. 494, Criminal P. C., a public prosecutor may:

"withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried."

The claim is that there was a withdrawal. The word "offence" is defined in S. 4 (o), Criminal P. C., as meaning

"Any act or omission made punishable by any law for the time being in force."

Therefore a withdrawal by a public prosecutor is withdrawal from the prosecution of any person for any act or omission made punishable by any law; that is, the Public Prosecutor states that he does not want to prosecute for certain alleged acts or omissions. In the present case there was no such statement by the prosecuting inspector. He merely stated that there was no case under S. 218, Penal Code. He did not state that there were any acts or omissions for which he did not sesire prosecution of the accused. He only gave his opinion that the evidence produced for the prosecution would not show a case under S. 218, Penal Code. I consider therefore that there was no withdrawal by the Public Prosecutor in this case. It is further clear that a withdrawal at the beginning of a case must come under S. 494 (a), Criminal P. C., and would only amount to a discharge of the accused and it would not come under sub-S. (b) a withdrawal after a charge has been framed, which produces the result of an acquittal.

The Magistrate proceeded to try the case as a warrant case and after the statements of accused he discharged Alopi Din, the secretary, and framed charges against the other three accused. The District Magistrate has taken up the case against Alopi Din under the provisions of S. 437, Criminal P. C., and he has considered the evidence in an order extending to 12 typed pages and he has come to the conclusion that Alopi Din and the other accused should be tried by the Court of Session and he has committed them for trial to the Court of Session and has framed charges. Learned counsel addressed me at considerable length on the merits of the case and he argued that this Court in revision could hear the case on its merits and decide whether there was sufficient material for these persons to stand their trial at the Court of Session or whether there was not. A great deal of evidence has been given in this case for the prosecution extending over 159 pages of the record. This is a case of committal under S. 437, Criminal P. C., to the Court of Session. I do not think it necessary to decide whether it is open to this Court in such a case to go into the evidence for the prosecution and to come to a decision in the manner suggested. But I consider that it would be very unwise to do so in the present case because that would amount to taking the place of the inquiring Magistrate. If I came to a decision contrary to the accused on the merits of the case and expressed such a decision in this order it would prejudice the fair trial of the accused at the Court of Session.

For these reasons I consider that in the present case it is undesirable that I should express any opinion on the merits of the prosecution evidence against Alopi Din. Learned counsel argued that it was not competent to the District Magistrate to set aside the order of discharge passed by the trial Court without upsetting its estimate of the oral and documentary evidence adduced in the case and holding that the same was perverse. This is ground No. 5 of the application. To support this proposition learned counsel referred to a ruling of mine in 1934 All 944 (1). That was a ruling under S. 436, Criminal P. C. I consider however that S. 437, Criminal P. C., differs in important particulars from S. 436, Criminal P. C. In my opinion S. 437, Criminal P. C., is mainly intended to meet the case where a Magistrate wrongly considers that he has jurisdiction to try a certain case and proceeds to try that case; and where the Sessions Judge or the Dis-

1. Nazir Ahmad v. Emperor, 1934 All 944=152 I C 884=1934 Cr C 1256.

trict Magistrate considers that the facts alleged show a case triable exclusively by the Court of Session and that the inferior Court has improperly discharged an accused person. In the present case the District Magistrate considers that S. 218, Penal Code, an offence exclusively triable by the Court of Session, is an offence shown by the facts alleged and therefore the District Magistrate considers that the inferior Court wrongly tried the case.

The function of a Magistrate trying a case is different from the function of a Magistrate inquiring into a case exclusively triable by the Court of exclusively triable by the Court on Session. It is not for a Magistrate making an inquiry into a case triable exclusively by the Court of Session to weigh the evidence or to give the accused the benefit of the doubt. As this Court has frequently laid down the duty of the Magistrate in such circumstances is to see whether there is sufficient evidence to commit to the Court of Session, and if he finds that there is sufficient evidence then he should commit the case to the Court of Session. Learned counsel relied on certain rulings which in my opinion do not apply to the present case. One ruling 1925 Pat 599 (2), does lay down that under S. 437, Criminal P. C., the Sessions Judge has to consider whether it was open to the Magistrate to come to the conclusion to which he did come on the materials before him. That a different view could be taken on the evidence would not justify the Sessions Judge in ordering commitment. He must come to the conclusion that the finding of the Magistrate is not only wrong but perverse. I do not consider that that ruling is one with which I can agree and I must respectfully differ. Learned counsel then argued a ground which is not contained in his memorandum of revision which was that for S. 437, Criminal P. C. to apply there must be an order of discharge on a charge of a section exclusively triable by the Court of Session. For this proposition he referred first of all to 1 All 413 (3), and to 1919 Mad 45 (4). In both those cases the Courts decided that the offence with which the District Magistrate or Sessions Judge desired to charge the accused under the section which corresponded to S. 437, Criminal P. C., was not an offence exclusively triable by the Court of Session.

The language of the section requires that the offence should be exclusively triable by the Court of Session. Therefore the Courts held that the order was not justified under the section in question. That however will not apply to the present case because S. 218 is exclusively triable by the Court of Session. Learned counsel then referred to 1918 Cal 943 (5). One of the two Judges did enunciate the proposition laid down by counsel, but the other Judge differed. I do not think therefore that a ruling in which two Judges differ on this point can be held to support the point. No authority therefore has been shown to support the proposition. It appears to me that the proposition as enunciated by counsel is not in accordance with the language of the section. The language of the section requires that the case should be triable exclusively by the Court of Session, but it does not go on to state that an accused person has been improperly discharged on such a charge. On the contrary the section merely says that it requires that an accused person has been improperly discharged by the inferior Court. These words are general and cover a discharge on any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Session. Argument was also made on ground No. 7 which states that on the finding that the applicant must have joined the conspiracy at least about the time that the civil suit was brought there could be no charge against the applicant under S. 218, Penal Code.

This argument reopens the question of the merits of the case into which I have said that I do not intend to go. No ground has been shown for interference with the order of the District Magistrate. It appears to me that both the prosecution and the defence are entitled to ask that there should be a fair trial. The District Magistrate has committed this case to the Court of Session for a fair trial. The present applicant in revision appears to consider that by coming to this Court a fair trial can be prevented and that this Court should consider the merits of the case in revision and give orders that the trial should not take place. I do not consider that such a procedure by this Court would be in

2. Ritbhanjan Rai v. Emperor, 1925 Pat 599=86 I C 822=26 Cr L J 886.
3. Queen-Empress v. Kanchan Singh, (1875) 1 All 413 (F B).
4. Nalluri Chenchiah v. Emperor, 1919 Mad 45 =50 I C 987=20 Cr L J 379=42 Mad 561.
5. Abdul Hakim v. Bazruk Ali, 1918 Cal 943=41 I C 658=18 Cr L J 834.

accordance with justice. The prosecution is entitled to have its case fairly heard under S. 218, Penal Code, which is a section exclusively triable by the Court of Session. Accordingly it appears to me that the correct order is to dismiss this application and allow the Court of Session to try the case. I accordingly refuse this application.

K.S. *Application dismissed.*

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KENDALL, AG. C. J. AND HARRIES, J.

P. Mohan Lal Gautam—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 572 of 1934, Decided on 7th December 1934, from order of Sess. Judge, Allahabad, D/- 25th May 1934.

(a) Press Act (as amended in 1932), S. 4 (1) (h), Expl. — Words actually tending to promote feelings of enmity — If published without malicious intention and with honest view to removal of same, they do not come under S. 4 (1) (h).

The explanation expressly provides that certain words published without malicious intention and with a certain definite and honest purpose are not to be regarded as words tending to promote feelings of enmity between different classes, though they might actually tend to promote such feelings. Words pointing out matters which are producing or have tendency to produce feelings of enmity or hatred between classes must often, if not invariably, tend either directly or indirectly to promote such feelings; yet if such words are published without malicious intention and with an honest view to the removal of such matters they are not within the amended S. 4 (1) (h) by reason of the provisions of Expl. 4 to that section. [P 370 C 1]

(b) Press Act (as amended in 1932), S. 4 (1) (h) — Document must be regarded as a whole.

The leaflet must be regarded as a whole as it would be grossly unfair to take one sentence out of its context. [P 370 C 2]

(c) Press Act (as amended in 1932), S. 4 (1) (h) — Intention of writer may be inferred from language of document.

The intention of the writer may properly be inferred from the language of the document which he has written. The language used may be so scathing, inflamatory and exaggerated as to make it clear that the writer intended more than what he actually wrote. A document may on the face of it have an entirely innocent meaning, yet the style of writing or the mode of expression adopted and language used may well indicate that the writer's real intention was something far from innocent, peaceful or lawful. [P 371 C 1, 2]

K. D. Malaviya—for Applicant.

Asst. Govt. Advocate—for the Crown.

Harries, J.—This is an application by Mohan Lal Gautam for revision of an order convicting him of an offence under S. 18 (1), Press Act.

The applicant was charged before the learned Magistrate with two offences, namely, one, under S. 18 (1), Press Act, and the other under S. 17 (2), Criminal Law Amendment Act. He was convicted of both offences and sentenced to six months' rigorous imprisonment in respect of each offence, the sentences to run concurrently. On appeal the learned Sessions Judge of the Allahabad District set aside the conviction and sentence under S. 17 (2), Criminal Law Amendment Act, but affirmed the conviction end sentence under S. 18 (1), Press Act,

In revision it is now contended before this Court that this conviction is bad in law as the proved and admitted facts disclose no offence against the section in question. The facts of the case are not in dispute and can briefly be stated as follows: On 15th December 1933, the applicant ordered from the Shive Press at Allahabad, 10,000 copies of pamplet entitled "Kisanon Sangathi Ho." The copies ordered were duly printed and were subsequently distributed in the rural areas though it appears that some copies were actually distributed in the City of Allahabad. Further the pamphlet was published verbatim in a Hindi paper called Partap on 18th December 1933, so it is therefore clear that the contents of this pamphlet was published on a fairly wide scale in the Districts surrounding Allahabad.

The pamphlet is addressed to Kisans and calls upon them to unite in order to obtain their rights and it is the allegation of the prosecution that it is a document which tends to promote feelings of enmity between Kisans on the one hand and zamindars or the Government on the other and consequently its publication was an offence under Section 18 (1), Press Act. Section 18 (1), Press Act, enacts that whoever makes sells, distributes, publishes, etc., any unauthorized news-sheets or news-paper shall be punishable with imprisonment not exceeding six months or with fine or with both. A news sheet is defined in S. 1 (6) of the Act, as any document other than a news-paper containing public news or comments on public news or any matter described in sub-S. (1). S. 4, of the Act and an unauthorized news sheet is defined in section 1 (10) of the Act, as any news sheet other than a news sheet pub-

lished by a person authorized under S. 15 of the Act, to publish it.

It is not and cannot be contended in this case that the applicant was a person authorized under S. 15 of the Act, to publish this document and it therefore follows that if this pamphlet is a news sheet within the meaning of the Act, it is an unauthorized one. It has not been argued that this pamphlet is a news sheet by reason of the fact that it contains public news or comments or public news, but it has been strongly urged on behalf of the prosecution that it is a news sheet within the meaning of the Act on the ground that it contains matter described in sub-S. (1), S. 4, Press Act, as amended by S. 16 of the Act 23 of 1932. A number of matters are set out in S. 4 (1) of the Act, as amended and the prosecution allege that this pamphlet is an unauthorized news sheet because it contains words tending directly or indirectly to promote feelings of enmity and hatred between different classes of His Majesty subjects, see S. 4 (1) (h) of the Act, as amended.

In explanation 4, to this amended section of the Act, it is laid down however that words pointing out without malicious intention and with an honest view to their removal matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subject shall not be deemed to be words of the nature described in class (h) of that sub-section. This explanation in our judgment makes it clear that all words tending either directly or indirectly to promote such feelings of enmity or hatred are not within the purview of this sub-section. The explanation expressly provides that certain words published without malicious intention and with a certain definite and honest purpose are, not to be regarded as words tending to promote feelings of enmity between different classes though they might actually tend to promote such feelings.

Words pointing out matters which are producing or have a tendency to produce feelings of enmity or hatred between classes must often, if not invariably, tend either directly or indirectly to promote such feelings, yet if such words are published without malicious intention and with an honest view to the removal of such matters they are not within the amended section 4 (1) (h) by reason of the provisions of explanation 4 to that section.

But for this explanation the writers of most articles discussing the supposed grievances of any class would be within this sub-section, because the grievance of any particular class is almost invariably due to some extent to the rights or actions of some other class and that being so it would be almost impossible to discuss the grievance of such a class without tending at least indirectly to promote feelings of enmity or hatred between that class and such other class. For example a discussion of the grievances of the workers in paticular mills must almost invariably involve criticism of the owners of those mills and similarly a discussion of the grievances of one particular race in India will in most cases involve some reflection on one or more of the other races who live in the country. Such articles however would not be within this sub-section by reason of explanation 4, if they merely pointed out the grievances without malicious intention and with an honest view to their removal.

In the pamphlet the subject-matter of this charge the condition of the Kisans is described and certain proposals are made for alleviating and improving their position and status. The Kisans are urged to unite and form an association for the purpose of furthering their claims and improving their lot, but nowhere is violence advocated, but on the contrary, they are urged to capture the legislatures by constitutional means and thus procure the necessary ameliorative legislation. The tone of the opening paragraph is somewhat dramatic and it may be that the facts as stated therein are somewhat exaggerated. If that paragraph stood by itself it might be argued that the document was within the amended sub-section. The lot of the Kisans is described as deplorable in the extreme and according to the writer he is frequently the victim of abuse and even of beatings at the hands of zamindars and Government Officials. No one however can deny that the present lot of the Kisans is not a very happy one, but even so this particular sentence does appear to offend on the side of exaggeration. However the leaflet must in our judgment be regarded as a whole as it would be grossly unfair to take one sentence out of its context and hold that such a sentence went beyond merely pointing out the Kisans, grievances without malicious intent and with an honest view to their removal i. e., beyond words such as are con-

templated in explanation 4 to the sub-section in question.

Taking the pamphlet as a whole it is extremely moderate in tone. The writer is obviously deeply moved by the grievances of the Kisans which he describes in picturesque and expressive language. He urges them to bestir themselves and unite to secure a majority in the legislatures and thus by constitutional methods obtain enactments to remove their grievances and improve their lot. There is nothing in the pamphlet to suggest that the writer had any motive other than that of improving the condition of those to whom it is addressed. He merely points out what he regards as their grievances with a view to remedying them by lawful means. From the language used it is clear in our judgment that it was not the intention of the applicant to inflame the Kisans against the zamindars or the Government, but rather to interest them in their condition and in his proposals for the amelioration of their position. The pamphlet concludes by urging them to unite so that these proposals might be lawfully carried out.

It is true that the words of the leaflet might tend to promote feelings of enmity or hatred between the Kisans and the zamindars, but after giving the document our most careful and anxious consideration we are satisfied that the writer did nothing more than point out with a view to their removal the grievances of the Kisans, i. e., point out matters which were producing or had a tendency to produce feelings of enmity or hatred between the Kisans and zamindars. Further, the applicant in his statement before the trial Court states that he had no intention to create ill will or feelings of enmity or hatred between the Kisan and zamindars and between the Kisans and the Government and that his only object was to improve the present condition of the Kisans.

There was no material before the Court from which the intention of the applicant could be inferred other than pamphlet itself its mode of publication and his statement made before the trial Court. The intention of the writer may properly be inferred from the language of the document which he has written. The language used may be so scathing inflammatory and exaggerated as to make it clear that the writer intended more than what he actually wrote. A document may on the face of it have an entirely innocent meaning, yet the style of writing or the mode of expression adopted and the language used may well indicate that the writers real intention was something far from innocent, peaceful or lawful. According to the applicants statement before the trial Court, he had no intention to create or stir up feelings of enmity or hatred between the Kisans and any other class. His only object, he said, was to ventilate the grievances of the Kisans with a view to interesting them in proposals for the improvement of their condition. We see nothing in the pamphlet in question or the mode of its publication which causes us to doubt that statement. The document cannot in our view be held to mean anything more than what it actually says and neither the language used nor the mode of publication suggests that the writer had any other motive or purpose in writing and publishing it than to point out the Kisans present unfortunate position with a view to obtain support for his proposal for the amelioration of their lot. In our judgment the writer had no malicious intent and we believe that his statement before the trial Court is true and ought to be accepted.

That being so, the document contained in our view nothing more than words pointing out without malicious intention and with an honest view to their removal matters which are producing and have a tendency to produce feelings of enmity or hatred between Kisans and zamindars and therefore by reason of explanation 4, the words are not to be deemed to be words which tend directly or indirectly to promote such feelings within the amended S. 4 (1) (h), Press Act. The learned Sessions Judge did not in our judgment, consider this aspect of the case. After a careful consideration of the terms of the pamphlet he came to the conclusion that the words tend to create feelings of enmity or hatred between Kisans and zamindars and that in his view concluded the matter. The real object or the intention of the writer was according to him wholly immaterial and he held that it was quite enough to bring the applicant within this section if the prosecution showed that the words used did tend directly or indirectly to promote feelings of enmity or hatred.

The learned Sessions Judge never addressed his mind to the question whether the words used were anything more than words pointing out with a view to their removal matter producing

or having a tendency to produce feelings of enmity or hatred between the two classes. If they were not, the intention of the writer was most material, for such words are not to be deemed to be words tending either directly or indirectly to produce such feelings if they were published without malicious intention and with an honest purpose of removing the matters creating such feelings.

In our judgment the pamphlet falls precisely within the words of explanation 4, and that being so it cannot be held to be an unauthorized news sheet within the meaning of S. 18 (1). Press Act, read with the other sections of that Act. The conviction of the applicant therefore cannot be sustained and we accordingly set aside the conviction and sentence and acquit him.

During the course of the argument another point was raised on behalf of the applicant, but not seriously argued. It was suggested that Kisans and zamindars were not sufficiently well defined or ascertainable classes to come within the section in question and in support of this contention the case of 1933 Bom 65 (1), was relied upon. Having regard to the view which we take of the terms of this pamphlet it is unnecessary to decide this point and we therefore express no opinion upon it.

K.S. *Conviction set aside.*

1.Mt. Maniben Liladhar v. Emperor, 1933 Bom 65=141 I C 780=57 Bom 253=34 Cr L J 231 =1933 Cr C 182.

A. I. R. 1935 Allahabad 372

BENNET, J.

Mahadeo Prasad — Plaintiff—Applicant.

v.

Girdhari — Defendant — Opposite Party.

Civil Revn. No. 391 of 1934, Decided on 12th December 1934, against order of Judge, Small Cause Court Allahabad, D/- 30th January 1934.

(a) Arbitration—It is not for arbitrator to dismiss or decree suit — Civil P. C. (1908), Sch. 2, Para. 16.

The function of an arbitrator is to come to a decision on the issues which have been referred to him and when his award is received the Court decides the suit and it is not for the arbitrator to dismiss or decree the suit. [P 372 C 2]

(b) Provincial Small Cause Courts Act (1887), S. 25 — Question of fact cannot be raised.

Question of fact cannot come before the High Court in revision from a Small Cause Court : 1916 *All* 33 and 1914 *All* 153, *Dist.* [P 373 C 1]

Gajadhar Prasad Bhargava— for Applicant.

Zamirul Haq—for Opposite Party.

Order.—This is an application by the plaintiff in civil revision under S. 25, Small Cause Court Act, against the decree of a Small Cause Court passed in terms of an award dismissing the suit of the plaintiff. One ground is taken, ground No. 4 which is a point of law that the award was inavalid in form. The award stated:

"I am of opinion that the plaintiff's case is not proved. I accordingly recommend the Court to dismiss the suit of the plaintiff with costs."

Learned counsel argues that the award should say "I dismiss the suit." No authority is given for that proposition and there is nothing in the second schedule to indicate that an arbitrator should dismiss a suit. I consider that the function of an arbitrator is to come to a decision on the issues which have been referred to him and when his award is received the Court decides the suit and it is not for the arbitrator to dismiss or decree the suit. S. 16, Sch. 2, indicates that it is the function of the Court to pronounce judgment and not the function of the arbitrator.

The remaining three grounds deal with alleged irregularities by the arbitrator. These allegations were the subject of objections taken by the plaintiff to the award and the lower Court has considered these objections and found that the plaintiff has failed to prove the objections. In the revision no ground is taken alleging any irregularity of the procedure of the lower Court. It is only the procedure of the arbitrator to which objection is taken. Learned counsel argued that under section 25, Provincial Small Cause Courts Act, he could raise again in this Court issues on questions of fact which have been decided against him by the Small Cause Court and counsel for this proposition relied on two rulings. In one of these rulings, 1916 All 33 (1), this Court held that there was no evidence before the Small Cause Court for a finding of fact by that Court. The present case is different because there was evidence before the lower Court and it came to a decision on conflicting evidence. The second ruling referred to was 1914 All 153 (2). In that case a learned Single Judge of this Court admitted evidence of an affidavit in

1. Bhairon Prasad v. Amina Begam, 1916 All 33 =35 I C 693=38 All 690.
2. Rebecca Stewart v. Debi Prasad, 1914 All 153 =25 I C 779.

revision and came to a finding of fact contrary to a finding of fact of a Small Cause Court. The ruling does not explain under what provisions of law the learned Judge considered that he was justified in acting. The mere fact that he did so act is not in my opinion a ground showing that he was entitled to do so. The language in S. 25 states that this Court may satisfy itself that the decree or order by the Small Cause Court was according to law. This expression "according to law" is parallel to the language in S. 100 (1) (a), Civil P. C., which states that one of the grounds for a second appeal is "the decision being contrary to law." Apparently therefore the expression in S. 25, Provincial Small Cause Courts Act, limits this Court in revision to grounds of law that might be raised in a second appeal and it does not cover a revision on question of fact. Questions of fact may be raised in a first appeal. A first appeal is governed by S. 96, Civil P. C. That section states:

"save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court."

The language used in this sub-section is perfectly general and it is stated merely that "an appeal shall lie." This covers not only an appeal on points of law but an appeal on question of fact. I do not find that there is anything in S. 25, equivalent to the words "an appeal shall lie" and there is nothing in that section to indicate that questions of fact can come before this Court in revision from a Small Cause Court. Accordingly in my view the grounds Nos. 1 to 3 of this application in revision are grounds which cannot be heard by this Court in revision under S. 25. Provincial Small Cause Courts Act. I therefore dismiss this application in revision with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 373

BENNET, J.

Thakur Bhawani Singh—Appellant.

v.

Baldeo and *another*—Respondent.

Civil Revn. No. 513 of 1934, Decided on 21st December 1934, from order of Small Cause Court, Judge, Chandausi, D/- 13th August 1934.

Civil P. C. (1908), Ss. 47 and 145 — Attached property entrusted to person—Latter failing to produce them — Suit by decree-holder against such person — S. 145 is no bar.

Where property attached in execution of a decree is entrusted to a person who fails to produce them, the decree-holder has a remedy by way of suit against such person and S. 145 is no bar to the suit : *Case law referred.*

[P 274 C 1, 2]

Shabd Saran—for Appellant.

Order.—This is an application in civil revision by a plaintiff whose suit has been dismissed by a Small Cause Court on the ground that the suit is barred by S. 145, Civil P. C. The plaintiff claimed that he had a decree in the Revenue Court against a third party and that in execution a buffalo and calf had been attached and entrusted to the defendants as superddars, that the defendants did not produce these animals for sale before the amin when required to do so and he therefore sued these defendants for the value of these animals. The lower Court has held that the plaintiff should have proceeded in the execution Court under S. 145, Civil P. C., and that that section bars a suit such as the present brought by the plaintiff. The Court has acted on a ruling in 1929 All 266 (1), by Dalal, J. That case was similar and the learned Judge held that the S. 145 acted as a bar. He did not give any reasoning for this conclusion. The plaintiff claims that he has a remedy under S. 145, Civil P. C., in execution or by way of a separate suit. In S. 145 it is stated that:

"where any person has become liable as surety (a) for the performance of any decree or any part thereof, or (b) for the restitution of any property taken in execution of a decree, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of S. 47."

"Now this section states that the person in question is to be deemed a party within the meaning of S. 47 for the purposes of appeal, but it does not state that he is to be deemed a party within the meaning of S. 47 for any other purpose."

It does no doubt state that the decree or order may be executed against him, but it does not state that it may be executed as if he were a party under S. 47. If there had been such a statement in the section then it might be held that S. 47 (1) would prevent any separate suit because that sub-section lays down that all questions arising between the parties shall be determined

1. Piare Lal v. Sitaram, 1929 All 266=113 I C 751.

by the Court executing the decree and not by a separate suit. I am of opinion that S. 145 did not intend to impose this restriction in the case of a person who was liable under S. 145, and there is nothing in the language of S. 145 which indicates such an intention. This opinion I may note is also shared by the learned Chief Justice in 1931 All 567 (2). It is true that the particular question was not before the Court in that case and the observation therefore may be considered as obiter dictum, but I consider that it was a correct statement of law. Learned counsel has also relied on 1920 Mad 75 (3), in which it was held that where a person stands surety for a judgment-debtor for the due performance of the decree and desires to cancel his security bond on the ground that it was obtained by fraud and undue influence he has no remedy to apply under section 145, Civil P. C., but must proceed by a suit and that S. 145, Civil P. C., does not make him a party to the suit within the meaning of S. 47, Civil P. C. In 36 Bom 42 (4), it was held that where a bond is executed as security for restitution in the event of a decree being reversed in appeal a suit upon such a bond lies. In 1933 All 269 (5), a Full Bench of this Court has held that it is necessary that a regular suit should be brought for the enforcement of a hypothecation lien on immovable property mortgaged as security in a suit and that it is not open to the Court to proceed in execution without a separate suit being brought.

Reference was also made to an old ruling of this Court in 6 N W P H C 261 (6), where it was held that the corresponding S. 204 of Act 8 of 1859 gives a remedy to the decree-holder against a surety in addition to any remedy which he might have on the surety bond, but that the section does not prevent the decree-holder from bringing a suit on the surety bond to enforce the contract made by him with the surety and the lien on the property mortgaged to secure the performance of that contract. It is true that this ruling and the Full Bench ruling which I have quoted both refer to the case of mortgages of immovable property given by way of surety, but I consider that the principal will also apply to a case like the present and that the plaintiff has a remedy by way of suit. Accordingly I set aside the decree of the lower Court and remand the case for disposal on the remaining issues. Costs hitherto incurred will abide the result. The court-fees of this Court will be returned to the plaintiff under S. 13, Court-fees Act.

K.S. *Case remanded.*

2. Shakir Husain v. Chandoo Lal, 1931 All 567=134 I C 836 (FB).
3. Ramanathan Pillai v. Doraiswami Aiyangar, 1920 Mad 75=55 I C 363=43 Mad 325.
4. Motilal Virchand v. Thakore Chandrasanji, Himatsangji, (1912) 36 Bom 42=12 I C 549.
5. Khairunnissa Bibi v. Oudh Commercial Bank, Fyzabad, 1933 All 269=142 I C 510=55 All 346 (FB).
6. Abdul Kadir v. Huree Mohun, (1874) 6 N W P H C 261.

** A. I. R. 1935 Allahabad 374

Full Bench

SULAIMAN, C. J., NIAMATULLAH AND BENNET, JJ.

Benares Bank, Ltd., Agra—Plaintiff—Applicant.

v.

Rajnath Kunzru and *others* — Defendants—Opposite Parties.

P. C. Appeal No. 18 of 1934, Decided on 24th January 1935, for leave to appeal to His Majesty in Privy Council.

*** * Civil P. C. (1908), S. 110—Two cross appeals filed in High Court separately disposed of—Plaintiff's appeal dismissed — Defendant's appeal allowed—Merely by fact of allowing cross appeal by defendant, dismissal of plaintiff's appeal does not cease to be one of affirmance.**

When two cross appeals are separately disposed of, the matters in controversy in the two appeals are distinct and separate and therefore the adjudications of such matters are also distinct and separate and if plaintiff's appeal is dismissed but the defendant's appeal is allowed, the dismissal of plaintiff's appeal is an affirmance of the adjudication made by the first Court so far as the matter in controversy in the plaintiff's appeal is concerned, whereas the allowing of the defendant's appeal is a variation of the adjudication of the first Court so far as the matter in controversy in that appeal is concerned. Hence from the mere fact that a cross appeal has been allowed and the adjudication varied so far as the matter in controversy in that appeal is concerned, it does not follow that the decision in the other appeal which is dismissed is not one of affirmance and plaintiff is not entitled to leave to appeal to Privy Council as of right: 1925 *P C* 60; 1918 *All* 245, *Rel. on. Case law discussed.* [P 377 C 1]

P. L. Banerji, B. Malik and *Govind Das*—for Applicant.

S. K. Dar and *A. M. Khwaja* — for Opposite Parties.

Order of Reference.

This is an application for leave to appeal to His Majesty in Council. There were two cross-appeals filed in this Court which were connected and disposed of by one judgment, but sepa-

rate decrees were prepared in the two cases. Leave to appeal to His Majesty in Council has already been granted in the defendant's appeal which was allowed and the decree of the Court below was reversed and the claim with regard to the subject-matter in dispute in that appeal disallowed. The decree in the plaintiff's appeal was one of dismissal of the appeal, and in that sense an affirmance of that part of the decree of the first Court which had dismissed the plaintiff's claim in part. But the operative order of the High Court was that the defendant's appeal should be allowed and the decree of the Court below modified and the suit dismissed in toto.

The question which arose in the plaintiff's appeal was to a large extent one of fact. Learned counsel for the plaintiff concedes that no substantial question of law arises in this case and that therefore the case does not fulfil the requirements of S. 110, Civil P. C. He however contends that the decision of the Court below has not been affirmed inasmuch as the cross-appeal was allowed and the decree of the trial Court was modified and the whole claim was dismissed. It was distinctly held in the case of Chiranji Lal v. Behari Lal, 16 A L J 864, that in a case of two cross-appeals there is no right of appeal to the Privy Council in one appeal in which the appeal is dismissed, merely because the cross-appeal has been allowed. But subsequent to the decision of that case their Lordships held in Annapurna Bai v. Rup Rao. 1925 A I R P C p. 60, that where a widow claiming maintenance allowance was allowed only a part of the amount claimed by her by the first Court and that amount was increased in her favour by the High Court, she had a right to appeal to His Majesty in Council for claiming the balance of the original amount put forward in the plaint. This case has, of course, been followed by most of the High Courts in India.

In the case of Nathu Lal v. Raghubir Singh, 1931 A L J 968, a Full Bench of this Court has held that where a cross-objection has been allowed, but the appeal itself has been dismissed, the decision is not one of affirmance and that there is an appeal to their Lordships of the Privy Council as of right. As regards cross-appeals, the view expressed by this Court has been followed by the Lahore High Court in Asa Ram v. Kishen Chand, 11 Lah 405, corresponding to 1930 A I R Lah 554. The Madras, Calcutta Bombay High Courts have gone even a step further, see Ramanathan Chetti v. Subramanian Chetti, 1926 A I R Mad 1024, Narendra Lal Das v. Gopendra Lal Das, 1927 A I R Cal 543 Kapurji Magniram v. Pannaji Debi Chand, 1929 A I R Bom 359.

On the other hand, the Patna High Court in the case of Jamuna Prasad Singh v. Jagarnath Prasad, 1929 A I R Pat 561, has expressed a contrary opinion, and has referred to the doubt expressed by Rankin, C. J., of the Calcutta High Court, as to the soundness of the course of decisions in his Court. In the Full Bench decision of this Court, referred to above, the question did not arise and was therefore left open, but one of the learned Judges pointed out the anomaly which would arise if in the case of a cross-objection being allowed, an appeal is admitted, but no appeal is admitted if a cross-appeal is allowed. We think that the question is of sufficient importance and in view of the conflict of opinions it requires consideration. We accordingly direct that the case be laid before the Hon'ble C. J., for the constitution of a Full Bench to decide the following point. Whether the applicant is entitled to appeal as of right.

Order of the Full Bench.

Sulaiman, C. J.—This is an application by the plaintiff for leave to appeal to His Majesty in Council. The suit was for recovery of a large sum of money alleged to be due on hundis and as money advanced against certain goods which were shipped. The Court of first instance decreed the claim so far as the amount due on the hundis was concerned and as regards the other claim confined the decree to a sum of £ 579 and dismissed the rest of the claim amounting to about Rs. 20,000. Two separate cross-appeals were filed in the High Court. One on behalf of the plaintiff against the dismissal of his claim and the other by the defendants in respect of that part of the claim which was decreed. These two appeals were separately numbered, but were connected and heard together and disposed of by one judgment. Two separate decrees were prepared in the two cases. The value of the subject-matter in dispute in the defendants' appeal has been found to be in excess of Rs. 10,000 and leave has accordingly been granted. The value of the subject-matter in dispute in the plaintiff's appeal was also more

than Rs. 10,000, but the appeal was dismissed.

It is conceded by counsel for the Bank that no substantial question of law arises in this case and that no appeal would lie unless it can be considered that the decree of the High Court is not one of affirmance or that the appeal is otherwise a fit one to go up to His Majesty in Council. The learned advocate for the plaintiff Bank contends before us that inasmuch as the decree of the Court below has not been affirmed, but has been varied in consequence of the cross-appeal having been allowed, the plaintiff has a right of appeal to His Majesty in Council even as regards the decree dismissing the plaintiff's appeal. In 1918 All 245 (1), Richards, C. J., and Tudball, J., laid down that where there are cross-appeals filed in the High Court on behalf of the plaintiff and the defendant and the defendant's appeal is decreed and the decree of the Court below varied, but the plaintiff's appeal is dismissed, the plaintiff cannot be allowed to appeal against the judgment of the High Court reversing the first Court's decree.

This case has been followed by the Lahore High Court in 1930 Lah 554 (2). In one case the Madras High Court went a step further and held that even where there is an appeal and a cross-objection and the cross-objection is allowed, the appellant is not entitled to appeal to His Majesty in Council from the decree dismissing his appeal: see 1926 Mad 1024 (3). But this view has not been, strictly speaking, followed in a later case of that Court in 1929 Mad 429 (4), where when an appeal and a cross-objection were disposed of together it was considered that there was only one decree which had varied the decree of the first Court.

So far as the question of an appeal and a cross-objection is concerned a Full Bench of this Court in 1932 All 65 (5), has recently laid down that where the cross-objection is allowed the appellant has a right of appeal to His Majesty in Council because the decree of the Court below is varied and the decision is not one of affirmance. Two members of the Bench were inclined to think that cross-objections stand on a different footing from cross-appeals, and the other learned Judge pointed out that there would be a clear anomaly if such a distinction were recognized. On the other hand, the Patna High Court in 1929 Pat 561 (6), has laid down that where there are two cross-appeals one of which is allowed, there is a right of appeal to His Majesty in Council even in the other cross-appeal. The learned Judges have based their decision principally on the pronouncement of their Lordships of the Privy Council in 1925 P C 60 (7).

The question for our consideration is whether the last mentioned Privy Council case has by implication overruled the previous decision of this Court. In 1925 P C 60 (7), the plaintiff, claiming to be the adopted son of the deceased owner, brought a suit for possession against the surviving widow and also another claimant who professed to have been adopted earlier. The defendants denied the plaintiff's adoption, set up the adoption of defendant 2 and defendant 1 further claimed a maintenance allowance with a charge on the estate. The trial Court holding that the plaintiff's adoption was proved and the alleged adoption of defendant 2 not proved, decreed the claim; but allowed maintenance to defendant 1 less than what she had claimed. Both the defendants appealed to the Court of the Judicial Commissioner and the decree of the trial Court was substantially affirmed, but was modified to the extent of increasing the maintenance allowance given to the widow. Both the defendants appealed to their Lordships of the Privy Council and raised the whole question in controversy in the suit. It was held by their Lordships that inasmuch as the decree of the Judicial Commissioner was not one of affirmance of the trial Court, they could appeal as of right. There was only one decree passed by the Judicial Commissioner and that decree had certainly varied the decree of the trial Court, though in favour of the appellants themselves.

The case of two cross-appeals is not exactly identical with an appeal and a cross-objection. In the case of an appeal and a cross-objection there is only one judgment delivered and only

1. Chiranji Lal v. Behari Lal, 1918 All 245=46 I C 124.
2. Asa Ram v. Kishen Chand, 1930 Lah 554=123 I C 523=11 Lah 465.
3. Ramananthan Chetti v. Subramanian Chetti, 1926 Mad 1024=97 I C 592.
4. Shunmuga Sundara Mudaliar v. Ratnavelu Mudaliar, 1929 Mad 429=121 I C 16=52 Mad 521.
5. Nathu Lal v. Raghubir Singh, 1932 All 65=135 I C 234=54 All 146 (S B).
6. Jamuna Prasad Singh v. Jagarnath Prasad Bhawat, 1929 Pat 561=117 I C 193.
7. Annapurna Bai v. Ruprao, 1925 P C 60=86 I C 504=51 I A 319=51 Cal 969 (P C).

one decree is prepared by the Court which embodies the adjudication in both the appeal and the cross-objection. On the other hand, under O. 41, R. 35 the decree of the appellate Court has to contain the number of the appeal, the names and description of the appellant and the respondent and a clear specification of the relief granted or other adjudication made. If there are two cross-appeals pending in the High Court two decrees have to be prepared giving all these particulars.

In the leading case of 25 All 109 (8), their Lordships have made it clear that the word "decision" in S. 596, old Civil P. C., corresponding to S. 110 of the new Code, has not the same meaning as the word "judgment" as defined, but that it means the decision of the suit by the Court. Obviously therefore the word "decision" does not mean the reasoning or the basis of the judgment, but the operative portion of the judgment which is ultimately incorporated in the decree that is prepared. Under S. 2 (2) of the Code, a decree is the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It follows that when two cross-appeals are separately disposed of the matters in controversy in the two appeals are distinct and therefore the adjudications of such matters are also distinct and separate. The dismissal of the plaintiff's appeal was therefore an affirmance of the adjudication made by the first Court so far as the matter in controversy in the plaintiff's appeal was concerned, whereas the allowing of the defendants' appeal was a variation of the adjudication of the first Court so far as the matter in controversy in that appeal was concerned. It is also possible that some times the array of parties in two cross-appeals may not be absolutely identical and the two appeals have therefore to be treated as two separate cases. It therefore seems to me that from the mere fact that a cross-appeal has been allowed and the adjudication varied so far as the matter in controversy in that appeal is concerned, it does not follow that the decision in the other appeal which is dismissed is not one of affirmance. I am of the opinion that the ruling of their Lordships of the Privy Council in 1925 P C 60 (7), does not even by implication overrule the decision in 1918 All 245 (1).

It is unnecessary to point out that in some later cases the Calcutta and Bombay High Courts have even expressed the view that in spite of the ruling in 1925 P C 60 (7), if the variation is not substantial there is no right of appeal. That view is doubtful, and it is not necessary to express any opinion on it. I would accordingly hold that the applicant is not entitled to appeal to His Majesty in Council as of right. The case is not otherwise a fit one for appeal.

Bennet, J.—I concur with the opinion expressed by the learned Chief Justice.

Niamatullah, J.—I am of the same opinion. The question is whether the decree passed by this Court dismissing the plaintiffs appeal affirmed the "decision" of the trial Court. The 3rd paragraph of S. 110, Civil P. C., in which the word "decision" occurs, also contains the word "decree" in the first line. It is difficult to hold that the Legislature used two different words to convey precisely the same idea. In my opinion the word "decision" on the one hand means something which differs from "judgment" and on the other hand, it does not mean "decree." In 25 All 109 (8), their Lordships did not hold that the word "decision" should be taken to be equivalent to "decree." They merely held that "decision" is not judgment. It seems to have been the view of their Lordships that the word "decision" occurring in the corresponding section of the Code of 1882 means "decision of the suit". There is nothing in 1925 P C 60 (7), to indicate that in that case their Lordships held otherwise. It is true, the contention put forward on behalf of the appellant was that the decree as distinguished from the judgment of the trial Court, was interfered with on appeal by the High Court. The judgment of their Lordships is brief, and in upholding the appellant's contention their Lordships have not made any observation which might show that the word "decision" should be taken in the same sense in which the word "decree" is defined in the Civil Procedure Code. The view taken by this Court in 1918 All 245 (1), does not appear to me to have been in any way affected by the two Privy Council cases referred to above. They did not hold that the word "decision" in S. 110 is equivalent to "judgment." Apparently they took the word in the same sense in which

8 .Tassaduq Rasul Khan v. Kashi Ram, (1903) 25 All 109=30 I A 35 (P C).

their Lordships used it in 25 All 109 (8). In my opinion the decision of the suit, so far as it is the subject-matter of the proposed appeal to the Privy Council, is meant by the word "decision" in S. 110, and not the decision of the whole suit.

It seems to me that, even if the word "decision" be taken to mean "decree", as defined in the Civil Procedure Code, the position is not materially different. A "decree" does not mean the document described as such. It means the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." If there are several distinct controversies in the suit and the decision of the Court is embodied in one document, described as a decree, the adjudication with regard to each matter in controversy is a decree in itself. In that sense one document, described as a decree, may contain several adjudications on several distinct matters and may amount to several "decrees." In this view, if the decree of this Court in the plaintiff's appeal affirmed the trial Court's adjudication in respect of the controversy relating to certain advances of money against goods shipped to England by Patni should be taken to be a decree, which is distinct from the decree passed by the trial Court as regards the controversy relating to another distinct matter. For these reasons, I am of opinion that the decree against which the applicant proposes to appeal to the Privy Council affirms the decision of the Court below and the applicant is therefore not entitled to leave as of right.

K.S. *Reference answered.*

✻✻ A. I. R. 1935 Allahabad 378

NIAMATULLAH AND BENNET, JJ.

Jagmandar Das Vaish and *others*, In re.

Civil Misc. No. 117 of 1934, Decided on 30th March 1934.

✻✻ **(a) Income-tax Act (1922), S. 13—Unrealized decree—Entry in interest khata—Item is not taxable.**

Unrealized decree entered in the interest khata the amount of which has not been received in fact is not taxable income for the purpose of assessment. There is nothing in S. 2 (15) of the Act, which would imply that the total income was to include an amount which had been decreed but not received : 1921 *Mad* 427; 1926 *Nag* 180; 1928 *Nag* 241 and 1929 *Nag* 50, *Ref to.*; 1933 *P C* 108, *Dist.* [P 379 C 1]

✻ **(b) Income-tax Act (1922), S. 4— Words "accruing or arising" merely refer to connexion between income and country.**

The words "accruing or arising" merely refer to the connexion between the income and the country in question that they do not explain what is not income. [P 379 C 1]

(c) Interpretation of Statutes — Words should be interpreted in ordinary sense except when used specially or technically.

Words used in an Act should be interpreted in their ordinary sense except when it is shown that they have been used in a special or technical sense. [P 379 C 1]

✻ **(d) Income-tax Act (1922), S. 16 — "Income" is what is actually received.**

The ordinary sense of "income" is what comes in i. e., what is actually received. There is nothing in the Income-tax Act to show that this ordinary meaning is not attached to the word. [P 379 C 1, 2]

Vishwa Mitra—for Assessee.

K. Verma—for the Crown.

Bennet, J.—This is a reference by the Income-tax Commissioner at the instance of an assessee, a Hindu undivided family. The two questions referred are: (1) Whether the unrealized decree of Rs. 23,269 against Talatuf Husain and others entered in the interest Khata is taxable income for the purpose of Income-tax, while in fact the amount has not been received at all, and whether the assessment of the applicants is correct under the law ? and (2) Whether the system of keeping the account adopted by the assessee is simply for the purpose of ascertaining the financial state of the family in a particular year or is open to the interpretation put by the Income-tax Officer ?

The assessment was made according to the income-tax authorities on the books of the assessee, and it is claimed that the amount of a decree, Rupees 23,012-6-0, which the assessee obtained in the account year and which was on account of the balance of interest on a certain mortgage, should be shown income of the assessee. The books of the assessee showed in the ledger of the mortgagor that there was this decretal amount credited to the mortgagor and also debited. The amount was also shown in what is called the interest ledger as an amount which was to be realized. It is not disputed that one part of the amount was realized during the year in question. The claim for the Department is that the books should be used for accounting and assessment in accordance with section 13, Income-tax Act. In other words, the proposition is that, although none of the decretal amount was re-

ceived, the assessee should be charged income-tax on this amount, because the assessee has shown the amount in his books. We consider that the Department was correct in claiming that the assessment should be made on the books under S. 13; but we do not think that the Department had used the books in the right way. The Commissioner claims that under the ruling reported in 1933 P C 108 (1), he is entitled to charge the assessee income-tax on this decretal amount. We do not consider that this conclusion follows from that ruling. There have been a number of rulings to the contrary, such as 1921 Mad 427 (2), 1926 Nag 180 (3), 1928 Nag 241 (4), 1929 Nag 50 (5), 1929 Pat 476 (6) and 1934 Lah 408 (7). Reference was made for the assessee to 1933 P C 101 (8)? but we do not consider that this case has any bearing on the point. Learned counsel for the Commissioner referred to S. 4, Income-tax Act, which states that the Act:

" shall apply to all income, profits or gains . . . , from whatever source derived, accruing of arising or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

His argument was that the words "accruing or arising" would apply to this decree. We consider that those words merely refer to the connexion between the income and the country in question, British India, and that they do not explain what is income or what is not income. We consider that words used in an Act should be interpreted in their ordinary sense, except when it is shown that they have been used in a special or technical sense. The ordinary sense of "income" is what comes in, that is, what is actually received by an assessee. There is nothing in the Act to show that this ordinary meaning is not attached to the word. "Income" is not actually defined in the Act; but in S. 2 (15) "total income" is stated to mean the "total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in section 16." There is nothing in this definition or in S. 16 which would imply that the "total income" was to include an amount which had been decreed but which had not been received. Accordingly our finding is on the first question in the negative, that the unrealized decree is not taxable income for the purpose of income-tax; and our answer on the second question is that the assessee was correct in stating that the books were kept simply for the purpose of ascertaining his financial state. Accordingly we direct this reference be returned to the Commissioner and we allow to Mr. Verma a fee of Rs. 150, and the amount which has been certified for the assessee will be allowed as costs against the Department.

G.R./R.K. *Reference returned.*

1. Commissioner of Income-tax v. Kameshwar Singh of Darbhanga, 1933 P C 108=142 I C 437=63 I A 146=12 Pat 318 (P C).
2. Secretary, Board of Revenue, Madras v. Arunachalam Chettiar, 1921 Mad 407=59 I C 482=44 Mad 65 (S B).
3. Pandurang Ramchandra v. Commissioner of Income-tax 1926 Nag 180=91 I C 980=21 N L R 175.
4. Commissioner of Income-tax v Nanhelal, 1928 Nag 241=111 I C 159=24 N L R 176.
5. Commissioner of Income-tax v. S. M. Chitnavis, 1929 Nag 50=117 I C 258=25 N L R 35 (F B).
6. *In the matter of.* Raghunandan Prasad Singh, 1929 Pat 476=122 I C 705=9 Pat 48.
7. Narain Das Bhagwan Das v, Commissioner of Income-tax, 1924 Lah 408=152 I C 167=15 Lah 486.
8. Raghunandan Prasad Singh v. Commissioner of Income-tax, 1933 P C 101=142 I C 446=60 I A 133=12 Pat 305 (P C).

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BENNET, J.

Mt. Sonkali—Plaintiff—Applicant.

v.

Mahabir Dube—Defendant—Opposite Party.

Civil Revn. No. 397 of 1934, Decided on 14th December 1934, against decree of Addl. Sub-Judge, Jaunpur, D/- 14th April 1934.

(a) Provincial Small Cause Courts Act (1887), S. 17 — Court cannot grant time to judgment-debtor to furnish security.

The Court cannot grant time to a judgment-debtor to furnish security under S. 17 of the Act, and where there is a want of compliance with the provisions of the section, the ex parte decree cannot be set aside. [P 380 C 2]

(b) Provincial Small Cause Courts Act (1887), S. 25—Revisional power can be exercised only where substantial injustice has directly resulted from material misapplication or misapprehension of law.

Section 25 of the Act is not intended to give in effect a right of appeal in all Small Cause Court cases either on law or fact. The revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law or from a material error in procedure. [P 381 C 1]

Shiva Prasad Sinha—for Applicant.

N. Upadhiya—for Opposite Party.

Order.—This is an application in revision by a plaintiff against an order of 14th April 1934, by a Small Cause Court in the following terms:

"I accept the affidavit and set aside the ex parte decree on condition that the defendant pays a sum of Rs. 10 as costs to the vakil for the other side."

The facts are as follows: Plaintiff brought a suit on a promissory note and obtained a decree ex parte on the 22nd July 1931. The summons on the defendant was served by affixation on his house and the affidavit of the process server was given that the wife of defendant was present in the house. This service was under O. 5, R. 17, and the Court held under R. 19 that the summons was duly served. On the 22nd July 1933, the defendant made an application for restoration of the suit, decided more than two years previously, filing an affidavit that he had no knowledge of the proceedings and offering personal security. No order was passed on the application of 22nd December 1933, at the time and on 25th January 1934, a personal security bond was filed. The application for restoration was put up for orders on the 27th January and the Court ordered that it would not accept personal security and that security of immovable property must be filed in accordance with the provisions of S. 17, Provincial Small Cause Courts Act. On the 22nd February the office reported that no security bond had been filed. Time was extended to the 7th March. The security bond was not filed and on the 8th March the application was dismissed. On the 20th March an application was made by the defendant for review of the order of the 8th March. Accompanying that application was a security bond of immovable property.

It will be noted that the application was only for review of the order of dismissal of the previous application, but the Court below has gone beyond the terms of the actual application and by its order has set aside the ex parte decree and directed restoration of the suit. In the affidavit of 22nd December 1933, the defendant alleged that he came to know of the decree on 18th December 1933. The legality of the present order has been attacked on various grounds. The first ground is that the defendant failed to comply with the terms of S. 17, Provincial Small Cause Courts Act, and the Court therefore acted with illegality and material irregularity in setting aside the ex parte decree, and the second ground was that the Court should have decided whether there was sufficient cause within the meaning of O. 9, R. 13. As regards this second point the Court below has accepted the affidavit and that affidavit does set forth what amounts to "sufficient cause." I think therefore that there is no merit in the second objection.

As regards the first objection it does appear that the Court has not complied with the provisions of S. 17, Provincial Small Cause Courts Act. There are a number of rulings on the points as to what a defendant must do under that section. In 1931 All 727 (1), these matters have been considered by a Full Bench. One of the points argued was in regard to limitation and the argument was made that under Art. 164 an application by a defendant for an order to set aside a decree passed ex parte must be made from the date of the decree or, where a summons was not duly served, when the applicant has knowledge of the decree. It was argued that the lower Court had not come to a finding that the summons was not duly served and that the affidavit did not set out any defect in the method of service. On the other hand the affidavit did set out that the defendant did not have knowledge of the suit and the Court has accepted that allegation. In the ruling in question on p. 1051 it is stated:

"The object of issuing a summons is to inform the party, against whom a suit has been instituted, of the fact that there is a suit against him, and if he so chooses, he may come to defend it. If that be the object of a summons, and if, for no fault of his own, a defendant was never put in a position to know that a suit had been instituted against him, whatever steps may have been taken for serving the summons on him, these steps can never be accepted as amounting to "due service."

This shows therefore that there was no due service on the defendant and the period of limitation would run from the time when the applicant had knowledge, that is, from 18th December 1933. The security however was not filed within 30 days from that date and it has been held in 1930 All 830 (2), by a Bench of this Court that the Court cannot grant time to a judgment-debtor to furnish security under S. 17, Small Cause Courts Act. There does appear to have been a want of compliance with the provisions of the section in this case. A receipt has been filed now by the defendant which purports to show that a payment of

1. Ram Bharose v. Ganga Singh, 1931 All 727=136 I C 609=54 All 154.
2. Moti Lal Ram Chandar Das v. Durga Prasad, 1930 All 830=128 I C 765.

Rs. 248, was made by the defendant to the plaintiff, and it is the case for the defendant that this receipt was in discharge of the sum due under the promissory note. That being so it appears desirable that the defendant should have a retrial. In 13 All 277 (3), it was laid down that S. 25, Provincial Small Cause Courts Act, was not intended to give in effect a right of appeal in all Small Cause Court cases either on law or fact. The revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law or from a material error in procedure. It appears to me that substantial justice is done to the parties by the order in question and that it is desirable in the interests of justice that there should be a retrial.

Accordingly I dismiss this application in revision. Costs hitherto incurred will be costs in the case.

K.S. *Application dismissed.*

3. Muhammad Bakar v. Bahal Singh, (1891) 13 All 277 (FB).

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BENNET, J.

Budhan and *others*—Defendants—Applicants.

v.

Korhey and *another*—Plaintiffs—Opposite Parties.

Civil Revn. No. 454 of 1934, Decided on 19th December 1934, against order of Munsif, Khurja, D/- 13th March 1934.

Civil P. C. (1908), S. 115 and O. 23, R. 1—Order under O. 23, R. 1—If trial Court has not exercised discretion judicially, High Court can interfere in revision.

Where the trial Court has made an order under O. 23, R. 1, without exercising its discretion judicially, that is without applying its mind to the matter before it with due reference to the provisions of the order, the High Court can interfere in revision: 1934 *All* 137, *Rel on.* [P 382 C 1]

Case law discussed.

Chandra Bhan Agarwalla—for Applicants.

Panna Lal—for Opposite Parties.

Order.—This is an application in civil revision by the defendants against an order under O. 23, R. 1 by a Munsif allowing the plaintiff to withdraw his suit with permission to file it afresh. The first point which was argued was whether this Court can interfere in revision with an order of that nature. For the opposite party reference was made to 1918 All 418 (1), where a Bench of this Court held in the year 1918 that the trial Court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the Court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiffs' application was not sufficient to bring the case within the purview of S. 115, Civil P. C. In that case the trial Court had held that it was necessary for the plaintiffs to give formal proof of a certain plaint and the evidence in the case had concluded and the stage of argument had been reached. One learned Judge held:

"It was for the Munsif to say whether or not there were 'other sufficient grounds' in the present case . . . . . however this may be, it seems to be that even if the Munsif be taken to have made a mistake in law, we nevertheless are not entitled to interfere in revision,"

and the other learned Judge stated:

"It cannot be said that the Court below exercised a jurisdiction which was not vested in it by law. In the exercise of the jurisdiction which it undoubtedly had it may have committed an error, and apparently it did commit an error in the present case; but that alone would not justify this Court in interfering under S. 115."

This ruling was followed in 1927 by a learned Single Judge of this Court Dalal, J., in 1927 All 750 (2). On the other hand in 1928 All 98 (3), there was a consideration of this question by a Bench of this Court and the Bench held that for a Court to invoke O. 23, R. 1, without giving any reason amounts to a material irregularity in exercising the jurisdiction given to it by that rule. In 1925 All 466 (4), there is a ruling by a learned Single Judge of this Court Daniels, J., in which he held that where a Court allowed the plaintiff to withdraw his plaint under O. 23, R. 1, Civil P. C., without applying his mind to the circumstances of the case and without any valid reason, the Court acted with material irregularity and its order was open to revision. In this case the learned Judge considered the ruling reported in 1918 All 418 (1), and distinguished it and also considered a later ruling reported in 1922 All 185 (5), in which one of the learned Judges, Banerji, J., who had taken part in the ruling of 1918

1. Jhunku Lal v. Bisheshar Das, 1918 All 418=46 I C 71=40 All 612.
2. Hasan Ali v. Lachhman Prasad, 1927 All 750=103 I C 372=50 All 143.
3. Kamta Singh v. Bhagwan Das, 1928 All 98=106 I C 431=50 All 199.
4. Ganga Prasad v. Kishni, 1925 All 466=87 I C 175=47 All 319.
5. Rahmat Ullah v. Dharam Singh, 1922 All 185=64 I C 948.

All 418 (1), allowed an application for revision in circumstances similar to the case in 1925 All 466 (4). In 1927 All 522 (6), Ashworth, J., held that the High Court could interfere in revision with an order under O. 23, R. 1 in which the reasons had not been set out. In 1929 All 133 (7), Weir, J., followed the decision in 1918 All 418 (1), but he also referred to 1927 All 522 (6), as a case in which interference could be made in revision. The latest ruling on the subject to which reference has been made is 1934 All 137 (8), in which a learned Single Judge of this Court, Kendall, J., held that where the trial Court had made an order under O. 23, R. 1, without exercising its discretion judicially, that is without applying its mind to the matter before it with due reference to the provisions of the order then this Court could interfere in revision. In that case the Munsif had given certain reasons which amounted to this: that there was a part of the defendant's case for which the plaintiff was not prepared and therefore the Court believed that the plaintiff had been prejudiced. I consider that I should follow this latest ruling and see whether the Munsif did apply his mind to the matter before him in the present suit.

Now, the order which the Munsif has made is extremely confused. He sets out that the plaintiff has brought a suit for injunction to prevent the defendants from interfering with the plaintiff's right and possession of a chabutra with an alternative relief for possession; that plaintiffs claimed as owners of the chabutra and alleged that defendants want to build on it; that the defendants denied plaintiffs' title and pleaded that the chabutra belonged to the zamindar and the defendants have obtained it from the zamindar and that the plaintiffs have not been in possession for 12 years as the zamindar obtained a decree against their father Chotey. The first issue framed was whether the plaintiffs are owners of the chabutra in suit and further issues followed in regard to limitation and res judicata. The Munsif stated:

"I agree that to make it a ground for an attack plaintiffs have not only to allege a pedigree but also to establish boundaries, of suit land after alleging same in the plaint. The evidence on point of pedigree at least is ignorable for defects in pleadings and that jeopardizes plaintiffs' claim. It is apparent that a bona fide dispute existed on point of title and I will allow plaintiffs an opportunity to establish their claim by coming to Court in proper form. As such I allow the case to be withdrawn with permission to file it afresh."

Now, learned counsel for the plaintiffs admits that the plaintiffs do not desire to alter their remedies of injunction or in the alternative possession of the chabutra. The only suggestion is that the pedigree should be put in the plaint. The lower Court appears to have considered that evidence could not be given of the pedigree unless it was set out in the plaint. That is an error. The plaint alleged that the plaintiffs were owners. As part of this allegation the plaintiffs may prove their pedigree. The point in regard to "establish the boundaries after alleging the same in the plaint" ignores the fact that the plaint does set out the boundaries of the chabutra. Learned counsel points out that one of the boundaries was given as land in possession of defendants. Clearly the plaintiffs meant land other than the chabutra in question. So a mere inaccuracy of this nature may be rectified by evidence. It appears to me that the lower Court did not apply its mind to the question before it. Learned counsel admitted that the case did not come within O. 23, R. 1 (2) (a), as the case where the suit must fail by reason of some formal defect. He claimed that it came under sub-R. (b), where there are other sufficient grounds. It is clear that the Munsif has not applied his mind to the point. For this reason I consider that it is open to this Court to interfere in revision.

Accordingly I set aside the order of the Munsif and direct that he should rehear the application in question. Costs in this Court will abide the result.

K.S. *Application allowed.*

6. Baijnath Pande v. Babban Pande, 1927 All 522=103 I C 232=49 All 659.
7. Chandrika Lal v. Sami Nath, 1929 All 133=115 I C 124=50 All 835.
8. Jumma v. Ram Sahai, 1934 All 137=147 I C 776.

A. I. R. 1935 Allahabad 382

KISCH AND BAJPAI, JJ.

Makund Swarup—Plaintiff — Appellant.

v.

Kishun Chand Singh and *others*—Defendants—Respondents.

First Appeal No. 574 of 1930, Decided on 20th December 1934, from decision of Sub-Judge, Bulandshahr, D/- 15th November 1930.

(a) Agra Tenancy Act (1926), S. 273—Suit relating to agricultural holding filed in civil Court — Plea of defendant that he is only thekadar from plaintiff—Civil Court cannot go into question as to whether thekadar is tenant.

Where in a suit relating to agricultural holding the only contention of the defendant is that he is a thekadar from the plaintiff and there is no plea that the relationship of landlord and tenant existed between the parties, all that the civil Court has to see is whether the defendant pleads that he holds the land as a tenant of the plaintiff; and as the defendant had so pleaded the civil Court is bound to submit the record to the revenue Court and not to go into the question whether a thekadar is strictly a tenant or not. [P 385 C 2]

(b) Agra Tenancy Act (1926), Ss. 3 (8), 219, 273—Land held by thekadar is agricultural holding.

Land held by a thekadar is an agricultural holding. [P 386 C 1]

(c) Agra Tenancy Act (1926), S. 218—Theka for particular period—Expiry of term and thekadar giving up all rights under lease—Landlord allowing thekadar to continue in possession for one year more but under different title—Holding over after such year—Suit for ejectment is cognizable by civil Court—Jurisdiction, civil Court.

Where there is a theka executed for a particular period and on the expiry of the period, the thekadar gives up all rights under the lease but the landlord allows him to continue in possession of the land for another year under a different title and the tenant holds over even after this period, the relationship of landlord and thekadar does not subsist between the plaintiff and the defendants and that it is not necessary for the landlord to institute a suit in the revenue Court for the ejectment of the tenant and the civil Court has jurisdiction to entertain same. [P 387 C 1]

S. K. Dar, *Shiva Prasad Sinha*, *S. B. L. Gaur* and *Lakshmi Saran* — for Appellant.

P. L. Banerji, *S. N. Seth* and *Chandra Bhan Agarwalla*—for Respondents.

Bajpai, J.—This is an appeal by the plaintiff, Makund Swarup, arising out of a suit brought by him for recovery of possession over a three-fourth share of mortgagee rights in the entire 20 biswas of village Ekka Tajpur alias Sikhra and a three-fourth share of mortgagee rights in the entire 20 biswas of mauza Rasulpur. The plaintiff further claimed to recover a sum of Rs. 2,500 principal and Rupees 933-6-0 interest on account of profits for the year 1332 Fasli and a sum of Rs. 4,000 principal and Rs. 1,133-6-0 interest on account of damages for the year 1333 Fasli. There was also a prayer for the recovery of Rs. 3,750 principal and Rs. 387-9-0 interest as mesne profits for the year 1334 Fasli and Kharif 1335 Fasli. The plaintiff impleaded as defendants to the suit Thakur Karan Singh, Deep Chand and Tejpal Singh, minor sons of Somraj Singh and Raghubir Singh.

The admitted facts which led to the institution of the suit may be stated. On 30th November 1904 a usufructuary mortgage was executed by Fazal Shah, Haidar Shah and Wazir Begum in favour of Makund Swarup and Ghafoor Bakhsh for Rs. 50,000, mortgaging four villages: (1) Landdoki Hasanpur, (2) Chashi, (3) Ekka Tajpur alias Sikhra and (4) Rasulpur. It was stated in the mortgage deed that Makund Swarup had advanced Rs. 30,000 and Ghafoor Bakhsh Rs. 20,000 and the former was a mortgagee of three-fifth share and the latter of a two-fifth share. This document was registered on 17th December 1904. On 24th January 1908 Ghafoor Bakhsh sold his mortgagee rights to Makund Swarup with the result that Makund Swarup became the sole mortgagee of the four villages mentioned above. On 18th August 1909 Makund Swarup executed a theka in favour of Girwar Singh and Tulsi Ram of three villages, Landdoki Hasanpur, Ekka Tajpur alias Sikhra and Rasulpur for 15 years from 1317 Fasli to 1331 Fasli, corresponding to the period from 1st July 1909 to 30th June 1924. This document is printed at p. 23 of our record. The thekadars were given the right to enter into possession over the leased property for a term of 15 years and they were required to pay a sum of Rs. 4,300 every year to Makund Swarup.

They had also to pay the annual Government revenue of Rs. 3,171. It may be mentioned that Girwar Singh and Tulshi Ram Singh, the two lessees, are first cousins, being the sons of two brothers. On 18th September 1920 Makund Swarup sold two-fifth of his mortgagee rights in all the four villages to Kishun Chand, Somraj and Raghubir. Kishun Chand was entitled under the sale deed to half of two-fifth and Somraj and Raghubir to the remaining half of two-fifth. Makund Swarup thus retained in himself three-fifth of the mortgagee rights. In the year 1922 Tulshi Ram, one of the thekadars died leaving behind him three sons, Karan Singh, Shib Singh and Naubat Singh, who became entitled to the lessee rights of Tulshi Ram. The position in 1922 after the death of Tulshi Ram therefore was that Makund Swarup had three-fifth mortgagee rights and Kishun Chand,

Somraj and Raghubir had two-fifth mortgagee rights in the above-mentioned four villages and Girwar Singh, Karan Singh, Shib Singh and Naubat Singh had lessee rights over three villages. It may be stated here that the village Chashi was not included in the lease and it remained in the possession of Makund Swarup and even when on 18th September 1920 Makund Swarup sold two-fifth of the mortgagee rights to Kishun Chand, Somraj and Raghubir, he did not deliver possession to the vendees of even a proportionate share in village Chashi.

The term of the theka expired on 30th June 1924 and on 5th July 1924 Makund Swarup applied for the expungement of the names of the thekadars. On 10th July 1924 Makund Swarup through his general attorney, Bankey Behari Lal, wrote to Girwar Singh that an application for getting the leased property released from the theka had been made in the competent Court and on account of the death of Tulshi Ram the theka had been legally dissolved. It was enquired of Girwar Singh whether he was willing to retain the theka in future or whether he wanted to sever his connection. Girwar Singh the same day wrote back that the theka was for a period from 1317 Fasli to 1331 Fasli, the term whereof had expired and the theka had dissolved. He definitely stated that he did not want to act as a thekadar any longer. On 29th July 1924 Karan Singh filed objections in reply to the application of Makund Swarup for the expungement of the names of thekadars in which on various grounds he pleaded that Makund Swarup was not entitled to mutation. It does not appear from the record that Shib Singh and Naubat Singh made any objections to the mutation application of Makund Swarup.

Before this mutation application could be decided, Karan Singh died on 16th August 1924, leaving behind him as his heirs his five sons Manik Singh, Kishun Chand Singh, Meghraj Singh, Balmakund Singh and Amar Singh. On 21st October 1924 an agreement was drawn up between Makund Swarup on the one hand, the owner of three-fifth mortgagee rights in the four villages, as first party, and Kishun Chand, Somraj and Raghubir, owners of two-fifth mortgagee rights in the four villages, as second party. This agreement stated that:

"the term of the theka had expired and after the expiry of the term of the theka the heirs and thekadars had no longer any right and the mortgagees were now entitled to get possession of the mortgaged property and applications for mutations of names and lambardarship had been filed by the parties."

It was provided that:

"in order to facilitate the management of the possession of the mortgagee rights it was necessary to settle as to which of the parties would take possession of whch part of the mortgaged property in lieu of the 3/5th and 2/5th mortgagee rights and make collections."

It was stated that Kishun Chand Singh was one of the heirs of the thekadar Karan Singh who as a thekadar lambardar was in possession or the villages comprised in the theka by making collections and as many matters relating to the arrears were still incomplete, it was necessary for Kishun Chand to settle the account relating to arrears within the year 1332 Fasli. The second party, namely, Kishun Chand Singh, Somraj and Raghubir, were stated to be liable for the profits for 1332 Fasli which profits after the adjustment of accounts of profits in respect of the mortgaged village, namely, Chashi which was in possession of Makund Swarup were fixed at the sum of Rs. 2,500 and this sum was promised to be paid half on 15th December 1924 and half on 15th June 1925. It was then said that from 1333 Fasli the second party in lieu of two-fifth mortgagee rights in four villages would enter into possession of the entire village, Landoki Hasanpur and the first party, namely, Makund Swarup, would enter, in lieu of three-fifth mortgagee rights in the four villages, into sole possession of three villages Chashi, Ekka Tajpur alias Sikhra and Rasulpur; and if the second party failed to deliver possession in the beginning of 1333 Fasli over the villages which under the agreement had been given to first party, then the second party would be liable for payment of Rs. 4,000 by way of damages to the first party. It was also agreed that each of the parties should make applications on their behalf and get all the suits relating to mutation of names and lambardarship pending in the Revenue Court struck off. On 5th February 1925 Makund Swarup's mukhtar-e-am made a statement in the mutation case that the application of Makund Swarup dated 5th July 1924 for the expungement of the names of the thekadars be struck off and the Revenue Court directed the application be struck off and shelved. It does not appear if any fresh applications for mutation were

made by either party on the basis of the agreement of 21st October 1924 and the names of Girwar Singh who, as we stated before, had disclaimed all connection with the theka, Shib Singh and Naubat Singh who had made no objections to the mutation application of Makund Swarup and the five sons of Karan Singh continued as thekadars in the revenue records. Of these 5 sons, Kishun Chand Singh in the agreement referred to above had definitely stated that the theka had expired and the thekadars had no longer any right and another son, Manik Singh who is a vakil and who according to the evidence of Bankey Behari in this case had prepared the draft of the agreement was an attesting witness to the document which is printed at p. 39 of our record.

It is clear from what we have stated before that village Chashi remained all along in the mortgagee possession of Makund Swarup but possession over Ekka Tajpur and Rasulpur was not given to Makund Swarup as stipulated in the agreement in the beginning of 1333 Fasli and the present suit was instituted on 28th April 1928 when the whole of 1334 Fasli and Kharik of 1335 Fasli had run out for the reliefs which we have already mentioned in the beginning of our judgment and as Somraj, one of the members of the second party was dead, his two sons along with the other members of the second party were impleaded as defendants. The defence of the two sons of Somraj and of Raghubir was that they never got mortgagee possession over two-fifth of the property ever since the sale deed of 18th September 1920 and the agreement dated 21st October 1924 was improperly and illegally obtained on account of the simplicity and inexperience of Somraj and Raghubir which had no binding effect. Various defences were raised by Kishun Chand Singh but the principal pleas were that the thekadars had not been ejected according to law and the civil Court had no jurisdiction to entertain the present suit. On 11th January 1929 after the issues had been framed, he moved the Court that there ought to be a clear issue on the plea taken by him that he was a tenant of the plaintiff and that under S. 273, Tenancy Act, (Local Act 3 of 1926) the issue on tenancy should be submitted to the appropriate Revenue Court for decision. On 19th January 1929 the Court acceded to this request and after framing another issue, namely, whether the relationship of landlord and tenant existed between the parties or not, sent the record to the Revenue Court for determination of that issue. The Revenue Court on the 17th August 1929 held that Kishun Chand was still a thekadar and therefore a tenant of the plaintiff. It appears that on 5th February 1930 after the decision of the Revenue Court was obtained, and upon representations made by the plaintiff, the learned Subordinate Judge re-called his previous order dated 19th January 1929, submitting the record to the Revenue Court. There was an appeal to the High Court against this order and it was held by this Court on 29th July 1930 that it was too late for the trial Court to go back upon his previous order after the Revenue Court had gone into the matter and recorded its finding in favour of one party. The appeal was therefore allowed and the order dated 6th February 1930 was set aside. The learned Subordinate Judge then took up the case on 15th November 1930 and as under S. 273, Cl. (3) he was bound to accept the finding of the Revenue Court on the issue referred to it, he held that the relation of landlord and tenant existed between the parties and upon that finding he also came to the conclusion that he had no jurisdiction to try the case. He therefore did not discuss the other issues and instead of returning the plaint for presentation to the proper Court (which was perhaps the most proper order) dismissed the plaintiff's suit. It may, thus be taken that the learned Subordinate Judge decided two issues in the case and refrained from deciding the others.

The plaintiff has therefore filed the present appeal and the first point taken by him is that S. 273, Agra Tenancy Act, had no application to the facts of the case because the lease in dispute was not one relating to an agricultural holding. We may mention that this Court on 29th July 1930 held that it was not necessary for it to decide this point and that if the trial Court had wrongly referred the issue to the Revenue Court, the mistake could be rectified on appeal and not by the trial Court reviewing its former order. We therefore propose to decide this preliminary objection of the plaintiff-appellant. It is said that a tenant according to the definition of the term in the Tenancy Act under S. 3, Cl. 6 includes a grove-holder but does

not include a thekadar and if the only contention of the defendant was that he was a thekadar from the plaintiff, there was no plea that the relationship of landlord and tenant existed between the parties. But even if it be conceded that a thekadar is not a tenant under S. 273, all that the civil Court has to see is whether the defendant pleads that he holds the land as a tenant of the plaintiff and as the defendant had so pleaded, the civil Court was bound to submit the record to the Revenue Court and not to go into the question whether a thekadar is strictly a tenant or not. It is then said that a lease like the present one does not relate to an agricultural holding. Now "holding" has been defined in S. 3, Cl. (8), Tenancy Act, and means:

"a parcel or parcels of lands held under one enure or one lease, engagement or grant and includes the interest of a thekadar."

Under S. 219, Cl. (2) a theka shall be deemed to be a lease for agricultural purposes within the meaning of S. 117, T. P. Act, 1882. It is therefore clear that the lease in question in the present suit does relate to an agricultural holding. It was conceded by the parties that the Tenancy Act of 1926 will regulate the procedure to be followed in the present case. It is therefore clear that the rulings that were given under the Tenancy Act of 1901 are no longer good law. A similar view was taken by a Bench of this Court in 1933 All 456 (1) where the terms "thekadar" and "agricultural holding" were considered. There is therefore no force in the preliminary contention advanced by the appellant.

Under S. 273, Cl. (4) the finding of the Revenue Court on the issue referred to it shall, for the purposes of appeal, be deemed to be part of the finding of the civil Court and we have got to decide whether the finding that the relationship of landlord and tenant or the relationship of landlord and thekadar existed between the parties is a correct one or not. We have further got to see whether the suit was rightly instituted in the civil Court or not. We propose to discuss the first question in the beginning, The suit is between Makund Swarup on the one hand and Kishun Chand, Deep Chand, Tejpal, Singh and Raghubir Singh on the other. Deep Chand and Tejpal Singh are the sons of Somraj Singh and neither Somraj Singh nor Raghubir Singh were ever the lessees of Makund Swarup. The only question is whether Kishun Chand can be said to be a lessee of Makund Swarup. He claims his right through Karan Singh who was a son of Tulshi Ram, a lessee under the document of lease dated 18th August 1909. The term of the lease expired on 30th June 1924 and on 21st October 1924 Kishun Chand stated in the agreement of that date that the thekadars and the heirs of the thekadars had no longer any right and the term of the theka had expired. No language can be more definite, more unambiguous and more unequivocal than that used by Kishun Chand in the agreement of the question of the termination of the theka and it does not lie in his mouth to say that he is a thekadar of the plaintiff. The plaintiff acting on the representation of Kishun Chand got his mutation application struck off and allowed Kishun Chand Singh, the second party to the agreement of 1924, to remain in possession of certain villages for the year 1332 Fasli after the expiry of the term of the lease. The plaintiff's position was altered to his prejudice and we are clearly of the opinion that Kishun Chand Singh is estopped from pleading that he is a thekadar or tenant of the plaintiff. It is then said that although under the terms of the lease the theka expired in 1331 Fasli (30th June 1924), the thekadar was allowed to remain in possession in 1332 Fasli under the agreement of 1924 and therefore they were holding over. Under S. 218, Tenancy Act, if a thekadar remains in possession after the expiry of his theka and the lessor accepts rent from him or otherwise assents to his continuing in possession, the theka is in contrary renewed from year to year. The argument therefore is that if in the absence of an agreement to the 1333 Fasli, according to the agreement, Kishun Chand Singh did not hand over possession over the villages mentioned in the plaint, the plaintiff in order to terminate the theka which under the provisions of S. 218 must be deemed to continue has to bring a suit for ejectment in the Revenue Court under S. 205, Cl. (d), or Cl. (e) and reliance is placed on S. 204 which says that no thekadar shall be ejected otherwise than in accordance with the provisions of this Act. The Board of Revenue had consistently held that a

1. Mt. Ram Siri v. Iqbal Bahadur, 1933 All 456 = 143 I C 876.

person holding over after the expiry of a lease for a fixed term could not be said to be a trespasser and the tenancy continues unless it is terminated by ejectment, abandonment or relinquishment: see 10 L R A Rev 243 (2) and 10 L R A Rev 301 (3). It is conceded that if a tenant or a thekadar gives up possession and puts the landlord in possession, it would not be necessary for the landlord to file a suit for ejectment; but it is strenuously contended that a mere declaration that the tenant would give up possession is not enough and if in contravention of the declaration, the tenant or the thekadar continues to remain on the land, the landlord cannot treat the tenant as a trespasser and file a suit for ejectment in the civil Court. It is said that in the present case under the terms of the agreement the theka was extended for the year 1332 Fasli, and there was no statement by Kishun Chand Singh after the expiry of 1332 Fasli that this fresh theka had expired. The statement in the agreement about the expiry of the theka related to the original theka of 1909 and if Kishun Chand Singh in spite of the promise to hand over possession of 1333 Fasli did not deliver possession, the position of Kishun Chand Singh under S. 218 was that of a thekadar from year to year. There is no proof in the present case that the plaintiff has accepted any rent from Kishun Chand Singh or has otherwise assented to Kishun Chand Singh's continuing in possession after 1332 Fasli as a thekadar and even if we were to accept the view of the Board of Revenue that in a proper case of holding over the tenancy continues and can be terminated only by a suit for ejectment in the Revenue Court, we are of the opinion that the position of Kishun Chand Singh in 1332 Fasli was not that of a thekadar. He soon after the expiry of the term of the original lease, made a definite statement to the effect that his rights as a thekadar no longer subsisted and the arrangement under which Kishun Chand Singh, Somraj Singh and Raghubir Singh were to remain in possession during the year 1332 Fasli was a different arrangement altogether. It was clearly stated by the second party:

"We are liable for 1332 Fasli only and after the adjustment of account of profits in respect of the mortgaged village, viz., Chashi which is in the possession of the first party, the amount thereof comes to Rs. 2500, and it is due to the first party and we shall pay one-half of it in Kharif on 15th of December and the other half in Rabi on 15th June."

This makes it clear that according to the agreement the lessees were not to remain in possession but the second party was to remain in possession. The amount fixed under the lease was Rs. 4,300 a year but according to this agreement the amount was fixed at Rs. 2,500; under the lease the lessees were liable to pay the annual sum reserved but under the agreement the second party were to pay the sum fixed by the agreement. The village Chashi was not included in the lease and the lessees had nothing to do with the profits of that village. But under the agreement the profits of that village were also taken into consideration. Two-fifth of the mortgagee rights in village Chashi were sold to the second party in 1920 and the second party were entitled to its profits from that date up till the date of the agreement but as Makund Swarup remained in possession, the profits of that village for four years were set off. We are clearly of the opinion that in the year 1332 Fasli the second party and not the lessees were to remain in possession under a different set of circumstances absolutely dissimilar to the terms of the lease. Learned counsel for the respondent has referred us to a statement made by Bankey Behari on 5th February 1925 (this would be in the year 1332 Fasli) where he says that at that time the heir of Karan Singh and the lessees were in possession of all the three villages. This was a loose statement made by the general attorney of the plaintiff or it may be that the second party allowed the lessees or the heirs of the lessees or the heirs of Karan Singh to remain in possession for facility of realizing the arrears of 1331 Fasli. We know that this statement cannot be taken at its face value when Girwar Singh, one of the lessees, definitely stated on 10th July 1924 that he did not want to act as a thekadar and when he again in his evidence in this case on 30th July 1929 stated on oath that:

"after the expiry of the period of the theka he was no more a thekadar nor were the heirs of Tulshi Ram thekadars any more."

If we were to consider the case of Kishun Chand Singh alone, apart

2. Mahir Zia Begum v. Janki, (1929) 10 L R A Rev 243
3. Nath Chandrawat Trust v. Lallan, (1929) 10 L R A Rev 301.

from other members of the second party, namely, Somraj and Raghubir, the position is that he gave up possession under the lease of 1909 on the expiry of the period fixed therein and then Makund Swarup allowed him to continue in possession under a different title. There was thus an evacuation by Kishun Singh, a restoration of possession by surrender to his landlord—the plaintiff—and a subsequent letting in of Kishun Chand Singh by Makund Swarup under a different arrangement and the breach of the terms contained in the different arrangement enables the plaintiff to get relief in the civil Court.

It was said that at best in 1924 Kishun Chand Singh should be deemed to have surrendered his thekadari rights and as the Tenancy Act of 1901 was in force in 1924, we must look to the provisions of relating to surrender contained in that Act and in order that the surrender should be effectual, the elaborate provisions contained in S. 83 et seq of Local Act 2 of 1901 should have been followed. These provisions relate to a tenant not bound by a lease or other agreement for a fixed period and Kishun Chand Singh held the land under a lease for a fixed period and even if these provisions be deemed to be applicable, they do not suggest that it is not possible for a landlord or a tenant to come together and agree by means of a registered document to a different state of affairs. Reliance in this connection was placed by learned counsel for the respondents and by the Revenue Court on the case of S. D. of the Board of Rev., U P No. 9 of 1913 (4). The learned members of the Board of Revenue held that an agreement to surrender without actual evacuation is invalid and that for the determination of a tenancy the essentials are a notice or agreement to surrender and the actual fulfilment of the agreement. In the case before them there was no abandonment at all. The deed of surrender was executed in July and the promise was to surrender on 1st July following; but the tenants ploughed and sowed in that month and showed no disposition to fulfil their agreement. In the case before us the facts are different. The defendant, Kishun Chand Singh, said that the theka had determined and gave up all rights under the same. He then along with certain persons other than the original lessees entered into possession in a different capacity in the year 1332. It is worthy of note that the learned members of the Board of Revenue in the case before them held that the landholders might possibly bring a suit for specific performance of the agreement or for damages for breach of contract in the civil Court and this is exactly what Makund Swarup has done in the present case.

We are therefore of the opinion that the relationship of landlord and thekadar does not subsist between the plaintiff and the defendants and that it was not necessary for the plaintiff to have instituted a suit in the Revenue Court for the ejectment of Kishun Chand Singh.

We now proceed to consider the question whether the present suit should have been filed in the civil Court or in the Revenue Court and in this connection it was also argued by the respondent that the plaintiff obtained no cause of action to maintain the present suit. So far as defendants 2 to 4 are concerned, it is clear that no relief could be obtained against them in the Revenue Court nor could any relief be obtained against Kishun Chand Singh upon the basis of the agreement which is the main plank of the plaintiff's case, in the Revenue Court. It is true that a plaintiff cannot oust the jurisdiction of a Revenue Court by dressing up his reliefs so as to make them cognizable by the civil Court but this is not one of those cases where the plaintiff has presented his plaint in a different garb or where the plaintiff could obtain adequate relief in the Revenue Court. Mortgagee possession over villages, Ekka, Tajpur and Rasulpur, could not be obtained in the Revenue Court. The sum of Rs. 2,500 plus interest could not be recovered in the Revenue Court for 1332 Fasli because this figure was not settled under the lease. The sum of Rs. 4,000 plus interest as damages fixed by agreement also could not be decreed by the Revenue Court, nor could the sum of Rs. 3,750 plus interest be awarded as mesne profits by the Revenue Court. The lease comprised three villages and in the present case one of them Landdoki Hasanpur has been kept scrupulously out of consideration.

It is then said that Kishun Chand Singh is a lambardar of the villages Ekka Tajpur and Rasulpur and the plaintiff cannot in the civil Court turn Kishun Chand Singh out from the of-

4. Selected Decision of the Board of Rev, U. P. No. 9 of 1913.

fice of lambardar. It appears that Kishun Chand Singh has purchased a proprietary share in the villages. The khewat printed at p. 76 of our record shows that mortgagee right exists over only a three-fourth share in the two villages and that a one-fourth share is free from the mortgage and that is why relief in the present suit is confined to a three-fourth share only and these are the only mortgagee rights that are now subsisting under the mortgage executed by Fazal Shah and others in 1904. It is common ground that Kishun Chand Singh became a lambardar because of his proprietary interest in the two villages and not because of his being a lessee. In para. 10 of the written statement he states that:

"the contesting defendant by virtue of making purchase is the exclusive partner of the mahals leased out and on the basis of such partnership has continued to make collections as Lambardar."

It is not necessary for the plaintiff to remove Kishun Chand Singh from lambardarship. Under S. 265 (1) the lambardar in an undivided mahal is entitled, in the absence of a contract to the contrary, to collect rents and other dues. It is thus clear that a contract amongst cosharers for the collection of rents is permissible. All that the plaintiff seeks by relief (a) in the present suit is that on the enforcement of the agreement of 1924 the plaintiff should be allowed to collect rents to the extent of three-fourth in villages Ekka Tajpur alias Sikhra and Rasulpur and this in effect is the possession which he claims. It is not necessary for Kishun Chand Singh to be removed from the office of lambardar for he may still continue to collect the rent of the remaining one-fourth share and if later on the plaintiff encounters any difficulties, he might be advised to apply for the removal of Kishun Chand Singh.

Finally it was argued that the plaintiff has no cause of action to maintain the present suit. It is said that the plaintiff has not sued for profits, has not applied for mutation of names under the agreement, nor has he applied for being appointed as a lambardar, and the argument is that if the plaintiff had done any of the above things, the defendant, Kishun Chand Singh, might have been objected. It was however not necessary for the plaintiff to adopt these measures before coming to Court. In para. 7 of his plaint, the plaintiff discloses his cause of action which is that in contravention of the terms of the agreement, the defendants and the ancestor of defendants 2 and 3 remained in possession of the properties situate in Ekka Tajpur and Rasulpur and by their improper acts deprived the plaintiff from gaining benefits therefrom. It was also said that the defendants undertook to pay Rs. 2,500 for 1332 Fasli and Rs. 4,000 for 1333 Fasli, neither of which sums was paid by the defendants. An application for being appointed as a lambardar and the granting of such an application could not have afforded adequate relief to the plaintiff and in order to obtain relief against defendants 2 to 4 at least under the terms of the agreement, plaintiff had necessarily to institute the present suit. Moreover the plea that the plaintiff has no cause of action for the suit was not taken in the trial Court.

We wish to make it clear that we have assumed so far that the deed of agreement dated 21st October 1924 is enforcible; we have not attempted to decide the question of its validity which is in issue between the parties on the plea taken by defendant 2 to 4 and when the case goes back to the trial Court, that Court will have to to adjudicate on that point. The Court below dismissed the plaintiff's suit on certain preliminary points and our decision is confined to those preliminary points alone. It was the plaintiff's case that when the agreement of 21st October 1924 was executed, all those who could be said to have any interest in the lease repudiated their connection and consented to the agreement. It is pointed out that Girwar Singh on 10th July 1924 wrote to Makund Swarup saying that he did not want to remain a thekadar, that Shib Singh and Naubat Singh never objected to the application of Makund Swarup for mutation that Manik Singh prepared the draft and was an attesting witness, that the other three sons of Karan Singh must be deemed to be represented by the elder brothers, Kishun Chand Singh and Manik Singh. Bankey Behari, a witness for the plaintiff, has deposed in the present case that all the above persons were consenting parties to the agreement of 1924 and it is said on the plaintiff's behalf that the entry of their names in the khewat is a paper entry. We do not wish to arrive at any finding on this point in the absence of Shib Singh, Naubak Singh, Meghraj Singh, Balmakund Singh and Amar Singh. Whatever our suspicions in that

direction might be, it is impossible to adjudicate upon the rights of persons who are not parties to the suit. All that we decide is that Kishun Chand Singh is definitely estopped from pleading any rights as thekadar and our judgment governs only him, the plaintiff, and the other defendants.

As a result of what we have said above, this appeal is allowed, the decree of the Court below is set aside and as the decision of that Court proceeded upon preliminary points, we remand the case to that Court under O. 41, R. 23, Civil P. C., for the disposal of other issues that arise in the case. Parties will be at liberty to produce fresh evidence. The plaintiff is entitled to a refund of the court-fee paid in this Court and to his costs of this appeal. Costs in the Court below incurred so far and to be incurred hereafter will abide the event.

K.S. *Appeal allowed.*

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RACHHPAL SINGH, J.

Sumeshar Bind and *others* — Defendants—Applicants.

v.

Baldeo Sahu and *others* — Plaintiff —Opposite Parties.

Civil Revn. No. 98 of 1934, Decided on 18th December 1934, against order of Small Cause Court, Judge, Gorakhpur, D/- 10th August 1933.

Civil P. C. (1908), S. 2 (11) — Person who would have got estate of deceased is his legal representative—Creditor is entitled to decree against surviving brother of deceased without proving that deceased has left any asset—Hindu law, joint family.

A person who would have got the estate of the deceased will be deemed to be his legal representative. A creditor of the deceased co-parcener is entitled to a decree against the surviving brother of the deceased without giving any proof that he has got possession over any property belonging to the deceased. When he applies for the execution of his decree, then the question will come up for consideration whether the deceased has left any asset. If the decree-holder can prove that the surviving co-parcener got any assets, then he would be entitled to execute his decree against surviving co parcener or co-parceners : 1927 *All* 459, *Rel on.* [P 391 C 1]

A. Dharam Das—for Applicants.

Harnandan Prasad and *H. P. Sen*—for Opposite Parties.

Order.—This is a revision application by the defendants arising out of a suit instituted by the plaintiff to recover a sum of money. One Ram Sunder had executed a pronote in favour of the plaintiff. He died. The defendants are the brothers of Ram Sunder, deceased. The plaintiff instituted a suit against them to recover the amount due on foot of the pronote. Several pleas were taken in defence, but it is not necessary to refer to them. The learned Judge of the Court below found that the execution of the pronote was proved. He held that Ram Sunder and his brothers constituted a joint family and therefore the brothers were legal representatives of the deceased. The suit was decreed against them to the extent of the assets of the deceased which might be proved to have come into their hands. Three of the defendants have preferred this revision application against the decree made by the Court below. The only question for the determination in this case is as to whether or not the brothers of the deceased can be said to be his legal representatives against whom a decree could be passed in respect of the amount borrowed by him.

I have considered this question. It appears that there are conflicting decisions on this point. Some High Courts have held that the members of the joint family, who succeed to the family, estate by survivorship are not legal representatives of the deceased inasmuch as they take the holder's estate by survivorship and not by succession. On the other hand some High Courts have held that they are the legal representatives of the deceased coparcener within the meaning of S. 2, Sub-Cl. 11, Civil P. C. It may be necessary some day to have a Full Bench decision on this point. But I am not inclined at present to refer this matter to a larger Bench in view of the opinion expressed in a ruling of this Court 1927 All 459 (1). In that case it was held that:

"A decree could be had against the legal representatives of a deceased debtor whether they had any assets of the deceased in their hands or not. How the decree when obtained was to be executed was a matter to be ascertained thereafter."

The principal question which is to be considered is whether the brothers of a deceased person in a joint family can be said to be his legal representatives. In the Civil Procedure Code in S. 2, Sub-S. 11 "legal representatative" has been defined thus:

"Legal representative means a person who represents the estate of a deceased person, and includes any person who intermeddles with the

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1. Tamiz Bano v. Nand Kishore, 1927 All 459= 101 I C 507=49 All 645.

estate of the deceased and where a party sues or is sued in representative character the person on whom the estate devolves on the death of the party so suing or sued."

This definition means that a person on whom the estate of the deceased devolves, would be the legal representative. If the deceased had left an estate then the surviving members of joint family would certainly be his legal representatives. In the case before me the deceased and his brothers were joint in an estate and therefore on the death of the deceased his surviving brothers would be his legal representatives in law. It was contended on behalf of the applicants that in this case there was no proof that the deceased had left any estate, and therefore it could not be said that his brothers are his legal representatives. It however appears to me that this question would have to be decided later on. The plaintiff is not under any duty to prove, before he can get a decree, that the persons named by him as the legal representatives got any estate of the deceased. All that he has to show, in order to get a decree, is that the person whom he is suing would have got the estate of the deceased, if he had left any. Now if the deceased had left any estate then his brothers would have been his legal representatives. The plaintiff was therefore entitled to maintain a suit against them without giving any proof that they were in possession of any property of the deceased. My view is that a person who would have got the estate of the deceased will be deemed to be his legal representative. A creditor of the deceased coparcener is entitled to a decree against the surviving brother of the deceased without giving any proof that he has got possession over any property belonging to the deceased. When he applies for the execution of his decree then the question will come up for consideration whether the deceased has left any assets. If the decree-holder can prove that the surviving coparcener got any assets then he would be entitled to execute his decree against surviving coparcener or coparceners.

It is perfectly correct that the surviving coparceners in a joint family estate take the estate on the death of one of the coparceners by right of survivorship and not by succession. That proposition cannot be disputed. The plaintiff in the case before me does not and cannot contend that in respect of the joint family estate the defendants can be treated as legal representatives of the deceased. The plaintiff desires a decree against the estate which the deceased might have held separately. In respect of the separate estate of the deceased his brothers who constituted a joint family along with him would be his legal representatives within the meaning of S. 2, Sub-Cl. 11, Civil P. C. For the reasons given above I hold that the judgment of the learned Judge of the Court below must be confirmed. I dismiss the revision application with costs.

K.S. *Application dismissed.*

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NIAMATULLAH AND ALLSOP, JJ.

Lachhmi Narain and *others* — Defendants—Appellants.

v.

Babu Ram and *others*—Plaintiffs and Defendants—Respondents.

First Appeals Nos. 8 of 1931 and 347 of 1930, Decided on 2nd November 1934.

(a) Mortgage — Mortgage is indivisible — But where there is severance of interest as between mortgagees with consent of mortgagor, position is different so far as frame of suit is concerned — It is better that suits by mortgagees are consolidated — Transfer of Property Act (1882), S. 60.

Ordinarily a mortgage is indivisible, both as regards the mortgagees and the mortgaged security, the mortgagees being joint tenants of the entire mortgaged property which is charged with every portion of the mortgage money. Where however there is severance of interests as between the mortgagees with the consent of the mortgagor, the position is different so far as the frame of the suit is concerned. Where the mortgagor states in the deed that he has borrowed specified amounts from each set of the mortgagees and that he has created a common charge in favour of all of them on the property therein specified for recovery of the total sum advanced by all the mortgagees, the implication is that as between the various sets of the mortgagees inter se, each is entitled to recover, not necessarily separately, from the mortgaged property the sum advanced by him. The entire mortgaged property is hypothecated to each of them. None has priority over the other. Ordinarily it is in the interests of all the mortgagees that one suit should be brought for the recovery of the entire mortgage money due to all the mortgagees. Hence where several suits are brought by the different mortgagees one suit supplements the other; and the Court should consolidate the suits. [P 393 C 2; P 394 C 1]

(b) Practice — Duty Court — Substantial justice should prevail over technical objections.

Even if a defendant is deprived of a plea of non-maintainability of suit by the Court using its inherent powers of removing a formal defect that should not deter the Court from doing substantial justice in preference to allowing technical objections. [P 394 C 1]

(c) Mortgage—Several persons advancing money to mortgagor on one deed—Mortgagor and all mortgagees agreeing that former should be deemed to have borrowed particular sum from individual mortgagees — Deed should be construed as one containing as many mortgage transactions as there are mortgagees.

Where severance of interest of several mortgagees arise from their own action to which the mortgagor is not privy, it is obvious that the indivisibility of the mortgage is not affected. Any private arrangement between the mortgagees over the head of the mortgagor cannot destroy their joint character as against the mortgagor. Where however the mortgagor and all the mortgagees agree in the mortgage deed itself that the former should be deemed to have borrowed particular sums forming the consideration of the deed from individual mortgagees, each of the mortgagees should be considered to be a creditor to the extent of the sum advanced by him. In such a case, if the mortgaged property has also been split up and the charge of each individual mortgagee is to rest on a specified part of the mortgaged property, the deed should be construed as one containing as many mortgage transactions as the number of mortgagees. [P 394 C 2]

(d) Mortgage—Several mortgagees tenants-in-common—Suit for sale of entire property by one of them—Others refusing to join with him and impleaded as defendants — He need not sue for mortgage money.

Where one of several mortgagees who are tenants-in-common brings a suit for sale of the entire mortgaged property, making his co-mortgagees defendants, they having refused to join with him as plaintiffs, he need not sue for the mortgage money: *Case law discussed.* [P 396 C 1]

(e) Civil P. C. (1908), S. 64—Mortgage of attached property — Part of consideration utilised for discharging prior encumbrances having charge on such property — Mortgage is valid only to this extent.

Where an attached property is mortgaged contrary to the attachment and part of the consideration is utilised for paying off prior encumbrances having charge on the property, the mortgage is valid only to this extent. It must be considered to be void regarding the other portion of consideration: 29 *Cal* 154, *Ref.* [P 397 C 1,2]

G. Aggarwala, G. S. Pathak and *Kartar Narain Agarwala*—for Appellants.

Panna Lal, Shabd Saran and *P. M. L. Verma*—for Respondents.

Judgment.—These appeals arise out of two suits on foot of two mortgage-deeds, both dated 3rd December 1917, executed by one Bakhat Bahadur, in which the same properties, seven in number, were hypothecated. One of the deeds was for Rs. 36,000 and the other for Rs. 1,950. The deed for Rupees 36,000 was in favour of four sets of mortgagees, while the other was in favour of only three out of those four. Most of the mortgage money was left with the mortgagees for payment to certain prior mortgagees, who had encumbrances on the mortgaged properties. A peculiar feature of the deeds is that the sum advanced by each of the mortgagees was specified in the deed, making up the entire sum advanced under them. The details are as follows:

No. of sets	Names of mortgagees, each set	Sum advanced under the deed for Rs. 36,000	Sum advanced under the deed for Rs. 1,950	Total
		Rs.	Rs.	Rs.
1	Doongar Mal, Misri Lal and Ram Chander (hereafter called mortgagees, 1st set) ...	12,000	650	12,650
2	Raghunath Sahai and Ram Sarup (hereafter called mortgagees 2nd set) ...	7,000	400	7,400
3	Babu Ram and Salig Ram (hereafter called mortgagees 3rd set) ...	13,000	900	13,900
4	Gulzari Lal and Shib Charan, (hereafter called mortgagees 4th set) ...	4,000	—	4,000
	Total ...	36,000	1,950	37,950

The interest of the original mortgagor in the mortgaged properties has since passed to a number of persons who purchased it at sales held in execution of decrees against him. On 8th November 1929, the second and the third of the four sets of the mortgagees instituted suit No. 49 of 1929,

for recovery of the amounts due to them under the mortgages by sale of the entire mortgaged property. They impleaded the other two sets of the mortgagees and the representatives-in-interest of the original mortgagor. On 3rd December 1929, the first and fourth sets of the mortgagees instituted suit No. 55 of 1929 for recovery of what was due to them under the mortgages, impleading their co-mortgagees (plaintiffs in suit No. 49 of 1929) and the representatives-in-interest of the mortgagor.

Written statements were filed by the transferees, who contested the claims of both sets of the plaintiffs in the two suits. Their main pleas were that: (1) The deeds in suit were not genuine and for consideration. (2) The properties to which the mortgages in suit relate were under attachment in execution of decrees in which the contesting defendants purchased, and therefore the mortgages were invalid. (3) Each of the suits being only for a portion of the mortgage money was bad and therefore not maintainable; and (4) one of the mortgaged properties, namely, mahal Ganga Ram Gir in village Barsua, having been exempted from the claim in suit No. 49, that suit was bad.

Some other pleas of minor importance were also taken; but they were not the subject of arguments in this Court and need not be mentioned.

The plaintiffs in suit No. 55 filed written statements in the other suit joining the plaintiffs of that suit in the prayer for sale of the mortgaged property; and in reply to the objection of the contesting defendants that the the suit, being for recovery of part of the mortgage money, was bad, they requested that the two suits be connected. Similarly the plaintiffs in the first suit (No. 49) made an application that the two suits be consolidated. This application was however dismissed by the lower Court on 24th March 1930, as it thought that this course would prejudice the defendants, whose objection that the suit is not maintainable would fail. The second suit, i. e., the one brought by the first and fourth sets of the mortgagees was dismissed on that date on the ground that the plaintiffs, who were entitled only to a portion of the mortgage money, could not maintain the suit. Strangely enough the other suit, in which precisely the same question arose, was not dismissed on that date or any other date. It was tried on the merits and decreed on 14th June 1930, for such amount as was found due to the plaintiffs of that suit, under the deed for Rs. 36,000 but not as regards the other deed because the plaintiffs were directed to confine their claim to one deed only and they elected to proceed with their claim on the basis of the deed for Rs. 36,000. The learned Judge held in that suit that the plaintiffs were entitled to maintain it. First Appeal No. 347 of 1930 has been preferred by the mortgagees first and fourth sets, whose suit No. 55 was dismissed; while F. A. No. 8 of 1931 has been preferred by the contesting defendants (transferees of the original mortgagor) from the decree in suit No. 49 in favour of the mortgages second and third sets.

The first question which calls for decision is whether each of the two suits being for part of the mortgage money and brought by some of the mortgagees is not maintainable. This question arises in both the appeals the appellants in one contending that it is not maintainable and those in the other urging the contrary. It cannot be disputed that ordinarily a mortgage is indivisible both as regards the mortgagees and the mortgaged security, the mortgagees being joint tenants of the entire mortgaged property which is charged with every portion of the mortgage money. Where however there is severance of interests as between the mortgagees with the consent of the mortgagor, the position is different so far as the frame of the suit is concerned. The mortgagor, in the present case, states in the deed that he has borrowed specified amounts from each set of the mortgagees and that he has created a common charge in favour of all of them on the property therein specified for recovery of the total sum advanced by all the mortgagees. The implication is that as between the various sets of the mortgagees inter se each is entitled to recover, not necessarily separately, from the mortgaged property the sum advanced by him. The entire mortgaged property is hypothecated to each of them. None has priority over the other. Ordinarily it is in the interests of all the mortgagees that one suit should be brought for the recovery of the entire mortgage money due to all the mortgagees. In the present instance, for all practical purposes, one suit supplements the other; and in our opinion the lower Court should have consolidated the two suits. The defendants

would not have been prejudiced so far as their liability was concerned. The learned Subordinate Judge was undoubtedly influenced by the consideration that they would be deprived of the benefit of their plea that the suits were not maintainable. The defendant is always deprived of such benefit, whenever the Court allows formal defects in the suit to be remedied by amendment or otherwise. In our opinion this ground by itself is not sufficient for refusing to exercise a discretion which the Court possesses. The ends of substantial justice should prevail over technical objections, if the Court has a discretion to adopt one course or the other. We are inclined to think that, on the date the learned Subordinate Judge rejected the application for consolidation and dismissed suit No. 55, he was of opinion that each of the suits was not maintainable. Apparently the other suit was not fixed for that date; and when it was taken up later, he was convinced by arguments of counsel that the suit was maintainable. If suit No. 55 had not already been dismissed, we have no doubt he would have re-considered the question of consolidation.

The general rule undoubtedly is that a mortgage is indivisible both as regards redemption by the mortgagor and recovery of the mortgage money by the mortgagee. It can be inferred from S. 60, T. P. Act, which declares that a person interested in a share only of the mortgaged property is not entitled to redeem his own share only on payment of a proportionate part of the amount due on the mortgage, and from S. 67, which empowers "the mortgagee" to obtain a decree for foreclosure or for sale, which implies that if several persons have jointly advanced money to the mortgagor on the security of the mortgaged property, they are denoted by the word "mortgagee," so that some only of them cannot be considered to be the mortgagee. In Cl. (d) appended to that section, which expressly negatives the right of:

"a person interested in part only of the mortgage money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interest under the mortgage"

is contained in an exception to the general rule above referred to in so far as it allows a separate remedy to each of several mortgagees, who with the consent of the mortgagor have severed their interests. The extent to which each of them can separately sue the mortgagor is not clearly provided by that clause. The effect of the exception is to indicate that the prohibition contained in the earlier part of the clause does not apply to a case in which the mortgagees have severed their interests with the consent of the mortgagor, the prohibition being that one of several persons interested in part only of the mortgage money cannot institute a suit for sale or foreclosure of a corresponding part of the mortgaged property. As to whether one of several mortgagees, who have severed their interests with the consent of the mortgagor, can sue for recovery of his share of the mortgage money by sale of the mortgaged property is neither expressly forbidden nor permitted by the section. Unless such a suit violates the general rule of indivisibility or is prohibited by some other rule of law, the question of its maintainability should be judged on general principles.

Where severance of interests of several mortgagees arises from their own action to which the mortgagor is not privy, it is obvious that the indivisibility of the mortgage is not affected. Any private arrangement between the mortgagees over the head of the mortgagor cannot destroy their joint character as against the mortgagor. Where however the mortgagor and all the mortgagees agree in the mortgage-deed itself that the former should be deemed to have borrowed particular sums forming the consideration of the deed from individual mortgagees, each of the mortgagees should be considered to be a creditor to the extent of the sum advanced by him. In such a case, if the mortgaged property has also been split up and the charge of each individual mortgage is to rest on a specified part of the mortgaged property, the deed should be construed as one containing as many mortgage transactions as the number of mortgagees. As their Lordships of the Privy Council pointed out in the case to which we shall presently refer, such a conveyance is conceivable, though it is inconvenient. In the present case the entire mortgaged property is charged with the aggregate amounts due to the mortgagees. The result is that each of the creditors is a mortgagee to the extent of the sum advanced by him which is secured on the entire mortgaged property, so that none of them can claim

priority as would be the case if they had advanced different sums to the mortgagor on different occasions.

It is open to all the mortgagees to bring one suit for recovery of the entire amount due to them by sale of the mortgaged property. Indeed, it is highly desirable that one suit only should be brought and the sale proceeds distributed among them. The question is whether some only of the mortgagees can separately sue the mortgagor for sale of the entire mortgaged property. In 15 All 108 (1), the right of one of several joint mortgagees to institute a suit for recovery of his share of the mortgage money by sale of the mortgaged property was negatived, even though the other mortgagees be impleaded as defendants. In (1896) A W N 153 (2), in which one of two mortgagees had instituated a suit impleading his co-mortgagee, and obtained a decree for sale, it was held that the other mortgagee could not subsequently bring another suit for recovery of his share of the mortgage money. The decision was based on the ground that the same mortgage cannot be enforced by sale of the whole mortgaged property twice. Though the judgment does not make an express mention of that fact, it is clear that the case was one in which no severance of interest between the two mortgagees had taken place.

1919 P C 24 (3) is a case which appears to us to be on all fours with the present case. By a compromise between two ladies and the representatives of the estate of a deceased relative it was agreed that each of them should receive a sum of Rs. 80,000, and that the entire sum, viz., Rupees 1,60,000, would be a charge on an estate of which the value was mentioned to be Rs. 2,95,000. The two ladies and the Administrator-General of Bengal, who represented the estate of the deceased, had executed the compromise. It was thus clearly a case in which two mortgagees were entitled to specified sums of money collectively charged on the entire estate and this was consented to by the Administrator-General, Bengal, who should be considered to have been in the position of a mortgagor. One of the two ladies instituted a suit for recovery of Rs. 80,000 and interest, awarded to her under the compromise, by sale of half of the property charged under the compromise. The other lady was impleaded as a co-defendant with the then representatives of the estate. Objection was taken to the frame of the suit on the ground that one of the two mortgagees could not maintain a suit for recovery of her share of the mortgage money by sale of half of the mortgaged property. The trial Court decreed the suit. On appeal the High Court allowed an application for amendment by which the plaintiff sought to have the entire property sold. After this amendment the High Court decreed the suit for sale of the entire mortgaged property. We may mention in passing that neither the report in 1919 P C 24 (3) nor that in 1919 P C 24 (3). mentions the fact htat the plaintiff had originally sued for sale of half only of the mortgaged property and subsequently the High Court allowed the amendment seeking a decree for sale of the entire property mortgaged for recovery of the money due to both mortgagees. We have obtained these facts from the report of the same case in 1919 P C 24 (3). This fact is material for ascertaining the exact ratio decidendi adopted by their Lordships of the Privy Council in deciding the case. Their Lordships observed as follows:

"This mortgage clearly affects the conveyance of the real estate of the mortgagees as tenants-in-common, and no redemption could be effected of part of the property by paying to one of the mortgagees her separate debt. It is not a mortgage to each of a divided half but a conveyance to them of the whole property."

"Where a mortgage is made by one mortgagor to two tenants-in-common, the right of eit er mortgagee who desires to release the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagors."

It cannot be said that their Lordships contemplated a claim by one of the two mortgagees who are tenants-in-common for recovery of the entire mortgage money and that as against the mortgagor the integrity of the mortgage has to be maintained; but it seems to us that their Lordships meant that one of the two mortgagees, where the consent of the other could not be obtained, could sue for recovery of what was due to him; but in granting him the relief everything

1. Gobind Ram v. Sundar Singh, (1892) 15 All 108=1892 A W N 246.
2. Kanhai Lal v. Jwala Dei, (1896) A W N 153.
3. Sunitabala Debi v. Dhara Sundari Debi, 1919 P C 24=53 I C 131=46 I A 272=47 Cal 175=24 C W N 297 (P C).

should be done which might be necessary to work out the entire security except so far that the plaintiff mortgagee alone would recover in that suit what was due to him. This is made clear by the remark that:

"In their Lordships' opinion the amendment of the plaint as directed by the High Court is not properly worded, and they consider the trial Judge should, on the re-hearing of the suit, make such amendment as may be necessary and proper."

This is also clear from the observation that:

"There could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor."

If one of the two mortgagees must sue for the entire mortgage money by sale of the mortgaged property and the Court is to decree the claim, a judgment has to be entered as between the mortgagee defendant and the mortgagor. The fact that the Court may safeguard the interest of the mortgagee defendant and pay to the plaintiff only his share will not prevent judgment being entered between the mortgagee defendant and the mortgagor. It seems to us that their Lordships held that one of the two mortgagees, who are tenants-in-common, can bring a suit for recovery of what is due to him by sale of the entire mortgaged property, that if payment is made to him by the mortgagor, he ceases to have any interest, but if he is not paid the entire mortgaged property will have to be sold and his share paid to him out of sale proceeds on rateable distribution. The mortgagee defendant would not be entitled to be paid, unless there is some amicable settlement between him and the mortgagor. He will have to bring a suit against the mortgagor just as the other mortgagee did. Of course, sale of the mortgaged property having already taken place, his charge will fasten on the balance of the sale proceeds which is held by the Court as substituted security. For these reasons we hold that, where one of several mortgagees who are tenants-in-common brings a suit for sale of the entire mortgaged property, making his co-mortgagees defendants, they having refused to join with him as plaintiffs, he need not sue for the mortgage money. To our mind this is clear from the fact that the High Court had allowed an amendment in the case noted above, the effect of which was to enable one of several co-mortgagees to sue for the entire mortgage money, but their Lordships disapproved of the amendment and made it clear that as between the mortgagor and the mortgagee defendant no judgment should be entered.

In the case before us, the second and third sets of mortgagees sued for their share of the mortgage money by sale of the entire mortgaged property, impleading their co-mortgagees as defendants, the latter having refused to join as plaintiffs. Similarly, the mortgagees first and fourth sets instituted their suit for the rest of the mortgage money. Both suits were, in our opinion, maintainable, even apart from consolidation which ought to have been allowed by the lower Court. If consolidation had been essential and the suits had not been maintainable without such consolidation, we would have ordered consolidation which we have every power to do. As a matter of fact, whether consolidation is formally ordered or not, the result would be the same as in the two appeals before us, the right and liabilities of all the mortgagees and mortgagors in whom the equity of redemption is vested will be adjudicated upon in respect of the entire mortgage money.

The next question of importance is whether the mortgage deeds in suit, which were executed during the continuance of an attachment in execution of the decree in which the contesting defendants purchased the mortgaged property are void as against them. It has been found by the lower Court in suit No. 49 of 1929 (F. A. No. 8 of 1931) that all the mortgaged properties except No. 6, were under attachment when the mortgage-deeds in suit were executed. This finding is supported by warrants of attachment and the inventory of the property attached under them. It is not disputed that the contesting defendants purchased at the auction sale held in pursuance of the attachment. It must therefore be held that the mortgage deeds in suit, so far as they are contrary to the attachment, are void as against all claims enforceable under the attachment (S. 61, Civil P. C). The lower Court however held that, in so far as sums advanced under the deed of Rs. 36,000 were paid by the plaintiffs, mortgagees, to prior encumbrancers who had a charge on most of the mortgaged properties, the deeds in suit are valid to the extent of sums thus paid and create a valid charge on the properties which

were redeemed by the plaintiffs, mortgagees.

The learned advocate for the defendants-appellants strenuously contended that the lower Court allowed the plaintiffs to succeed on a claim of subrogation which claim had not been in the plaint, and that they were prejudiced inasmuch as they might have pleaded limitation and want of due execution and attestation. We are of opinion that the learned Subordinate Judge has not allowed the plaintiffs to succeed by an appeal to the doctrine of subrogation, though his judgment is somewhat vague on the point.

The mortgage deed of Rs. 36,000 gives details of prior encumbrances and except for three small sums the entire consideration is left with the mortgagees for the discharge of those encumbrances. It has been found that the mortgagees paid Rs. 10,133-11-0 to prior mortgagees.

The consideration of the other deed, namely, that for Rs. 1,950, was partly left for payment to certain creditors who had no charge on any property and was partly paid to the mortgagors in cash. There can be no doubt that this mortgage was contrary to attachment under which the defendants-respondents claim and should be considered to be void against them. The same view must be taken as regards so much of the consideration of the mortgage for Rs. 36,000 as was paid to the mortgagors in cash; or to prior creditors not shown to have had a charge on the property mortgaged under the deed in suit, but as regards Rs. 7,807-8-0 which represents prior encumbrances discharged by the plaintiffs, mortgagees the position is quite different. The attachment was subject to the prior encumbrances. The mortgagors' equity of redemption as it was on the date of attachment should alone be considered to have been attached. The interest in the property vested in the prior mortgagees was not affected by the attachment, and so far as that interest passed to the new mortgagees, the mortgage for Rs. 36,000 was not contrary to the attachment. S. 64, Civil P. C.. merely provides that

"where an attachment has been made, any private transfer . . . . . of the property attached or of any interest therein . . . contrary to such attachment shall be void as against all claims enforceable under the attachment."

A mortgage is the transfer of an interest to the mortgaged property by the mortgagor to the mortgagees. As already stated, the attachment could not affect the interest which had been previously transferred to the prior encumbrances; and the only enforceable claim which the attaching creditor had under the attachment was in respect of the mortgaged property minus that interest. So far as that interest was transferred by the new mortgage during the continuances of the attachment, it was in no way contrary to the attachment, and to that extent the mortgage for Rs. 36,000 is valid. This result is not materially different from the one which would have been arrived at if the plaintiffs-mortgagees had been allowed to succeed on a claim of subrogation. The latter course would lend some support to the contesting defendants' contention that it was not put forward in the plaint in so many words. At the same time, the plaint makes it perfectly clear that the mortgage money under the deeds in suit was applied towards the payment of prior encumbrances. It is not necessary to invoke the aid of the doctrine of subrogation, as we hold that the mortgage deed for Rs. 36,000, on which the present claim is based, is itself valid to the extent of prior encumbrances paid thereunder.

Section 276, Civil P. C., of 1882, has been re-enacted as S. 64 of the present Code of Civil Procedure with slight verbal alterations which, if anything, strengthen the case of the plaintiffs, mortgagees. The words "during the continuance of attachment" have been replaced by the words "contrary to such attachment." It was held under the old Code by their Lordships of the Privy Council in 29 Cal 154 (4) that the new mortgage in circumstances similar to those of the present case was valid to the extent of the prior encumbrances paid out of the mortgage money advanced during the continuance of an attachment. Their Lordships observed as follows:

"So far as mortgage for Rs. 40,000, mortgage made during the continuance ofattachment, prejudiced the execution creditor, it is void as against him: but the section does not render void, transactions which in no way prejudice him, and to hold the mortgage void so as to confer upon him a benefit, which no one ever intended he should have, is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the effect of that section is to give an execution creditor an unencumbered fee simply instead of an equity of redemption against the intention of the parties."

4. Dinobundu Shaw Chowdhry v. Jogmaya Das, (1902) 29 Cal 154=29 I A 9=8 Sar 217 (P C).

Accordingly we hold, on the language of S. 64, Civil P. C., and on the authority of the case noted above, that the conclusion arrived at by the lower Court as regards the liability of the mortgaged properties in respect of Rs. 14,003-14-3 due to plaintiffs of suit No. 49 of 1929, is correct.

One of the questions raised in the lower Court was that the deeds in suit were not genuine or for consideration. That Court held those deeds to be genuine. As regards consideration, it found that the deed for Rs. 36,000 was valid to the extent of prior encumbrances discharged by the plaintiffs of both suits. It recorded no finding as regards the consideration of the other mortgage deed for Rs. 1,950, as it dismissed suit No. 55 of 1929 (in which the claim on the basis of that mortgage was persisted in) on a preliminary ground. It recorded no finding on that part of the case in the other suit, as the plaintiffs elected to confine their claim to the mortgage for Rs. 36,000. The question is not material, as we have held that that mortgage is void as against the contesting defendants having regard to S. 64, Civil P. C. The lower Court decreed Rs. 14,003-14-3 in suit No. 49 of 1929 (F. A. No. 8 of 1931), which has not been questioned in the appeal arising from that suit. In suit No. 55 of 1929 (F. A. No.347 of 1930), the evidence shows that three sums 3,657, 1,172 and 2,978-8-0 (Total 7,807-8-0), were paid by the plaintiffs of both suits to prior encumbrancers. It should be noted that Mathura Prasad is not one of them. The share of the plaintiffs of suit No. 55 of 1929 is 4/9ths of that sum. In the view of the case we have taken, this latter suit should also be decreed. Though the lower Court has left other issues undecided, we think that it is not necessary for us to remand the suit or remit issues, as the findings of the lower Court confirmed by us in appeal No. 8 of 1931 have become conclusive. All those who are parties in suit No. 55 of 1929 are also parties in the other suit. Nor is there any material question which cannot be disposed of on the materials before us. A decree in terms similar to those of the decree in suit No. 49 of 1929 (F. A. No. 8 of 1931) should be passed in suit No. 55 of 1929 (F. A. No. 347 of 1930).

The only other question which was urged before us in F. A. No. 347 of 1930 has reference to property No. 6, as to which the lower Court held in the other case that there was no evidence as to whether it was under attachment in execution of decree. Accordingly it directed sale of that property. If all the issues arising in the connected suit had been decided by the lower Court, this part of the decree would have been otherwise, as we find from the evidence of Doongar Mal, one of the mortgagees, "but property No. 6 (village Barsua, mahal Ganga Ram Gir) had been sold in execution of a decree obtained by a prior mortgagee before the present suit was brought." He made this statement in answer to the contesting defendants' plea that one of the mortgaged properties not having been included in the claim the suit was bad. He explained the reasons why that property had been left out. Accordingly we must hold that suit No. 55 of 1929 is not bad for the reason that one of the mortgaged properties has been left out, as it has been sold at the instance of a prior mortgagee and the plaintiffs-mortgagees can now have no claim to sale thereof. This fact did not appear in suit No. 49 of 1929 (F. A. No. 8 of 1931), and the decree of the Court directing the sale of property No. 6 will be ineffectual.

The result is that F. A. No. 8 of 1931 is dismissed with costs, F. A. No. 347 of 1930 is allowed with proportionate costs, and we direct that a decree in terms similar to that in suit No. 49 of 1929 (F. A. No. 8 of 1931) giving six months' time for payment from this date be passed for recovery of four-ninths of Rupees 7,807-8-0 except in so far that property No. 6 will not be sold. Cross-objection filed by Krisna Murari Lal and another is dismissed.

K.S. *Appeal dismissed.*

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KENDALL, AG. C. J. AND BAJPAI, J.

Mt. Ram Dulari v. *Bhola*

Civil Revn. No. 548 of 1934, Decided on 10th December 1934,

(a) Civil P. C. (1908), O. 17, R. 3 — Plaintiff appearing in person and by counsel — Adjournment refused— Dismissal of suit on absence of both is dismissal on merits and not for non-appearance.

Where on the day fixed for hearing the plaintiff has appeared in person and by counsel and on the refusal for adjournment, the plaintiff and his pleader absented and the Court dismissed the suit :

Held : that it would be preferable to hold that such a decision was one on the merits, even

were redeemed by the plaintiffs, mortgagees.

The learned advocate for the defendants-appellants strenuously contended that the lower Court allowed the plaintiffs to succeed on a claim of subrogation which claim had not been in the plaint, and that they were prejudiced inasmuch as they might have pleaded limitation and want of due execution and attestation. We are of opinion that the learned Subordinate Judge has not allowed the plaintiffs to succeed by an appeal to the doctrine of subrogation, though his judgment is somewhat vague on the point.

The mortgage deed of Rs. 36,000 gives details of prior encumbrances and except for three small sums the entire consideration is left with the mortgagees for the discharge of those encumbrances. It has been found that the mortgagees paid Rs. 14,003-14-3 to prior mortgagees having a charge on the mortgaged properties except No. 6. The consideration of the other deed, namely, that for Rs. 1,950, was partly left for payment to certain creditors who had no charge on any property and was partly paid to the mortgagors in cash. There can be no doubt that this mortgage was contrary to attachment under which the defendants-respondents claim and should be considered to be void against them. The same view must be taken as regards so much of the consideration of the mortgage for Rs. 36,000 as was paid to the mortgagors in cash; but as regards Rs. 14,003-14-3, which represents prior encumbrances discharged by the plaintiffs, mortgagees the position is quite different. The attachment was subject to the prior encumbrances. The mortgagors' equity of redemption as it was on the date of attachment should alone be considered to have been attached. The interest in the property vested in the prior mortgagees was not affected by the attachment, and so far as that interest passed to the new mortgagees, the mortgage for Rs. 36,000 was not contrary to the attachment. S. 64, Civil P. C., merely provides that:

"where an attachment has been made, any private transfer . . . . . of the property attached or of any interest there in . . . contrary to such attachment shall be void as against all claims enforceable under the attachment."

A mortgage is the transfer of an interest to the mortgaged property by the mortgagor to the mortgagees. As already stated, the attachment could not affect the interest which had been previously transferred to the prior encumbrances; and the only enforceable claim which the attaching creditor had under the attachment was in respect of the mortgaged property minus that interest. So far as that interest was transferred by the new mortgage during the continuances of the attachment, it was in no way contrary to the attachment, and to that extent the mortgage for Rs. 36,000 is valid. This result is not materially different from the one which would have been arrived at if the plaintiffs-mortgagees had been allowed to succeed on a claim of subrogation. The latter course would lend some support to the contesting defendants' contention that it was not put forward in the plaint in so many words. At the same time, the plaint makes it perfectly clear that the mortgage money under the deeds in suit was applied towards the payment of prior encumbrances. It is not necessary to invoke the aid of the doctrine of subrogation, as we hold that the mortgage deed for Rs. 36,000, on which the present claim is based, is itself valid to the extent of prior encumbrances paid thereunder.

Section 276, Civil P. C., of 1882, has been re-enacted as S. 64 of the present Code of Civil Procedure with slight verbal alterations which, if anything, strengthen the case of the plaintiffs, mortgagees. The words "during the continuance of attachment" have been replaced by the words "contrary to such attachment." It was held under the old Code by their Lordships of the Privy Council in 29 Cal 154 (4) that the new mortgage in circumstances similar to those of the present case was valid to the extent of the prior encumbrances paid out of the mortgage money advanced during the continuance of an attachment. Their Lordships observed as follows:

"So far as mortgage for Rs. 40,000 (mortgage, made during the continuance of attachment prejudiced the execution creditor, it is void as against him: but the section does not render void, transactions which in no way prejudice him, and to hold the mortgage void so as to confer upon him a benefit, which no one ever intended he should have, is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the effect of that section is to give an execution creditor an unencumbered fee simply instead of an equity of redemption against the intention of the parties."

Accordingly we hold, on the language of S. 64, Civil P. C., and on

4. Dinobundu Shaw Chowdhry v. Jogmaya Dasi, (1902) 29 Cal 154=29 I A 9=8 Sar 217 (P C).

the authority of the case noted above, that the conclusion arrived at by the lower Court as regards the liability of the mortgaged properties other than No. 6 in respect of Rs. 14,003-14-3 is correct.

One of the questions raised in the lower Court was that the deeds in suit were not genuine or for consideration. That Court held those deeds to be genuine. As regards consideration, it found that the deed for Rs. 36,000 was valid to the extent of Rs. 14,003-14-3. We have already mentioned this fact. It recorded no finding as regards the consideration of the other mortgage deed for Rs. 1,950, as it dismissed suit No. 55 of 1929 (in which the claim on the basis of that mortgage was persisted in) on a preliminary ground. It recorded no finding on that part of the case in the other suit, as the plaintiffs elected to confine their claim to the mortgage for Rs. 36,000. The question is not material, as we have held that that mortgage is void as against the contesting defendants having regard to S. 64, Civil P. C. The lower Court decreed five ninths of Rupees 14,003-14-3 in suit No. 49 of 1929 (F. A. No. 8 of 1931), which represents the share of the plaintiffs of that suit. The remaining four ninths of that sum must be deemed to be the share of the plaintiffs of suit No. 55 of 1929 (F. A. No. 347 of 1930), which was dismissed by the lower Court. In the view of the case we have taken, this latter suit should also be decreed. Though the lower Court has left other issues undecided, we think that it is not necessary for us to remand the suit or remit issues, as the findings of the lower Court confirmed by us in appeal No. 8 of 1931 have become conclusive. All those who are parties in suit No. 55 of 1929 are also parties in the other suit. Nor is there any material question which cannot be disposed of on the materials before us. The remaining four-ninths of Rupees 14,003-14-3 represents the share of the plaintiffs in suit No. 55 of 1929 (F. A. No. 347 of 1930). A decree in terms similar to those of the decree in suit No. 49 of 1929 (F. A. No. 8 of 1931) should be passed in suit No. 55 of 1929 (F. A. No. 347 of 1930).

The only other question which was urged before us in F. A. No. 347 of 1930 has reference to property No. 6, as to which the lower Court held in the other case that there was no evidence as to whether it was under attachment in execution of decree. Accordingly it directed sale of that property. If all the issues arising in the connected suit had been decided by the lower Court, this part of the decree would have been otherwise, as we find from the evidence of Doongar Mal, one of the mortgagees, "but property No. 6 (village Barsua, mahal Ganga Ram Gir) had been sold in execution of a decree obtained by a prior mortgagee before the present suit was brought." He made this statement in answer to the contesting defendants' plea that one of the mortgaged properties not having been included in the claim the suit was bad. He explained the reasons why that property had been left out. Accordingly we must hold that suit No. 55 of 1929 is not bad for the reason that one of the mortgaged properties has been left out, as it has been sold at the instance of a prior mortgagee and the plaintiffs-mortgagees can now have no claim to sale thereof. This fact did not appear in suit No. 49 of 1929 (F. A. No. 8 of 1931), and the decree of the Court directing the sale of property No. 6 will be ineffectual.

The result is that F. A. No. 8 of 1931 is dismissed with costs, F. A. No. 347 of 1930 is allowed with proportionate costs, and we direct that a decree in terms similar to that in suit No. 49 of 1929 (F. A. No. 8 of 1931) giving six months' time for payment from this date be passed for recovery of four-ninths of Rupees 14,003-11-3 except in so far that property No. 6 will not be sold. Cross-objection filed by Krisna Murari Lal and another is dismissed.

K.S. *Appeal dismissed.*

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KENDALL, AG C. J. AND BAJPAI, J.

Mt. Ram Dulari—Applicant.

v.

Bhola—Opposite Party.

Civil Revn. No. 548 of 1934, Decided on 10th December 1934, against order of Sub-Judge, Allahabad, D/- 16th August 1934.

(a) Civil P. C. (1908), O. 17, R. 3 — Plaintiff appearing in person and by counsel — Adjournment refused— Dismissal of suit on absence of both is dismissal on merits and not for non-appearance.

Where on the day fixed for hearing the plaintiff has appeared in person and by counsel and on the refusal for adjournment, the plaintiff and his pleader absented and the Court dismissed the suit :

Held : that it would be preferable to hold that such a decision was one on the merits, even

though the evidence and arguments on behalf of the parties may not have been discussed, than to hold that a suit has been dismissed for non-appearance of the plaintiff, when as a matter of fact the plaintiff has actually appeared both by counsel and in person and O. 17, R. 3 covers the circumstances of the case : 1931 *All* 703 and 1933 *All* 41, *Rel on.* [P 401 C 2]

(b) Civil P. C. (1908), S. 115 and O. 17, R. 3—Order of dismissal on merits — Court restoring same — High Court held could interfere and set aside order of restoration.

Where the lower Court finding that there were no grounds for allowing an adjournment, dismissed the suit and the case was covered by O. 17, R. 3 but subsequently restored the same : [P 402 C 1]

Held : that the order of dismissal having been duly passed and having been embodied in a decree, the same Judge had no jurisdiction whatever four months later to recall the order for merely arbitrary reasons and that the High Court could interfere and set aside the order of restoration. [P 402 C 1]

N P. Asthana and *B. N. Sahai* — for Applicant.

M. Waliullah, *Shah Zamir Alam* and *Ram Nama Prasad*—for Opposite Party.

Kendall, J.—This is a defendant's application against an order passed by the Subordinate Judge of Allahabad, dated 16th August 1934, restoring the plaintiff's suit on condition that the plaintiff should pay Rs. 200 as costs to the defendant. The application is made on the ground that the Court had no jurisdiction to restore the suit which had been dismissed on 10th April 1934. The circumstances which led up to these proceedings are as follows: A suit was filed in forma pauperis in 1932 by two plaintiffs, Dukhi and Bhola who were father and son. This suit was one relating to property valued at over two lacs of rupees, and it was against the widow of one Bisheshar, deceased, on the ground that the plaintiffs were entitled to the property for reasons with which we are not now concerned. The application to sue in forma pauperis was allowed, issues were struck on 27th April 1933 and the dates fixed for final hearing were December the 4th to 7th 1933. In the meanwhile the plaintiff had applied on 15th August 1933 for the appointment of a receiver, but this application was rejected in October. An appeal was made against that order, which is now pending before this Court as F. A. F. O. No. 188 of 1933. In connection with this appeal the record of the suit was sent to the High Court. But on the defendant's application, it was ordered to be sent back to the trial Court in order that the original suit should proceed. On 28th November both plaintiffs applied for an adjournment of the suit from the date fixed for final disposal, namely, 4th December, on the ground that the record was in the High Court, and other reasons were also given. This application was allowed, and the suit was Adjourned until 9th April 1934.

In the meanwhile however on 4th December 1933 Dukhi died. His son, Bhola, made an application on the last day allowed him by the law of limitation, namely, 5th March 1934, to be brought on the record in his place as survivor. Notice was issued to the opposite party, but on 5th April the Court passed an order to the effect that as Bhola was the son of Dukhi, all that it was necessary to do was to strike off Dukhi's name so that Bhola could proceed alone in his own right. It may be mentioned that one of the arguments on behalf of the opposite party is that Dukhi and Bhola had sued not only as a joint family entitled as such to succeed to the property. but also individually as reversioners to Bisheshar. It has been suggested therefore that the Court was wrong in ordering that it was only necessary to strike off the name of Dukhi, because it was also necessary to implead Bhola anew as the representative of Dukhi in his capacity as a reversioner. Bhola made another application on 28th March 1934 for the postponement to the hearing of the suit. This was refused, but Bhola made another application on 7th April 1934, which was ordered to be put up on the date fixed for the hearing of the suit.

On that date—the 9th April—the plaintiff's advocate appeared and filed an application for the further postponement of the proceeding. This was rejected, and the advocate stated that he had no further instructions. It should be mentioned that the application was signed not only by the advocate, but by the plaintiff, Bhola, himself. The order on the order sheet was that the case should be put up on the following day for delivery of judgment and on the following day the Court passed an order in the following form. First the cases of the parties were stated at length and the issues were given in detail. The order then proceeds:

"Findings : In December 1933, plaintiff 1 died leaving his son, plaintiff 2, as the sole survivor. Owing to the death of plaintiff 1, hear

ing fixed for 4th December 1933 was adjourned to 9th April 1934. The plaintiff asked for adjournment to 9th April 1934. The plaintiff asked for adjournment again, which was refused. The plaintiff and his counsel then absented. The contesting defendant has brought three counsel practising in the High Court, including Dr. Asthana. The case is dismissed for default with costs of the contesting defendant."

It should be added that a decree was prepared on the basis of this order, and in the decree it is stated that the suit is dismissed for want of prosecution. The order against which the present application has been made is a subsequent order passed by the same Subordinate Judge, restoring the suit which was dismissed by the order of the 10th April. This later order does not give any reason for restoring the suit, except that the decision was not a decision on the merits:

"Looking at my judgment of 9th April 1934, I can say that it was not a decision on the merits. The pleadings and issues were given simply to enable the superior Court to apprehend the case in which that order was made. No decision on the issues was made . . . . . The inconvenience to the defendant can be compensated by awarding damages . . . . . Considering the entire circumstances I would restore the suit on the plaintiff paying Rs. 200 as costs of the defendant."

The rule of the Civil Procedure Code under which the suit was restored was not quoted at all. But it has been argued on behalf of the applicant by Dr. Asthana that, in the circumstances, it must be held that the order was passed under R. 3, O. 17. Under that order the Court may either adjourn the hearing or "proceed to decide the suit on the merits," and it is therefore argued that whatever the Court believed when the matter came before it on 16th August 1934, the order of 10th April was one that was passed under this rule, and that it was a decision on the merits. We have been referred on behalf of the applicant to two recent decisions of this Court. In 1931 All 703 (1), it was held in circumstances like the present, that is to say where a pleader appears and applies for adjournment and the Court refuses to grant an adjournment, that the decision of the Court is on the merits and a decree. Again in 1933 All 41 (2), it was held in similar circumstances to those in the present case that the order had been passed under O. 17, R. 3. that it amounted to a decree, and that the plaintiff's remedy was either by way of review or appeal and not by way of an application for the setting aside of the decree and for the restoration of the suit.

Mr. Ramnama Prasad has attempted to support the order of the learned Subordinate Judge in an ingenious and elaborate argument. He has approached the case from three points of view, which may be dealt with separately. In the first place, he argues that O. 17, R. 3 does not apply to the order of April the 10th. The adjournment to that date, it is suggested, was made by the Court because the record of the suit was in the High Court and it was necessary to postpone the proceeding apart entirely from any application that may have been made by the plaintiff, R. 3, however, is to the following effect:

"Where any party to a suit to whom time has been granted fails without reasonable excuse, to produce his evidence or to cause the attendance of his witnesses or to . . . . . perform any act necessary to the further progress of the suit, the Court may proceed under the rule."

We have no doubt from the history of the circumstances of the case given above that the adjournment was made on the application of the plaintiff, and although the Court may have had a variety of reasons for allowing the adjournment, there was no doubt that it was the plaintiff who moved the adjournment, and that it was necessary for the plaintiff to cause the attendance of his witnesses and to proceed with the suit on the adjourned date, and that it was on account of Bhola's default to do so that the order was passed. A further argument under this heading relates to Bhola's status not only as a member of a joint family, the right of which to sue survived the death of Dukhi, but also as the successor of Dukhi in his capacity of reversioner. It is argued that looked at from this point of view, the suit was in abeyance from the 4th December, when Dukhi died, until 5th April, when the order of the Court was passed directing Dukhi's name to be expunged from the record. This is an argument however that applies rather to the merits of the question of whether an adjournment should have been allowed, and might be considered if the matter before us were on appeal; but it has no force in an application for revision.

The second point of view which has been pressed before us is that R. 3, O. 17 might properly have been applied by the learned Judge, but that

1. Baldeo Singh v. Chhaju Singh, 1931 All 702 = 133 I C 622.
2. Manmohan Das v. Krishna Kant, 1933 All 41 = 142 I C 141.

as a matter of fact he did not apply it. For this argument there appears to be some support in the wording of the order against which the present application is made. We have already quoted the words, which show that the Judge believed, when he passed this order, that his former order was not a decision on the merits. We have however quoted authority on behalf of the applicant to show that such an order does amount to a decision on the merits, and if this was so, it was not open to the Judge to reconsider the matter on the later date and to change his mind. We are asked to believe that in his order of 10th April the Judge really did act under the provisions of O. 9, and we have been referred to the case of 1933 All 118 (3), in which a Bench of this Court in dealing with a matter very similar to the present one remarked as follows:

"The Assistant Collector did not make any reference in that order to the evidence that had already been produced in the case. He did not by that order examine the merits of the plaintiff's claim, nor did he deal with the validity or otherwise of the defence raised by the contesting defendant. He clearly in that order expressed himself as dismissing the suit 'for want of prosecution.' Such a decision cannot be characterized as a decision on the merits."

If we were to follow the decision of that Bench, we should be bound therefore to hold that the decision was not one on the merits, because the Judge did not examine the merits of the plaintiff's claim, nor deal with the validity of the defence raised. On the contrary, he dismissed the suit for default on the ground that the plaintiff asked for a further adjournment, which was refused, and that he had then absented himself with his counsel. The Bench continuing with the reasoning towards the end of their judgment have remarked that as O. 17, R. 3 did not apply, the only other rule in the Code under which the order could be passed was R. 8, O. 9, Civil P. C., and held that the Court must therefore have passed its order under that rule. The learned Judges however go on to show that as the plaintiff's counsel was present, such an order, that is to say an order dismissing the suit under the provisions of O. 9, would not have been in accordance with law, but they refused to interfere in revision on the ground that the only result of the order of the lower Court would be that there would now be a decision on the merits.

We are left to decide between the authority of this decision and that of the Benches in the cases reported in 1931 All 703 (1) and 1933 All 41 (2), which have held that in a case like the present O. 17, R. 3, will apply, and that a decision like that passed by the Subordinate Judge on 10th April may amount to a decision on the merits. We think that it would be preferable to hold that such a decision is one on the merits, even though the evidence and arguments on behalf of the parties may not have been discussed, than to hold that a suit has been dismissed for non-appearance of the plaintiff when as a matter of fact the plaintiff has actually appeared both by counsel and in person, and our decision from this point of view is that not only does O. 17, R. 3 cover the circumstances of the case, but that the Subordinate Judge did actually apply that rule on 10th April 1934, though in his subsequent order, namely the one which is now the subject of this application, he either changed his mind or forgot the circumstances in which he passed the earlier order.

The third point of view is that even if the provisions of O. 17, R. 3 applied to the present case, and the Court was technically wrong in restoring the suit, it is not necessary now for us to revise that order for the reasons that have been given in 1933 All 118 (3), namely, that there has been no miscarriage of justice and that the only effect of the order will be that the plaintiff's suit will now be heard on the merits. We do not think however that there are any equities in favour of the opposite party. It seems quite clear that Dukhi and Bhola were acting together and that between them they had been working to delay the hearing of the suit for the purpose of keeping the defendant out of possession of the property, if possible, by the appointment of a receiver. The learned Subordinate Judge himself in his order which is the subject of this application has remarked that the plaintiff was making frantic efforts to obtain adjournments of the hearing without any reasonable grounds and that he failed, without reasonable excuse, to produce his evidence; so that it appears that even if the matter had been one with which he could deal under O. 9, there would have been no grounds whatever for allowing the res-

3. Panna Lal v. Basdeo, 1933 All 118=143 I C 307.

toration of the suit under R. 8 of that Order, nor was he called on in any way to make use of the inherent powers of the Court under S. 151. The Court had to decide the matter with due regard to the provisions of R. 3 of O. 17—and it is clear from his order that there were no good grounds for allowing an adjournment—or to proceed to deal with the suit on the merits, and he chose the latter course. That order having been duly passed and having been embodied in a decree, the same Judge had no jurisdiction whatever 4 months later to recall the order for merely arbitrary reasons as he has done in the present case. We think therefore that it is necessary to interfere. and we therefore allow the application with costs, set aside the order of the Subordinate Judge and direct that the original order passed by the Judge on 10th April dismissing the suit be restored.

It has been brought to our notice that after the order of 10th April had been passed, the plaintiff filed an appeal in the High Court, but that before this came up for admission in forma pauperis the suit had been restored by the trial Court. The position of the plaintiff of course was completely altered by the order restoring the suit, and if there is no provision of law to prevent his proceeding with the appeal, we see no reason why he should not be allowed to do so.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 402

BENNET, J.

Lal Ratnakar Singh — Judgment-debtor—Appellant.

v.

Kr. Rudra Pratab Singh and *another* —Decree holder—Respondents.

Ex. First Appeal Nos. 340 and 341 of 1934, Decided on 16th November 1934, from decision of Sub-Judge, Allahabad, D/- 15th August 1934.

(a) Execution — Decree in favour of three persons awarding them separate costs—Joint application for execution by two for separate costs is maintainable.

Where a decree is passed in favour of three persons awarding them separate costs, a joint application for separate amounts due to them is maintainable; and it is obviously more convenient for the purposes of attachment and sale that for the execution of a single decree there should be a single application and a single procedure of attachment and a single procedure of sale; otherwise if there were a multiplicity of applications and attachments and sales there would be considerable confusion.

[P 403 C 2]

(b) Execution — Application by several persons — One of them can withdraw and application can be continued in name of others.

One of several applicants for execution can be allowed to withdraw if he desires; when he withdraws, the application continues naturally in the name of the remaining applicants.

[P 404 C 1]

N. Upadhipa—for Applicant.

Lal Paduman Singh — for Respondents.

Judgment.—These are two execution first appeals brought by judgment-debtors under similar circumstances. The facts are that there was a suit for partition and there was an appeal in the High Court which was dismissed and three defendants were allowed separate costs as follows in the High Court:

				Rs.	a.	p.
Recoverable by defendant	1	...		7,193	11	0
" " "	3	...		1,132	11	0
" " "	2	...		2	0	0
			Total	8,328	6	0

The High Court's decree was dated 29th January 1929. On 25th January 1932 these three persons made an application for execution of the decree. The application stated that they were entitled to the separate amounts of costs set forth. Objection was taken that Maharao Raja Ram Singh had no right to execute the decree and that objection was upheld. The lower Court then had the application of two persons before it to obtain execution of separate amounts due to them. The lower Court decided that these two persons should not have made one application for execution and that the law required that separate applications should be made. The lower Court held that the two applicants might choose which of them would continue the execution case and that as regards the one who would continue the execution case his application would not be barred by time. The appeal has been taken against this order and the grounds set forth that when the lower Court held that the execution application was not maintainable it should have dismissed the application and that the Court was wrong to allow one of the applicants to continue the application and to hold that he was within time. When argument began in the case I informed learned counsel for the appellant that he would have to satisfy me that the decision of the lower Court was correct that an application by the two persons was not maintainable. Learned counsel was

not able to show any rule of the Civil Procedure Code which required that separate applications should be made. Learned counsel relied on a ruling reported in 13 W R 244 (1). In that case there was a decree awarding a sum of money to five persons, one-half to three persons and one-half to two persons. There was a proceeding for the execution of a half of the decree by one set of persons. Later after the period of limitation had expired the other set of persons made an application and claimed that the application in execution of the first set of persons saved limitation for the second set of persons also. This was the question which the Bench had to decide whether the application of the first set of persons saved limitation for the second set of persons. The Bench held that it did not. In deciding this point the learned Chief Justice stated on p. 245, in Col. 1:

"The decrees are as distinct as if they had been passed in two different suits. We think that the applicants can no more take advantage of the proceedings by Beechuk and Ramdeen than they could of proceedings taken by decree-holders in a totally different suit. A case has been referred to in which it is said that a partial execution by one or more decree-holders operates for the benefit of all parties who have any interest in the decree. Now, if that partial execution of the decree be an attempted execution of the whole decree for the benefit of those entitled, no doubt the whole decree may be kept alive. But I am certainly not prepared to say that if a person who has only a fractional share, say one anna, in the decree, is improperly allowed to execute a fractional part of the decree (a proceeding I may observe, which is nowhere allowed by the Act 8 of 1859), it appears to me there is no ground or principle on which it can be said that such partial execution should be allowed to operate for the benefit of the persons entitled to the other 15 annas of the decree."

The latter part of this quotation shows that the learned Chief Justice considered that on the question of procedure it was wrong to allow a person to whom a one anna share of the decretal amount had been decreed to make a separate application for execution. This is the only part of the ruling which deals with the question at present before me, that is the question of procedure. The question of limitation in the Calcutta ruling has no bearing on the present case because the present is not a case where one set of decree-holders had been taking steps in execution and another set claimed the benefit of such steps. On the contrary so far whatever has been done has been done jointly by all the decree-holders. I consider that the Calcutta ruling is against the contention of learned counsel for the appellant and that the principle of that ruling is that separate application should not be made but that all the decree-holders should join in one application even though they are entitled to separate amounts under the decree. Learned counsel dwelt on the expression in the ruling that "the decrees were as distinct as if they had been passed in two different suits." I consider that the learned Chief Justice in using this expression was referring to the question of limitation and what he meant to convey was that for the purposes of limitation the action of one set of decree-holders could not save limitation for another set of decree-holders. When the learned Chief Justice came to deal with the question of procedure he laid down that a separate application was improper. Turning to the provisions in the Civil Procedure Code I find under S. 2 (2):

" 'Decree' means the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in that suit."

There is therefore one decree in each suit and there are not two decrees in one suit. In the present suit there was actually one formal decree drawn up. O. 21, R. 10 lays down:

"Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, etc.,"

that is, for the execution of one decree there should be one application made by the holder. The singular imports the plural and where there are more holders than one of a decree the language implies that the holders of the decree should make an application. It is obviously more convenient for the purposes of attachment and sale that for the execution of a single decree there should be a single application and a single procedure of attachment and a single procedure of sale, otherwise if there were a multiplicity of applications and attachments and sales there would be considerable confusion. Learned counsel referred to the provisions of S. 73, Civil P. C., and stated that one application should be made by one of the persons entitled under this decree and that the other persons might apply for rateable distribution under S. 73. That section however states in Sub-S. (1) that it

1. Chooa Sahu v. Tripoora Dutt, (1870) 13 W R. 244.

implies to the case of execution of decrees for the payment of money passed against the same judgment-debtor. The use of the word in the plural indicates that the section is not intended to apply to the case of a single decree. The procedure therefore under S. 73 cannot in my opinion be imported into the present case. On the theory of learned counsel apparently what would be done is to have separate applications made for execution and for separate sales, each of separate parts of the property (which would be difficult in case the judgment-debtor has only one item of property) and also by some rule unspecified and unknown to the Code separate applications should be joined for the purpose of attachment and sales. It appears to me that all these difficulties are obviated if the procedure which has actually been adopted by the decree-holders is permitted and an application is entertained by the Court from all the persons entitled under this decree. For these reasons I consider that the decision of the lower Court was incorrect and that the application before it was an application which was perfectly good in law. It was therefore unnecessary for the lower Court to direct that the applicants should choose which of them should continue and which of them should withdraw from the application. I desire however to add my opinion on the points which have been raised by the memoranda of appeal. Assuming that the lower Court was correct in directing that the applicants must choose which of them should continue learned counsel has failed to satisfy me that there is any rule of law which prevents one of the applicants from withdrawing from the application. Learned counsel admitted that where there are several plaintiffs one of the plaintiffs may withdraw from the suit. He was not able to show why one of several applicants for execution could not similarly be allowed to withdraw if he desired. When one of the applicants withdraws, the application continues naturally in the name of the remaining applicants and as the application was made within the period of limitation no question of limitation can arise.

For these reasons I dismiss these two appeals under O. 41, R. 11. Permission is granted for a Letters Patent appeal.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 404

SULAIMAN, C. J. AND BENNET, J.

Ghana Nand—Plaintiff—Appellant.

v.

Gobardhan and *others*— Defendants—Respondents.

Letters Patent Appeal No. 72 of 1932, and Second Appeal No. 388 of 1930, Decided on 21st January 1935, from decision of Rachhpal Singh, J., Allahabad, D/- 1st December 1932.

Civil P. C. (1908), O. 41, R. 22 — Appeal by defendant and cross-objection by plaintiff—Latter allowed — Plaintiff appealing from decree—Defendant can either file cross appeal or file cross-objection to plaintiff's appeal—In either case appellate Court can dispose of entire suit

Where in an appeal filed by the defendant, the cross-objection filed by the plaintiff is allowed and the plaintiff files a second appeal not being completely satisfied with the lower appellate Court decree, it is open to the defendant either to file a cross-appeal from the other part or to file a cross-objection to the plaintiff's appeal. In either case the appellate Court is seized of the whole matter and has jurisdiction to dispose of the entire suit: 25 *All* 628 and 1924 *All* 867, *Dist.* [P 405 C 1]

Damodar Das—for Appellant.

R. C. Ghatak—for Respondents.

Judgment.—This is a Letters Patent appeal from a decision of a learned Judge of this Court dismissing the whole claim. The trial Court decreed the claim in part and dismissed the rest of the claim. The defendants filed an appeal to the lower appellate Court and the plaintiffs filed a cross-objection to that appeal. The result was that the plaintiffs' cross-objection was allowed and the claim was decreed to a larger extent while the defendants' appeal was only dismissed. The plaintiffs were not satisfied with their partial sucess and came up to the High Court in second appeal. The defendants, instead of filing any separate appeal, filed a cross-objection to the plaintiffs' appeal. The learned Judge held that the defendants' cross-objection was well founded and dismissed the whole suit.

In the Letters Patent appeal it is contended before us on behalf of the plaintiffs that the learned Judge of this Court had no jurisdiction to dismiss the whole claim. It is urged that it was the duty of the defendants to appeal from the decree dismissing their appeal and not merely file a cross-objection. Reliance was placed on the cases of 25 All 628 (1) and 1924 All

1. Ramji Das v. Ajudhia Prasad, (1903) 25 All 628.

867 (2). The former case was under the old Code, and in both the cases there were cross-appeals before the lower appellate Court.

In the case of the two cross-appeals in the lower appellate Court, where that Court passes two separate decrees which are not identical with each other, it may well be suggested that the subject-matter in dispute in the two cases is distinct and separate. Where the Court has passed two separate decrees in the two cross-appeals, it may well be argued that although a defendant who has not appealed from the decree dismissing his own appeal, may be allowed to file a cross-objection to the plaintiff's appeal in respect of any matter that was decided against him in the plaintiff's appeal, he should not be allowed to raise by way of cross-objection the matter which was decided against him in his own appeal from which he has filed no appeal. But in the case of a cross-objection pending in the lower appellate Court, no separate decrees are passed and there is only one joint decree disposing of the whole matter. To such a case O. 41, R. 22, is in express terms applicable; and where the plaintiff appeals from a part of that joint decree, it is open to the defendant either to file a cross-appeal from the other part or to file a cross-objection to the plaintiff's appeal. In either case the appellate Court is seized of the whole matter and has jurisdiction to dispose of the entire suit. We are therefore unable to hold that the learned Judge of this Court, when he had a cross-objection before him, had no authority to interfere with the dismissal of the defendants' cross-objection in the Court below. The appeal is accordingly dismissed with costs.

K,S. *Appeal dismissed*

2. Parbhu Dayal v. Murli Dhar, 1924 All 867= 78 I C 677.

A. I. R. 1935 Allahabad 405

BENNET, J.

L. Narain Das — Plaintiff — Applicant.

v.

Mannoo Lal—Defendant — Opposite Party.

Civil Revn. No. 377 of 1934, Decided on 13th December 1934, against order of Small Cause Court Judge, Cawnpore, D/- 8th June 1932.

Limitation Act (1908), Arts. 66 and 68 — Simple bond—Money payable after specified period—But in default of monthly payment of interest creditor may sue—Such clause is for benefit of creditor and he can waive right to sue on breach of condition to pay interest — In such case limitation will run only from period stipulated in bond — Arts 66 and 68 should be read together.

Where in a simple bond it is provided, that, if the monthly interest is not paid or if the principal money lent is not paid at the end of a specified period, the creditor may sue, even though there is a breach of the condition for payment of interest, still that is a matter over which the creditor has a right of waiver and limitation will only begin to run from the period stipulated in the bond for payment. In such cases the clause regarding right to sue on breach of condition regarding interest is exclusively for the benefit of the creditor. The two Arts. 66 and 68 must be read together in the case of such bonds; and limitation runs either from the date specified for payment of the bond or from the date when the condition as regards payment of interest is broken. The two Arts. 66 and 68 read together tantamount to Art. 132 and the expression "when the money sued for becomes due" would apply to either Art. 66 or Art. 68: 1933 *All* 235; 1933 *All* 235 (*F B*), *Relon.* [P 406 C 1, 2]

G. R. Pathak—for Applicant.

K. Verma—for Opposite Party.

Order.—This is an application in civil revision by a plaintiff whose suit was dismissed by a Small Cause Court on the ground of limitation. The plaintiff sued to recover a sum of money on a bond executed by defendant on 23rd April 1928. The bond contained the following terms:

"*Dar soorat na ada karne sood mahawari kisi mah kai ya guzar jane miad muayam bala ek sal ke har do surat me dain ko ikhtaiyar hai ki kul rupaya apne asal mai sood wa balai sood mujhse wa mere zat wa jaidad manqoola wa ghair manqoola se ba sarye nalizh adalat ek musht wasul kar lan.*"

This is a very usual term and it provides that if the monthly interest is not paid or if the principal money lent is not paid at the end of the year, in either case the creditor may sue. The finding of facts is not clear but the judgment indicates that the monthly interest was not paid and that the cause of action arose before the expiry of the year under Art. 68, Sch. 1, Limitation Act. The suit was actually brought on 1st April 1932, on the allegation in the plaint that the cause of action arose on 23rd April 1929, when the period of one year stipulated in the bond for payment of principal expired. The lower Court held however that the cause of action had arisen more than three years before the date on which the suit was brought. The lower Court then considered whether certain payments totalling Rupees 198 in the cash book of the creditor

would save limitation under Art. 20, Limitation Act, and it held that as the payments were not in the handwriting of the defendant limitation would not be saved by these payments. We are not now concerned with this matter.

The case for the applicant is that the suit is within limitation on the basis of certain rulings which lay down that even though there is a breach of the condition for payment of interest still that is a matter over which the creditor has a right of waiver and limitation will only begin to run from the period stipulated in the bond for payment. This was a simple money bond. The ruling on which reliance is placed in the main is a ruling of their Lordships of the Privy Council reported in 1932 P C 207 (1). That ruling was on a mortgage-deed for which the period of limitation is under Art. 132, Sch. 1. The ruling proceeded on the ground that a proviso of the nature quoted in the mortgage-deed was exclusively for the benefit of the mortgagee and that the proviso purported to give them an option either to enforce the security at once or if the security was ample to stand by their investment for the full term of the mortgage. If the contrary view were taken, and it was held that the breach of the condition for payment of interest rendered the mortgage money immediately due, the mortgagor would have a right to sue for redemption. Learned counsel for respondent argues that this particular line of reasoning is peculiar to a mortgage-deed and that as there is no redemption in the case of a simple money bond the reasoning ought not to be applied. I consider however that an analogous reasoning does apply in the case of a simple money bond. On the theory of the lower Court it would have been open to the debtor in the present case to pay back the principal when the first default was made which was apparently when the first month's interest became due. To allow a debtor such an option for his own default might be highly inconvenient to a creditor. A creditor places money at interest on a bond in which he fixes a period for repayment and it may well be that he desires that arrangement to stand until the period has elapsed. On the other hand, a debtor might suddenly find himself in possession of funds and desire to break the contract and make repayment at an earlier date. It does not follow that the creditor should be forced to accept such repayment before the date stipulated contrary to the principles laid down in the case of mortgages that a debtor should be allowed to pay off a simple money bond by means of making a default. I think therefore that the reasoning in the Privy Council ruling in question will apply also in the present case.

Further it would be extremely awkward to have one rule of limitation applying in the case of mortgages and a different rule of limitation applying in the case of simple money bonds where the terms and conditions were in identical language. The next argument which was made was on the difference in language between Art. 132 and Art. 68. In Art. 132 which is for enforcing payment of money charged on immovable property limitation begins to run from the time "when the money sued for becomes due." In article 68 for a suit on a bond subject to a condition limitation begins to run from the time "when the condition is broken." Learned counsel therefore argued that the expression was different in regard to a simple money bond. But a simple money bond is governed not only by Art. 68, but also by Art. 66 which provides for a suit on a simple bond where a day is specified for payment that time runs from "the day so specified." In a bond like the present if no default in payment of interest is made then Art. 66 applies for limitation. If, on the other hand, default is made in payment of interest then Art. 68 applies. The two articles therefore must be read together in the case of the bond in suit and limitation therefore runs either from the date specified for payment of the bond or from the date when the condition as regards payment of interest is broken. The two Arts. 66 and 68 read together are in my opinion tantamount to Art. 132 and the expression "when the money sued for becomes due" would apply to either Art. 66 or Art. 68.

Learned counsel also argued that Art. 80 would apply to the bond in suit, that is, for a suit on a bond not herein expressly provided for. If that article is taken limitation runs from the time when the bond becomes payable. Again I find no distinction to be drawn between this period and the period for Art. 132. Learned counsel also pointed out that in Art. 75 for instalment bonds there was a provi-

1. Lasa Din v. Gulab Kunwar, 1932 P C 207= 138 I C 779=59 I A 376=7 Luck 442 (PC).

sion in the column of time in regard to waiver and that provision does not appear in the articles which would refer to the bond in suit. That may be so, but in reply it may be said that there is no provision in Art. 132 for the period from which time begins to run for waiver. The ruling of their Lordships of the Privy Council in 1932 P C 207 (1) in regard to mortgages has been applied by a Bench of this Court to the case of a simple money bond in 1933 All 235 (2). The bond there had conditions similar to the present bond and I consider that no distinction can be drawn between that case and the present. Reference was also made to 1934 All 397 (3) where the ruling of their Lordships had been followed in the case of the mortgage bond.

For the opposite party it was admitted that there was no ruling of any Bench of this Court holding the view expressed by the Court below since the ruling had been given by their Lordships of the Privy Council in 1932 P C 207 (1). For these reasons I consider that the suit of the plaintiff is within time and accordingly I set aside the order of the lower Court and remand the case for decision on the merits. The costs hitherto incurred will be costs in the suit. Court-fees of this Court will be returned to the applicant in revision.

K.S. *Application allowed.*

2. Lalta Prasad v. Gajadhar Shukul, 1933 All 235=149 I C 181=55 All 283.
3. Muhammad Husain v. Sanwal Das, 1934 All 397=148 I C 951.

A. I. R. 1935 Allahabad 407

BENNET, J.

Secy. of State—Applicant.

v.

Messrs. Neaz Ali Hamid Ali — Opposite Party.

Civil Revn. No. 298 of 1934, Decided on 5th December 1934, against order of Small Cause Court Judge, Agra, D/- 26th January 1934.

Limitation Act (1908), Art. 30 — Suit for compensation against company for injury to goods — Limitation runs from date of injury and not from date of open delivery of such goods to consignee.

Under Art. 30, time begins to run from a perfectly definite date that is when the loss or injury occurs. Hence where it is clearly shown by the admission of the consignee's letter of 5th August 1931 that the loss had occurred prior to that date, a suit brought on 15th October 1932 is clearly time-barred. In such a case plaintiff cannot claim that limitation runs only from date of open delivery to him by the company : 1923 *All* 22 ; 1923 *All* 342, *Dist.* [P 407 C 2]

Muhammed Ismail—for Applicant.

Din Dayal—for Opposite Party.

Order.—This is a civil revision on behalf of the defendant the Secretary of State representing East Indian Railway, against a decree of a Small Cause Court of Agra. in favour of the plaintiff for Rs. 466 damages. Some points were taken by the learned Government advocate on behalf of the applicant in revision against details of the decretal amount and he pointed out that Rs. 74 for interest allowed was calculated on the total claim of Rs. 575 and the interest should have been reduced by the Court when the Court held that the amount due to the plaintiff as damages was Rs. 392 and not Rs. 575. These details however need not be further considered as it appears to me that the suit is barred on the ground of limitation. The admitted facts are that:

"a consignment of 30 bags of rice was sent to the plaintiff from Saharanpur to Agra and arrived on 3rd August 1931. A letter is on the file of the Court dated 5th August 1931 from the plaintiff to the defendant alleging that the consignment has been found in badly damaged and deteriorated condition owing to the wilful negligence of the railway servants as has already been personally pointed out."

This shows that the damage which forms the subject of the suit was known to the plaintiff on 5th August 1931. That damage is stated to have been caused by water to the consignment of rice. There is no suggestion in the plaint or in the judgment of the lower Court that further damage was caused at any later date. The suit of the plaintiff clearly comes under Art. 30, Sch. 1, Limitation Act, which is for a suit against a carrier for compensation for losing or injuring goods-period one year from the time when the loss or injury occurs. The loss or injury occurred prior to 5th August 1931, and the suit was not brought until 15th October 1932. Allowing a period of two months for the statutory notice the suit was 10 days beyong time under Art. 30. The lower Court has taken a different date for the start of limitation that is 15th August 1931. This was the date on which opened delivery was given to the plaintiff by the Railway. The lower Court has taken the date of open delivery as the starting point in accordance with three rulings. The first ruling is 1923 All 22 (1). This ruling dealt with Art. 31 which is for a suit against a carrier for compensation for non-deli-

very or delay in delivering goods and the period of one year runs from the date when the goods ought to be delivered. In that ruling there was some correspondence proved between the Railway and the consignee plaintiff and accordingly the Court held that the date when the goods ought to be delivered was indefinite and it extended that date by the time of the correspondence. Similarly in 1927 Oudh 478 (2), there was another ruling on Art. 31. The third ruling is reported in 1923 All 342 (3). This ruling is on Art. 48. The period of time in that article runs from the date when the person having the right to the possession of the property first learns in whose possession it is.

It is clear that a ruling on that article has no bearing on the present case. The rulings therefore quoted by the lower Court cannot be applied to Art. 30 where time begins to runs from a perfectly definite date that is when the loss or injury occurs. Here it is clearly shown by the admission of the plaintiff's letter of 5th August 1931, that the loss had occurred prior to that date. The suit therefore was brought beyond the time allowed by Art. 30, Limitation Act, and the suit is clearly time-barred. It was represented on behalf of the opposite party that a decree should be given for the amount of Rs. 146-11-9 which the Railway had offered to the plaintiff in full payment of the loss. That offer was not accepted by the plaintiff. The plaintiff chose to bring a suit in the Courts and he brought his suit beyond the time for limitation. No decree can be passed in the suit for any amount as the suit is time-barred. Accordingly I allow this application in revision with costs throughout and I dismiss the suit of the plaintiff.

K.S. *Application allowed.*

1. Jugal Kishori v. G. I. P. Ry. Co., 1923 All 22 =68 I C 981=45 All 43.
2. Bala Prasad v. B. N. W. Ry. Co., 1927 Oudh 478=106 I C 311.
3. Devi Deen & Sons v. Rohilkhand & Kumaon Ry., 1923 All 342=75 I C 669.

A. I. R. 1935 Allahabad 408

BENNET, J.

Messrs. Nanak Chand Shadiram—Appellant.

v.

Mahabir and *another*—Respondents.

First Appeal No. 109 of 1933, Decided on 27th November 1934, from order of Addl. Dist. Magistrate, Cawnpore, D/. 8th April 1933.

(a) Workmen's Compensation Act (1923), S. 30 (1) (a)—Order awarding compensation—Appeal lies.

An appeal lies under S. 30 (1) (a) from an order awarding compensation. [P 409 C 1]

(b) Civil P. C. (1908), O. 47, R 1 — Commissioner under Workmen's Compensation Act cannot review his order — Workmen's Compensation Act (1923).

The Commissioner under the Workmen's Compensation Act has no power to review his order under O. 47, R. 1. [P 409 C 1]

(c) Workmen's Compensation Act (1923), Ss. 10 and 19 (1) — Claim for compensation by son, widow and minor children — Commissioner passing order only in regard to claim of son — Subsequent application regarding claims of widow and minors—Order passed on original application — Commissioner has jurisdiction to do so.

Where in a claim for compensation by the son, widow and minor children of the deceased, the Commissioner passes an order regarding the claim of the son only and subsequently another application is made regarding the claims of widow and minors, the Commissioner has jurisdiction to pass order on the original application. [P 409 C 2]

(d) Workmen's Compensation Act (1923), S. 24—Formal appearance.

The words in S. 24 indicate formal appearance on behalf of person claiming. [P 410 C 1]

(e) Hindu Law — Joint family— Managing member can act on behalf of members without authorization in writing — Workmen's Compensation Act (1923), S. 24.

In the case of a Hindu joint family, acts on behalf of the members of the joint family such as the widows and minors are done by the managing members. Hence no authorization in writing by them is necessary. [P 410 C 1]

K. C. Mital — for Appellant.

Gopi Nath Kunzru—for Respondents.

Judgment.—This is a first appeal from order brought by an employer against an order, dated 8th April 1933, directing the employer to pay Rupees 393-12-0 only compensation to a widow of one Murli, who it was held died of accident on 26th June 1931, in the employment of the appellant. The facts are that within six months from the death on 24th August 1931 an application was made to the Collector of Cawnpore by one Mahabir, son of Murli setting out the facts and stating:

"3. That on his death Murli left as his heirs Mahabir, applicant, Hanuman, one widow and one daughter.

4. That according to S. 3, Cl.-A, S. 4, Workmen's Compensation Act, the applicant who is the son of the deceased and manager of his family is entitled to receive compensation to the extent of Rs. 540 from the defendant firm."

A written statement was taken in reply on 7th January 1933. The Collector passed an order on this application stating:

"The most important issue is whether Mahabir is entitled to claim compensation. He has

admitted that he is (now) in his 18th year. This settles the matter so far as Murli is concerned. He may not claim.

Now during the hearing an attempt has been made to bring up claims for a widow and two minor children of whom Mahabir has deposed but of whom he said nothing at all in his claim (or the preliminary notice to the employer) and who themselves have not claimed. The question present would be whether they could not be given compensation. No semblance of a sound reason has been shown for not introducing the alleged widow and minors to the Court at an earlier stage leave alone to the employer who may have been moved to pay some compensation if satisfied.

In these circumstances, I must and do hold that the claim is time barred, and it is so much so that I shall not extend the time.

I reject the claim."

On the same date an application was filed by Mahabir purporting to be for review under O. 47, R. 1, Civil P. C., stating that Mahabir was claiming in paras. 3 and 4 of his plaint for other members of the family and asking that the order of that date be set aside and that:

"the case be decided after taking into consideration paras. 3 and 4 of the plaint."

Next day the Commissioner held that the original application referred also to the widow and minors:

"I shall therefore take up their questions tomorrow, framing further issues necessary."

Three issues were framed and the order in question awarding compensation to the widow as a dependant was passed. In first appeal it has been urged that the Commissioner under the Workmen's Compensation Act has no power to review his order under O. 47, R. 1 and therefore that he had no jurisdiction to pass the order under appeal. An objection was taken that no appeal lay, but as the order awards compensation, I hold that an appeal lies under S. 30 (1) (a). It has not been urged for respondent that the Commissioner has powers of review and there is nothing in the Workmen's Compensation Act, to confer any power of review on a Commissioner under that Act. It has been held in 1930 Lah 657 (1), that a Commissioner has no power to set aside a previous order for compensation made by him under a mistake and in the general rules made under the Workmen's Compensation Act, R. 29, sub-R. (2), it is provided that no addition or alteration shall be made to the judgment other than the correction of a clerical or arithmetical mistake arising from an accidental slip or omission. I consider therefore that the Commissioner did not have powers to set aside his order of 7th January 1933, in review. It is true that the application made to him is headed "review", but it is also true that his order of 8th March 1933, does not purport to be an order in review or setting aside the previous order of 7th January 1933. What he purports to do is to pass orders in regard to the original written application of 24th August 1931, in so far as it refers to the claim of the widow and minors, as he had not passed any order in regard to that claim in that application. Learned counsel for appellant argued that he had passed an order, in the order of 7th January 1933. I do not think that he passed any order in regard to the claims of the widow and minors in the petition in his order of 7th January 1933, because the language of that order is confined to a hypothetical claim made orally on that date only in regard to the widow and two minor children. No order was passed in regard to the written claim on behalf of the widow and two minor children on 24th August 1931. In my view the order of 7th January 1933, was final as regards the personal claim of Mahabir, but no order was passed on that date in regard to the claims of the widow and minors. The Commissioner therefore had failed to adjudicate on that matter and a supplementary order was necessary. It is laid down in S. 19 (1). Workmen's Compensation Act, (8 of 1923). that:

"If any question arises under this Act as to the liability of any person to pay compensation ..... the question shall in default of agreement, be settled by the Commissioner."

The Commissioner was bound to settle the question of whether the compensation was due to the widow and minors on the application of 24th August 1931 and that claim which was brought within the period of six months from the death as prescribed by S. 10 was a claim which he had not decided. I consider therefore that the Commissioner had jurisdiction to pass order of 8th April 1933, now under appeal. Some further argument was made by learned counsel that the application of 24th August 1931, could not have been made by Mahabir on behalf of the widow and minors because S. 24 of the Act. requires that any appearance, application or act to be made or done by any person before or to a Commissioner may be made or done on behalf of such person by a legal practitioner or other person authorized in writing by "such person." As the words "other person" are joined to legal

1. In the matter of Karim Dad, 1930 Lah 657= 125 I C 637=1930 Cr C 801.

practitioner, I understand that these words indicate formal appearance on behalf of the persons claiming. In the case of a Hindu joint family acts on behalf of the members of the joint family such as the widows and minors are done by the managing member. It has been stated in these proceedings that Mahabir is the managing member. I consider therefore that the application was validly made by Mahabir on behalf of the widow and minors and that no authorization in writing by them was necessary. For these reasons I dismiss this first appeal from order with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 410

BENNET, J.

Lakhmi Das—Plaintiff—Appellant.

v.

Lakho Ram and *another*— Defendants —Opposite Parties.

Civil Revn. No. 518 of 1934, Decided on 21st December 1934.

(a) Penal Code (1360), S. 464 — A signing for B—B present at time—A must be held to be authorized to do so.

The definition of a false document given in S. 464 shows that for forgery a signature must be made by a person who knows that he has not got authority from the person whose signature he purports to make on it.

Where defendant 2 was present when defendant 1 made a signature for defendant 2 on the document in suit:

Held: that defendant 2 must be held to have authorized that proceeding and that there could be no question of want of authorization or forgery in law. [P 410 C 2]

(b) Negotiable Instruments Act (1881), S. 4 — Document showing that certain amount is due and that it will be paid in instalments on fixed dates with interest is promissory-note.

A document set out the fact of the amount of debt being due from the father of defendants and then stated that the total of Rs. 400 will be paid in four instalments on the dates fixed in four years with interest at one per cent per mensem:

Held: this was an unconditional promise to pay and therefore the document was a promissory-note within the meaning of S. 4. [P 411 C 1]

(c) Promissory-note — It may be by instalments—Negotiable Instruments Act (1881), S. 5.

The second para. of S. 5 shows that a promissory-note may be payable by instalments. [P 411 C 1]

(d) Stamp Act (1899), Ss. 35, 36 and 61—Promissory-note insufficiently stamped cannot be admitted in evidence even on payment of stamp duty and penalty—But where lower Court has admitted it, such admission cannot be questioned—Promissory-note.

A promissory-note which is insufficiently stamped cannot be accepted on payment of the stamp duty, and penalty as a promissory-note is excepted by sub-S. (a). But where the instrument has been admitted in evidence by the lower Court, the admission cannnot be questioned. S. 61 does not give any jurisdiction to deal with the case of an instrument which should not have been admitted at all. [P 411 C 1, 2]

(e) Negotiable Instruments Act (1881), S. 118-Lower Court holding document not to be promissory-note and not taking presumption under S. 118(a) finding document not supported by consideration — Document found by appellate Court to be promissory-note — Decision regarding consideration is vitiated.

Where the lower Court holds a document which is truly a promissory-note to be not a promissory-note and without taking the presumption under S. 118 (a) finds the document not supported by consideration, the decision regarding consideration is vitiated. [P 411 C 1]

Din Dayal—for Applicant.

N. P. Asthana and *B. N. Sahai*—for Opposite Parties.

Order.—This is a civil revision by a plaintiff whose suit has been dismissed on preliminary issues by a Small Cause Court. The plaintiff sued on a document dated 30th September 1930, to recover Rs. 365-2-0. The plaintiff alleged that Rs. 400 was due to him from the father of defendants, who was dead at that time, and that the defendants agreed to pay the amount and executed the document in suit. The lower Court held that it had not been proved that the document was executed for consideration, and further it stated that defendant 1 forged the signature on the document of defendant 2. At the same time the Court held that defendant 2 was present when defendant 1 wrote the signature of defendant 2 on the document. The definition of a false document is given in S. 464, Penal Code, and it shows that for forgery a signature must be made by a person who knows that he has not got authority from the person whose signature he purports to make on it. As defendant 2 was present when defendant 1 made a signature for defendant 2 on the document in suit, I consider that defendant 2 must be held to have authorized that proceeding and that there could be no question of want of authorization or forgery in law.

The next question is what is the nature of the document. The lower Court states that it appears to be an acknowledgment, but as interest is mentioned in it so it cannot be called an agreement. The document sets out the fact of the amount of debt being owing from the father of defendants and then states that the total of

Rs. 400 will be paid in four instalments on the dates fixed in four years with interest at 1 per cent per mensem. This appears to me to be an unconditional promise to pay and therefore the document is a promissory note within the meaning of S. 4, Negotiable Instruments Act. The second paragraph of S. 5 shows that a promissory note may be by instalments. As the document is a promissory note a presumption arises under S. 118 (a), Negotiable Instruments Act that it was made for consideration. The lower Court has not taken this presumption into account because it did not hold the document to be a promissory note. The decision therefore on the question whether there was consideration or not has been vitiated by the failure to consider this presumption of law.

Learned counsel for the defendants-respondents argues that the document was not properly stamped. The document bore a stamp of two annas. As a promissory note came under Art. 49, Sch. 1. Stamp Act, and it was payable otherwise than on demand, the duty was the same as under Art. 13. a bill of exchange, and under Art. 13, as some of the instalments were payable at more than one year after date the duty would be the same as on a bond, that is Rs. 2 under Art. 15 on a bond for an amount exceeding Rs. 300, but not exceeding Rs. 400. Learned counsel therefore argues that under S. 35, Stamp Act. the instrument being a promissory note should not have been admitted into evidence, and he further points out that a promissory note which is insufficiently stamped cannot be accepted on payment of the stamp duty and penalty as a promissory note is excepted by sub-S. (a). This argument is undoubtedly correct, but the instrument has been admitted in evidence by the lower Court. Under S. 36 where an instrument has been admitted in evidence such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. S. 61, sub-Ss. (1) and (2) gives a Court in the exercise of civil jurisdiction, being the Court to which appeals lie, a jurisdiction to deal with the case of instruments which should not have been admitted in evidence without the payment of duty and penalty under S. 35 or without the payment of a higher duty than those paid. It does not give such Court any jurisdiction to deal with the case of an instrument which should not have been admitted at all. The language of S. 36 is perfectly clear and as this Court has got no authority to deal with the instrument under S. 61. therefore the instrument cannot now be called in question on the ground that it was not duly stamped. The objection therefore cannot be taken in this Court.

I consider therefore that the decree of the lower Court must be set aside and I set it aside and I remand the case to the lower Court for disposal according to law, that is, it will take into account the presumption which arises under S. 118 (a), Negotiable Instruments Act, on this instrument as a promissory note. Costs hitherto incurred will abide the result. The plaintiff will receive the court-fee in this Court under S. 13, Court-fees Act.

K.S. *Decree set aside.*

A. I. R. 1935 Allahabad 411

KISCH AND BAJPAI, JJ.

Babu Ram and *others*—Appellants.

v.

Inam Ullah—Plaintiff—Respondent.

First Appeal No. 561 of 1930, Decided on 19th December 1934.

(a) Civil P. C. (1908), O. 34, R. 6 and S. 11, Expl. 5—Plaintiff claiming personal decree in plaint — Defendent not denying it nor Court mentioning anything about it in decree—Subsequent application under O. 34, R. 6 is not barred by res judicata.

Where the right of the plaintiff to obtain a personal decree has been decided, the parties will be bound by such decision. But where there has been no decision on the point, even though plaintiff had claimed for such a relief in the plaint, the plaintiff is not barred from claiming it under Expl. 5, S. 11. Expl. 5 would not apply unless the relief claimed was such as it was obligatory on a Court to grant: *Case law referred.* [P 413 C 1; P 414 C 2]

(b) Civil P. C. (1908), O. 34, R. 6—Charge created by operation of law—Charge-holder is not disentitled from pursuing personal remedy—Transfer of Proporty Act (1882), S. 100.

– If a charge holder has all the right of a simple mortgagee, he can, when the net proceeds of the sale have proved insufficient and if the balance is legally recoverable from the defendant, claim a personal decree for such amount. The mere fact that the charge has been created by operation of law does not disentitle the charge holder from pursuing the personal remedy : 1934 *Cal* 862, *Dist.* [P 415 C 2; P 416 C 1]

(c) Contract—Deed executed by one party according to agreement — Both parties are bound.

In India agreements between two contracting parties are evidenced by the execution of a single document by one of the parties alone yet if the contract is agreed upon the parties are bound by

the rights conferred and the liabilities imposed by the document. [P 415 C 2]

Panna Lal—for Appellants.

Harnandan Prasad and *P.M.L. Verma*—for Respondent.

Bajpai, J.—This is an appeal by the defendants against whom a personal decree under O. 34, R. 6, Civil P. C., has been passed by the Court below.

The facts which have given rise to this appeal are as follows: On 15th November 1915, Ahmad Husain, Hamid Husain, Mt. Maqbul-un-nissa and Anwar Husain sold some immovable property to Mool Chand, Babu Ram, Makhan Lal and Raghunath Das, for a sum of Rs. 12,266. Out of this, a sum of Rs. 3,030 was left with the vendees for payment to one Moti Lal, a creditor of the vendors. The vendees did not pay the said amount to Moti Lal, and the vendors thus obtained the right to recover the amount of unpaid purchase money from the vendees. This right was sold to Inam Ullah the present plaintiff 1.

On 16th November 1921, Inam Ullah together with the original vendors brought suit No. 220 of 1921, in the Court of the Subordinate Judge of Budaun for recovery of a sum of Rs. 3,030 together with Rs. 2,727 as interest against Mool Chand Babu Ram, Makhan Lal and Raghunath Das by sale of the property which had been sold to them and it was also prayed that if the property aforesaid be not sufficient for the amount claimed, then the plaintiffs may be allowed to recover the amount from the person and other property of the defendants. On 20th March 1922 the suit was decreed and it was said that in default of payment, the property comprised in the saledeed or a sufficient part of it should be sold. No issue was struck on the question of the plaintiffs' right to recover any portion of the decretal amount from the person and other property of the defendants, nor was there any discussion in the judgment on that point. The decree that was framed was on a printed form and the printed words "if the sale proceeds be printend words "if the sale proceeds be entitled to obtain a personal decree" were scored out.

On 16th October 1922, a final decree for sale was prepared and in execution thereof the property was sold on 28th November 1923, for Rs. 1,550 and the sale, notwithstanding the defendants' application to set it aside, was confirmed on 8th December 1925, by the executing Court. On 12th December 1925, Inam Ullah, applied for the preparation of a personal decree under O. 34, R. 6, Civil P. C., against the vendees. The learned Subordinate Judge on 6th March 1926, dismissed the application of Inam Ullah for the preparation of a personal decree and on 8th June 1926, Inam Ullah, filed First Appeal No. 296 of 1926, in the High Court against the order refusing to prepare a final decree. Before this appeal could come up for hearing, the vendees appealed to the High Court against the order of the executing Court dated 8th December 1925, confirming the sale in favour of Inam Ullah and on 21st December 1926, the High Court allowed the appeal of the vendees against the order refusing to set aside the sale and directed a fresh sale to be held. This second sale took place on 20th October 1927 and the price that was fetched at the auction-sale was Rs. 4,400.

First Appeal No. 296 of 1926, came up for hearing in this Court on 28th May 1929 when a preliminary objection was taken on behalf of the defendants-respondents. The plaintiff, Inam Ullah, therefore took time to apply for the amendment of his application dated 12th December 1925, for the preparation of a decree under O. 34, R. 6 on the ground that as by reason of the fresh sale a larger amount was obtained, the amount for which the personal decree was to be passed should be decreased from Rs. 6,666-12-0 to Rs. 5,088-7-6. Babu Ram and others objected to the amendment being granted on the ground that the original application for the preparation of a personal decree was based upon a sale that took place on 28th November 1923. That was confirmed on 8th December 1925, and as the said sale was set aside by the High Court on 21st December 1926:

"all proceedings incidental thereto and consequent upon such sale including the application for preparation of a personal decree were ipso facto swept aside and Inam Ullah could not legally ask for amendment of an application that has become ineffectual and inoperative."

It was said that Inam Ullah could not be allowed in law to convert a cause of action that arose in 1925 into one that accrued in 1927 and:

"make his application of 12th December 1925 relate prospectively to an event that happened about two years later."

The defendants alleged that several questions required determination and could be gone into only when a fresh application on the basis of the subsequent sale was made. This matter

came up for hearing before this Court on 24th October 1929, and it was held that the defendants' contentions were valid and the amendment could not be granted.. The learned Judges said that:

'first sale having been set aside, subsequent proceedings under O. 34, R. 6 automatically fell through"

and the result was:

"that the parties were relegated to the position which they occupied immediately after the final decree was passed."

The plaintiff's application for amendment having been rejected, the plaintiff made an oral request for the withdrawal of his appeal and the learned Judges acceded to this request. The result was that First Appeal No. 296 of 1926 was dismissed with costs on 24th October 1929. On 11th August 1930. Inam Ullah applied for preparation of a personal decree under O. 34, R. 6. against Babu Ram, Mt. Hira Kunwar, widow of Mool Chand, Makhan Lal and Raghunath Das for the recovery of a sum of Rs. 5,404-8-0. Babu Ram and others objected on the ground that the decree-holder was not entitled to a personal decree and that the application was barred by the rule of res judicata. The Court below repelled the objections of the defendants and directed that a decree under O. 34, R. 6 be prepared against the judgment debtors, Babu Ram, Makhan Lal, Raghunath Das and the assets of Mool Chand in the hands of Mt. Hira Kunwar. The defendants have appealed. They contend that the present application was barred by the principle of res judicata, that the appellants were not personally liable, and that the application was barred by time.

The plea of res judicata, asserting that the plaintiff's right to obtain a personal decree has been negatived previously, is taken with reference to two proceedings. It is said that when the plaintiff brought suit No. 220 of 1921. he definitely claimed a relief to the effect that if the property, the sale of which was claimed, be not sufficient for the amount of the suit, then the plaintiff may be allowed to recover the amount of the suit from the person and other property of the defendants and as this relief was not granted, the plaintiff is not entitled to obtain the same relief at a later stage of the suit. We are of the opinion that this contention is not sound. In 14 All 513 (1). the learned Judges observed that although:

"it is true .... that .... a general form of plaint for a suit for sale under a mortgage, does include in its prayers for relief a prayer that if the proceeds of the sale of the mortgaged property shall not be sufficient for payment in full of the amount to be ascertained, the defendant should pay to the plaintiff the amount of the deficiency .... The more correct way of drawing up a decree in a suit for sale on a mortgage would be to confine the decree for sale, i. e., the first decree to be passed to a decree under S. 88 against the mortgaged property, and that any subsequent relief to which, after that decree had been executed .... the plaintiff was entitled, should stand over for a decree under S. 90."

They went on to say:

"In our opinion S. 13, Civil P. C., would not apply to an application under S. 90 for a decree, no matter whether the plaintiff had or had not claimed originally in his suit subsequent relief, or whether, if claimed, such subsequent relief had been allowed or disallowed by the Court when making the decree under S. 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under S. 88 had been exhausted."

In 2 A L J 379 (2), Banerji, J., held that:

"In such a suit although the plaintiff may properly claim a personal decree against the defendant, the Court in making its decree under S. 88 should confine the decree to one for sale of the property"

and the learned Judge referred to Musahab Zaman Khan's case with approval. It is however contended by the appellants that form No. 128 which was a general form of decree for sale in a mortgage suit under the Transfer of Property Act. of 1882, is very different from form No. 4 in Sch. 1, Civil P. C.; for whereas the previous form was confined strictly to a decree under S. 88, T. P. Act. and did not include any subsequent relief, the present form contemplates the inclusion of a statement to the effect that if the net proceeds of the sale are insufficient to pay the amount, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance; but this simply means that it is open to a Court, while deciding the suit. to adjudicate upon the right of the plaintiff and implies that if the Court so chooses, it may decide whether the plaintiff will or will not be at liberty at a later stage to apply for a personal decree. There can be even now no doubt that the appropriate time for such an adjudication is when the sale has been held and the net proceeds of the sale have been found to be insufficient. The amount for which the personal decree is to be given can under no circumstances

1. Musaheb Zaman Khan v. Inayatullah, (1892) 14 All 513=1892 A W N 80.

2. Uttam Ishlok v. Phulman Rai, (1905) 2 A L J 379=1905 A W N 144.

be determined till after the sale has taken place and before this stage is reached, the Court can at best determine the abstract right of the plaintiff to obtain a personal decree. Where therefore as. in the present case, the Court has not struck an issue on this abstract right of the plaintiff and has not decided the same. it cannot be said that when the sale has taken place, the plaintiff is precluded from obtaining a personal decree after the sale. if he is otherwise entitled. The form of the decree has now received a further modification and it runs as follows:

"The plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and the law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance."

Reliance is placed by the learned counsel for the appellants on the case of 28 All 365 (3), which was an appeal under the Letters Patent from the decision in 2 A L J 379 (2) wherein the learned Judges referred to the case in 14 All 513 (1), and said that they did not disagree with the view taken in that case. but added that where a party entitled to a charge claims not merely a remedy against the property the subject-matter of the charge, but also a personal remedy against the owner of that property. it was not premature to decide the question of liability on the hearing of the original suit and if this question has already been the subject of determination at the former trial, the rule in 14 All 513 (1). was too broadly stated. It would therefore appear that the Court can, if it so chooses, determine this question at the hearing of the original suit but it is not bound to do so, and if it has refrained from deciding the question, although a claim was made in the plaint, it cannot be said that a subsequent claim to that effect at a later stage is barred by res judicata. Mr. Panna Lal has referred us to the cases of 1918 P C 159 (4), 1934 Cal 764 (5), 1930 Oudh 378 (6), 1933 Lah 329 (7) and 1933 Oudh 352 (8), wherein it has been held that if there is a composite decree. that is, a decree for sale. containing a declaration that if the net proceeds of the sale are insufficient to pay such amount, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance, there is an adjudication which is detrimental to the defendant and if the defendant does not appeal from it, he is under S. 97, Civil P. C., precluded from disputing its correctness afterwards. Yet there are observations in some of these cases that the personal relief against the mortgagor can be asked generally only when proceeds of the sale prove insufficient and that a composite decree like this may be valid, but it is usually improper. All these cases only go to show that where the right of the plaintiff to obtain a personal decree has been decided. the parties will be bound by such decision. We have not been referred to a single case wherein it has been held that if there has been no decision on the point and if the plaintiff had claimed for such a relief in the plaint, the plaintiff would be barred from claiming it under Expln. 5, S. 11. Expln. 5 would not apply unless the relief claimed was such as it was obligatory on a Court to grant and the cases, including cases of this Court, to which reference has already been made show that it is not obligatory for a Court to grant the relief in the nature of a personal remedy at the time of the original suit. In 1927 Mad 779 (9). it was held:

"that the fact that the personal remedy is asked for in the plaint and that nothing appears about it in the decree, is not enough to say that the plaintiff is for ever after barred from asking for it."

We might mention that in the written statement the defendants nowhere alleged that the plaintiff was not entitled to a personal decree.

It is then said that the plaintiff did once on 12th December 1925, ask for a personal decree and the Court on 6th March 1926. refused the plaintiff's application. The plaintiff's appeal against this decision having been dismissed on 24th October 1929, the plaintiff is at all events now debarred from claiming a personal decree by his present application. This is the second proceeding with reference to which the plea of res judicata is taken and strong reliance is placed on the case of 1921 P C 11 (10). where their Lordships

3. Uttam Ishlok Rai v. Ram Narain Rai, (1906) 28 All 365=3 A L J 171=1906 A W N 44.
4. Jeuna Babu v. Parmeshwar Narayan, 1918 P C 159=49 I C 620=47 Cal 370 (P C).
5. Mukhram Agarwala v. S. Ehsan Ahmad, 1934 Cal 764=152 I C 770.
6. Ram Nath v. Nageshur Singh, 1930 Oudh 378=126 I C 689 (F B).
7. Ishar Das v. Maya Mal, 1933 Lah 329=144 I C 738.
8. Maqbool Ahmad v. Dinga Prasad, 1933 Oudh 352=144 I C 931 (F B).
9. Govindasamy Koundan v. Kandasamy Koundan, 1927 Mad 779=103 I C 528.
10. Hook v. Administrator General of Bengal, 1921 P C 11=48 I A 187=48 Cal 499 (P C.)

held that S. 11, Civil P. C., is not exhaustive of the circumstances in which an issue is res judicata and it was observed that the binding force of an adjudication at one stage of the suit depends not necessarily upon S. 11, but upon general principles of law and that if it were not binding, there would be no end to litigation. In an administration suit it was held that a certain gift over was invalid as creating a perpetuity and in further proceedings in the suit the validity of the gift over was attempted to be reagitated and their Lordships held that this could not be done. We have, in an earlier portion of our judgment, referred at some length to the circumstances under which the plaintiff withdrew his appeal and we are of the opinion that as a result of the decision by the High Court, the plaintiff's right to obtain a personal decree has been expressly reserved and that the defendants cannot be permitted to say that the plaintiff should not now be allowed to claim a personal decree on the ground of res judicata, if under the law he is entitled to it. The first sale after which the claim was made for a personal decree was set aside by the High Court. The plaintiff had appealed against the decision of the learned Subordinate Judge, disallowing the plaintiff's application for a decree under O. 34, R. 6, and the defendants raised a preliminary objection that the appeal had then become infructuous and when the plaintiff wanted to amend his application, they strenuously resisted the same and this Court definitely said that by reason of subsequent events the parties had been relegated to the position which they occupied immediately after the final decree was passed. In our opinion the defendants cannot be permitted to take up now a contrary position on general principles of law and, if anything has been decided between the parties by this Court it is that the plaintiff has obtained a fresh right to apply.

We now proceed to decide the question whether the plaintiff can obtain a personal decree. Mr. Panna Lal contends that under S. 55, Cl. (4), sub-S. (b), T. P. Act, the plaintiff has a charge upon the property sold to the defendants to the extent of the unpaid purchase money and he must confine himself to that property alone; he cannot claim any relief against the person and other property of the defendants. He has however to meet the provisions of S. 100, T. P. Act, which provides that:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge,"

If a charge holder has all the right of a simple mortgagee, he can, when the net proceeds of the sale have proved insufficient and if the balance is legally recoverable from the defendant, claim a personal decree for such amount. It is said that where a charge has been created by operation of law the charge holder is not clothed with the rights of a simple mortgagee qua a personal remedy. Reliance is placed on the case of 1934 Cal 862 (11), but the facts of that case were entirely different.. Their Lordships held that S. 67-A. T. P. Act, did not apply where a charge has been created under section 205. Calcutta Municipal Act. Reference was also made to the judgment of Richards, J., in 2 A L J 379 (2), but Banerji, J., the other member of the Bench, was of a contrary opinion and we feel inclined to agree with his view for the reasons given by him. It is worthy of note that there was an appeal against this decision and although the decision of the Letters Patent Bench proceeded on a different point Stanley. C. J., observed that if it were necessary to determine the question of the right of a charge holder to obtain a personal decree they would have difficulty in resisting the forcible reasoning to be found in the judgment of Banerji, J. It is conceded that if the plaintiff had brought a suit in the first instance for the recovery of the unpaid purchase money from the defendants personally, there could have been no defence. In the sale-deed in favour of the defendants there was an express stipulation that Rs. 3,030 was being left with the vendees for payment to one Mool Chand, a creditor of the vendors. In India agreements between two contracting parties are evidenced by the execution of a single document by one of the parties alone and yet if the contract has been agreed upon the parties are bound by the rights conferred and the liabilities imposed by the document. The defendants therefore must be deemed to have covenanted to pay the sum

11. Corporation of Calcutta v. Arun Chandra Singh, 1934 Cal 862=153 I C 972=61 Cal 1047.

of Rs. 3,030 to the creditor and as they broke the contract, the article applicable would be 116 of the Limitation Act, the document being a registered one, and the period of suit would be six years. Art. 111, Limitation Act, would not be applicable because that applies to a simple case where the vendee has not paid a portion of the purchase money to the vendor and not where he has broken a contract to pay the same to a creditor of the vendor. There can be no doubt that the vendee made himself personally liable and the amount therefore is legally recoverable within the meaning of O. 34. R. 6, and mere fact that a charge also has been created by operation of law does not disentitle the charge holder from pursuing the personal remedy.

Mr. Harnandan Prasad on behalf of the respondent has referred us to 1931 All 99 (12). This case fully supports the respondent both on the point of res judicata and on the question of the plaintiff's right to obtain a personal decree. It was held that where title has passed to the purchaser as the result of the purchase, the purchaser is personally liable for the purchase money under S. 55 (5), Cl. (b), T. P. Act, irrespective of the personal liability created by the sale-deed and that this personal liability is apart from the liability imposed on the property purchased by him under S. 55 (4), Cl. (b). The learned Judges said that where a charge is the result of a contract, there may also be a personal remedy to be found. While discussing the plea of res judicata, they observed as follows:

"The question of res judicata arose in this way. The plaintiff when he brought his suit appended relief (b) to his plaint:

'If the proceeds of the sale be insufficient to pay up the decretal amount due to the plaintiff at the time, he may be authorized to apply for a decree for the balance.

Exception was taken on behalf of the defendants to the reliefs sought by the plaintiff. But nothing specifically was said about the particular relief which we have quoted above. No issue was framed . . . . . The learned Judge who tried the case does not mention even the existence of this relief in his judgment. He contented himself with passing a decree under O. 34, R. 4, Civil P. C. The decree that was framed followed the form No. 8 series (d) appended to Sch. I and gave the plaintiff liberty to apply for a personal decree for the amount of the balance.

On behalf of the appellants it has been contended that this decree having become final, the plaintiff's right to apply under O. 34, R. 6 has been recognized once for all and the decree can not be departed from.

We are of opinion that S. 11, Civil P. C., does not in terms apply to this case. The present proceedings are only a part of the original proceedings and it cannot be said that the matter was decided either specifically or by implication in a previous suit. The rule of res judicata has been applied to subsequent proceedings when the points raised in the subsequent proceedings were raised in the earlier proceedings and were specifically decided. In the circumstances we do not think that we are in a position to apply the rule of res judicata and to hold that the plaintiff's right has been settled once for all and in his favour."

The case before us is, if anything, stronger on facts and we also, as we said before, are not prepared to hold that the plaintiff's right has been so settled once for all when the preliminary decree was passed against him. We are therefore of the opinion that the plaintiff is entitled to a personal decree and there is no bar either of res judicata or of any other principle of law to his obtaining such a decree.

Finally it was contended that the plaintiff's application for the preparation of a final decree was barred by time. There is no force in this contention. As stated before the article applicable to the facts of the present case is Art. 116, Limitation Act. The sale-deed was executed on 15th November 1915 and the suit was brought within six years of that date on 16th November 1921, because 15th November 1921 was a holiday. For the reasons given above, we have come to the conclusion that the decision of the Court below is correct and we dismiss this appeal with costs.

K.S. *Appeal dismissed.*

12. Raghukul Tilak v. Pitam Singh, 1931 All 99=130 I C 198=52 All 901.

A. I. R. 1935 Allahabad 416

NIAMATULLAH, J.

Mohammad Yar Khan—Appellant.

v.

Puran Pershad—Respondent.

Second Appeal Nos. 10 and 11 of 1933, Decided on 6th February 1935, from order of Dist. Judge, Moradabad, D/- 7th July 1933.

Provincial Insolvency Act (1920), Ss. 6 and 9—Merely because debts exceed Rs. 500, creditor is not entitled to make application—Act of insolvency committed by debtor must be proved.

Section 9 of the Act prohibits a creditor from making an application for insolvency, inter alia where the debts do not amount to Rs. 500 or more. It does not follow that if the debts exceed that amount, a creditor is necessarily entitled to make an application for insolvency. The condition required by S. 7 must also be ful-

filled viz. that debtor had committed act of insolvency. [P 417 C 1]

M. Mahmudullah—for Appellant.

R. K. S. Toshniwal—for Respondent.

Judgment.—These two connected appeals arise from two applications made by the respondent under the Insolvency Act, for an order adjudging the appellants as insolvents. He claims to be a creditor under a promissory note, dated 15th May 1929, said to have been executed by the two appellants. The latter executed a sale-deed on 9th September 1931, in favour of their wives in lieu of their dower debts. Thereupon the respondent made two applications one against each of the appellants on the same date for the insolvency of the two debtors who are brothers. The respondent was absent on the day the case was taken up by the Court of first instance, which dismissed the application not for non-appearance, but on the merits. The respondent preferred an appeal in the Court of the District Judge, Moradabad. who reversed the order of the first Court and adjudicated the appellants as insolvents. The present appeals are from the order of the District Judge.

It is argued that, in the absence of a finding that the appellants committed an act of insolvency, no order of adjudication could be passed. The learned District Judge has found that the appellants are indebted in sums exceeding Rs. 500; but he has not arrived at any definite finding as to whether they committed any act of insolvency. S. 9, Provincial Insolvency Act, prohibits a creditor from making an application for insolvency inter alia, where the debts do not amount to Rs. 500 or more. It does not however follow that if the debts exceed that amount, a creditor is necessarily entitled to make an application for insolvency. The condition required by S. 7 must also be fulfilled. That section provides that if a debtor commits an act of insolvency, an insolvency petition may be presented either by a creditor or by a debtor. It follows that the second condition which must be present before an application made by a creditor for insolvency can be entertained is that the debtor committed an act of insolvency. S. 6 lays down what amounts to an act of insolvency. None of the clauses other than (b) and (c) of that section are said to be applicable to the circumstances of this case. There is no finding by the lower appellate Court that the appellants made a transfer of their property or any part thereof with intent to defeat or delay their creditors, or that they made any transfer of their property or any part thereof which would, under the Provincial Insolvency Act, or any other enactment for the time being in force be void as a fraudulent preference, if they were adjudged insolvents. The learned Judge has referred to the sale made by the appellants in favour of their wives and remarked that:

"Transfer of one's tangible property to wife in lieu of dower is always suspect"

Before adjudicating the appellants as insolvents, the learned Judge should have definitely found, as was alleged by the respondent, that the sale in question amounted to a fraudulent preference. In the absence of such finding, the order of adjudication, passed by the lower appellate Court was not justified. I allow this appeal set aside the order of the lower Court and remand the case to that Court for disposal according to law. Costs shall abide the result.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 417

NIAMATULLAH, J.

Bhagwan Dass—Defendant — Appellant.

v.

Kashi Prasad and *others* — Plaintiff and Defendant — Respondents.

Second Appeal No. 1435 of 1934, Decided on 14th February 1935, from decision of Sub-Judge, Mirzapur, D/- 8th August 1934.

Limitation Act (1908), S. 44 — Property alienated by guardian as if it were his own — Suit by minor for possession after attaining majority—Art. 44 does not apply—Minor.

Where a minor's property is sold by his guardian, who professed to act as such or who can be shown to have acted in that capacity, the minor may be bound to have the deed set aside within three years after attaining majority ; but where the property has been alienated by the guardian as if it were his own and the mortgagee treats it as the property of the alleged guardian personally and has it sold as such, Art 44 cannot apply. Such a transfer is void ab initio.

[P 418 C 1]

N. U. A. Siddiqui—for Appellant.

Judgment.—This is an appeal by the defendant in a suit brought by the plaintiff-respondent for recovery of possession of certain property alleged to belong to him. The defence was that the plaintiff's suit was barred by limitation, as the defendant was an auction-purchaser in execution of a decree passed on foot of a mortgage made

by the plaintiff's natural guardian, and as the suit had not been brought within three years after the plaintiff attained majority. Art. 44, Limitation Act, was relied on. The lower appel-Court held that that article did not apply in the circumstances of this case.

The property in dispute was purchased by the plaintiff's father, on whose death the plaintiff inherited it. During the latter's minority one Panna Lal and the plaintiff's mother executed a deed of simple mortgage in favour of one Ram Charan. The deed, on the face of it, affords no indication whatever that the property belonged to the plaintiff and that his mother acted as his guardian in that transaction. On the contrary the recitals clearly show that the executants of the deed had contracted certain loans in lieu of which the mortgage-deed in question was executed. Subsequently the mortgagee instituted a suit on foot of the aforesaid mortgage and obtained a decree for sale. It is noteworthy that the plaintiff was not impleaded in that suit, and the property was treated as the property of those who had executed the mortgage-deed then in suit. A decree was passed against the plaintiff's mother and her co-mortgagor and their interests in the property should be deemed to have been sold and purchased by the appellant.

In my opinion, Art. 44 cannot apply to a case of this description. Where a minor's property is sold by his guardian who professed to act as such or who can be shown to have acted in that capacity, the minor may be bound to have the deed set aside within three years after attaining majority; but where the property has been alienated by the guardian as if it were his own and the mortgagee treats it as the property of the alleged guardian personally and has it sold as such Art. 44 cannot apply. It cannot be said to be a case of a transfer of minor's property by his guardian. Where a guardian transfers property in circumstances which did not justify the transfer, such transfer is only voidable. Where however the transfer is void ab initio, Art. 44 does not apply. Where a minor's property is sold by another person, even though he be his guardian claiming it to be his own, the minor's interest is not affected by such transfer, which is void.

The decree appealed from is correct. The appeal is dismissed under O. 41 R. 11, Civil P. C.

Leave to appeal under the Letters Patent is granted.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 418

NIAMATULLAH AND ALLSOP, JJ.

Chunnu Lal and *others* — Plaintiffs — Appellants.

v.

Swami Prasad and *others* — Defendants—Respondents.

First Appeal No. 362 of 1930, Decided on 17th December 1934, from decision of Addl. Sub-Judge, Banda, D/- 23rd April 1930.

Hindu Law—Family arrangement — Nearest reversioner agreeing to settle dispute and accepting consideration for recognizing adoption — He and his heirs are bound by arrangement.

Where in a dispute between two ladies and the nearest reversioner, the latter agreed to a settlement and accepted consideration for recognizing the adoption :

Held : that he and his heirs were bound by the arrangements : 1918 *P C* 70, *Rel on.*

[P 420 C 1, 2]

P. L. Banerji, N. C. Vaish and *H. P. Sen*—for Appellants.

K. N. Katju, Bankey Behari and *K. B. L. Nigam*—for Respondents.

Niamatullah, J.—The appellants were plaintiffs in the Court below. The suit which they instituted was for the recovery of certain zamindari shares, shops. houses and trees which were at one time admittedly, for the most part, the property of one Ajudhia Prasad. They claimed this property as Ajudhia Prasad's reversioners. We may mention that it was alleged that a few of the properties had not belonged to Ajudhia Prasad and there was some controversy upon this point in the Court below but these questions have not been seriously argued before us and in the view of the case which we take. it is unnecessary to go into them. Of the plaintiffs appellants 8 are the sons and grandsons of Faqire, Jagannath and Bankey who were the nephews of Ajudhia Prasad. The 9th plaintiff is a transferee of part of the property from some of the other plaintiffs. It is admitted that the right of the plaintiffs to claim possession could not have arisen before the death of Mt. Lalta Bai Ajudhia Prasad's daughter, and that at that time Faqire was alive and Jagannath and Bankey were dead. It is therefore evident that it is only the heirs of Faqire who can have any right to the property even if the allegations made by the plaintiffs are true.

At the death of Mt. Lalta Bai Faqire was the nearest reversioner and the other plaintiffs were remote reversioners who could have no claim to possession. If Faqire's heirs can be said to have established a right to the property, it is no concern of ours that they should have allowed the other plaintiffs to join with them in claiming the property. But if Faqire's heirs cannot succeed, the suit must be dismissed in its entirety.

Ajudhia Prasad had a daughter Mt. Lalta Bai, as we have already mentioned. and he also had a son Kallu who died before him. When Ajudhia Prasad died in the year 1890, Mt. Lalta Bai was alive and there were also alive Ajudhia Prasad's widow, Mt. Sai and Kallu's two widows Mt. Saloni and Mt. Ladli. Mt. Sai died sometime after her husband. Some of the property was already entered in the revenue register as being in the possession of some of these ladies, but whether they were entitled to it in their own right, is, as we have already said, a question into which we do not propose to enter. It is sufficient to say for the purposes of this appeal that after Ajudhia Prasad's death the property in suit was entered in the register as in the possession of Mt. Lalta Bai and Mt. Saloni, between them. Mt. Ladli had also died soon after Ajudhia Prasad. Mt. Saloni in the year 1890 made gifts by two deeds of some of the property to Tantia Prasad. This man was the husband of Mt. Lalta Bai's only daughter Mt. Gaura. Swami Prasad was their son. He lived with Mt. Saloni and Mt. Lalta Bai and in the year 1909, these ladies set up a claim that Mt. Saloni was entitled to adpot him as a son to her deceased husband and there was. as a result. an arrangement between them and Tantia Prasad and Faqire about the distribution of the property. This arrangement is evidenced by four documents. The first is an agreement to refer the disputes to arbitration the second is the award of the arbitrators, the third is an agreement accepting the award and the fourth is a declaration by Mt. Saloni that she has adopted Swami Prasad. The effect of the agreement is set forth in the award. It is that Faqire shall get 1/3rd of the property on the death either of Mt. Saloni or Mt. Lalta Bai whoever shall die first, that Mt. Saloni and Mt. Lalta Bai shall have the power to give the other 2/3rds of the property to Swami Prasad after taking him in adoption or to do with it whatever they think proper; that the movable property and houses shall remain in the possession of Mt. Saloni, Mt. Lalta Bai and Swami Prasad and that Faqire and his heirs shall have nothing to do with it, that the shares in the villages which stand recorded in the name of Swami Prasad or Tantia Prasad shall continue to be in possession of Swami Prasad and that certain property which had been dedicated to a temple shall continue to remain in dedication. This dedication was made in the year 1892 by Mt. Lalta Bai. The four documents, that is, the agreement to refer to arbitration, the award of the arbitrators, the agreement to accept the award and the declaration of adoption, are all dated 13th May 1909, and are clearly parts of the same transaction which in effect amounted to an agreement that Faqire should obtain 1/3rd of the property on the death of Mt. Saloni or Mt. Lalta Bai, whoever died first. and that the remaining 2/3rds of the property should go to Swami Prasad on the allegation that he was the adopted son of Kallu.

Mt. Saloni died soon after this agreement was made and Faqire, according to its terms, took possession of 1/3rd of the property and he and his heirs have been in possession ever since. Mt. Lalta Bai. in the year 1913, attempted to obtain possession of this 1/3rd share. but the suit which she instituted was withdrawn by her as the result presumably of a compromise. In the year 1910, Bhagwan Das, one of the plaintiffs, the son of Bankey, instituted a suit in order to obtain a declaration that the arrangement which Faqire had made with Mt. Lalta Bai, Mt. Saloni and Tantia Prasad, was not binding upon the reversioners. He obtained a decree from this Court and that decree was affirmed by their Lordships of the Privy Council. who however made it clear that the declarations would have no effect between the defendants of that suit inter se, i. e.. that they would have no effect as between Faqire and the other persons to the agreement. As in the result Faqire became the nearest reversioner on the death of Mt. Lalta Bai in the year 1918, the decision in the suit can have no effect whatsoever upon the result of the suit with which we are now dealing. A number of issues were raised, but the main issue on which the decision of the Court below dismissing the suit proceeded and the main issue which has been argued be-

fore us is whether the agreement entered into by Faqire on 13th May 1909 prevents his heirs from claiming 2/3rds of the property of Ajudhia Prasad, which is the property in suit.

It has been argued before us that the so-called award of the arbitrators is not one which can operate as a binding decision between the parties, that Mt. Lalta Bai could not enter into an agreement to divide the estate with the nearest reversioner, that Faqire could not transfer the mere possibility of succeeding to the estate and that even if Faqire obtained some consideration in that he was in possession of 1/3rd share, all that a Court can do is to compel his heirs to make restitution. Reference has been made to a number of cases, of which we may mention the following: 1916 Mad 579 (1). 1923 P C 189 (2), 22 Cal 354 (3) and 1922 P C 403 (4).

It has also been argued that there can be no question of an estoppel by representation and reliance is placed on the case of 1918 P C 196 (5). We do not think that it is necessary for us to go into these questions or to discuss the rulings which have been quoted. It is possible that the agruments addressed to us might have some force if the claim was made by persons who were not parties to the agreement and who were not claiming through Faqire. It seems to us that this case should be decided upon the simple ground that Faqire and the two ladies came to a family arrangement in respect of disputed claim to the property. It has been said that the arrangement cannot be described as a family arrangement because it was clearly not binding upon all the members of the family as is evidenced by the decision in the case instituted by Bhagwan Das. We do not think that there is any force in this argument. The agreement was entered into by Faqir and it so happened that he was the nearest reversioner when the succession opened upon the death of Mt. Lalta Bai. In so far as he agreed to settle the dispute which arose out of the claim of the ladies that Swami Prasad could legally be adopted and accepted consideration for recognizing the adoption. we consider that he and his heirs are bound by the arrangement. We find support for our opinion in the decision of their Lordships of the Privy Council in the case of 1918 P C 70 (6). We may quote a passage from the judgment in that case which sets forth the facts and the decision thereon. Their Lordships say:

"In 1892 the family was a Hindu joint family to which the ordinary Hindu law applied. All the sons of Balak Ram had died. Ganga Ram had died childless in 1874, and Badri Prasad had died childless in 1877. Bahadur Lal had died sonless in 1883, leaving his widow, Mt. Ram Dei, surviving him. Mt. Ram Dei became, on the death of Bahadur Lal, entitled for life to a Hindu widow's right to the whole of the family property. Lala Kanhai Lal had then no right or any kind to any share in the family property, but he set up a claim to the whole property based on the allegation that he had been validly adopted by Mt. Parbati to her deceased husband, Badri Prasad. If that claim had been substantiated by proof of a valid adoption, Lala Kanhai Lal would have been entitled to the whole family property, and Mt. Ram Dei would have been entitled merely to maintenance. Although as a general rule of Hindu Law a man cannot adopt his sister's son, the claim was a serious one. Lala Kanhai Lal's case was that, according to an Agarwal custom (the family was of the Agarwal caste), which governed the family; a man could lawfully adopt his sister's son; and he alleged that Badri Prasad had given Mt. Parbati authority to make the adoption, and that he, Lala Kanhai Lal, had been validly adopted to Badri Prasad. That Lala Kanhai Lal might have found it difficult or impossible to prove that he had been validly adopted is immaterial. He made the claim; it was a serious one, and it was supported by Mt. Parbati and it must have influenced Mt. Ram Dei, who was induced, doubtless mainly by that claim, to consent to a division of the family property, in which she obtained for herself merely a one-fourth share. The claims which were set up by Mt. Parbati and Mt. Kausilla, that the three sons of Balak Ram had separated, must also have influenced Mt. Ram Dei to agree to the compromise of 1892. Lala Kanhai Lal was a party to that compromise. He was one of those whose claims to the family property, or to shares in it, induced Mt. Ram Dei, against her own interests and those of her daughter, Mt. Kirpa, and greatly to her own detriment, to alter her position by agreeing to the compromise, and under that compromise he obtained a substantial benefit, which he has hitherto enjoyed. In their Lordship's opinion he is bound by it, and cannot now claim as a reversioner."

Much of the passage which we have quoted might be applied verbatim to the facts of the case before us. It is

1. Lakshmi Narayana Jagannadha v. Vararah Lakshmi Narasimha, 1916 Mad 579=29 I C 241=39 Mad 554.
2. Annada Mohan Roy v. Gour Mohan Mullick, 1923 P C 189=74 I C 499=50 I A 239=50 Cal 929 (P C).
3. Hem Chunder Sanyal v. Sarnamoyi Debi, (1895) 22 Cal 354.
4. Harnath Kuar v. Indar Bahadur Singh, 1922 P C 403=71 I C 629=50 I A 69=45 All 179 (PC).
5. Rangaswami Goundan v. Nachiappa Goundan, 1918 P C 196=50 I C 498=46 I A 72=42 Mad 523 (PC).
6. Kanhai Lal v. Brij Lal, 1918 P C 70=47 I C 207=45 I A 118=40 All 487 (PC).

true that in the case of 1918 P C 70 (6). Kanhai Lal himself was claiming that he was an adopted son but here we have the converse case that the two ladies Mt. Lalta Bai and Mt. Saloni were claiming that Swami Prasad might legally be adopted and that they intended to make the adoption. If their claim was a valid one Faqire would have no possibility of succeeding as a reversioner. In 1918 P C 70 (6), he allowed the widow a right to a ¼th share of the property and he was not allowed thereafter to claim the property. In the present case, Faqire allowed Swami Prasad 2/3rds of the property and he should not be allowed to claim that share and his heirs can be in no better position than that in which he would have been himself. It has been suggested that there was no valid ground in the present case for the claim of the two ladies that Swami Prasad could legally be adopted. The position is much the same as that in 1918 P C 70 (6). The claim was made and it is possible that there might have been an allegation of custom according to which the adoption would have been lawful. There was certainly a possibility of litigation and Kanhai Lal who was a member of the family would not have been likely to give up his title to any part of the property if there had not been any basis at all for the claim made by the ladies. In the circumstances, if he preferred to accept the possibility of having his interests advanced on the death of one of the ladies (as in fact it was advanced in 1909, on the death of Mt. Saloni), in preference to awaiting the chance that the reversion might fall to him on the death of Mt. Lalta Bai, he should not be allowed now to avoid the election which he made. That being so, his heirs cannot sustain their claim and, as we have already said, if they cannot do so, the other plaintiffs have no rights in the property.

The result is that the appeal fails and it is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 421

THOM AND IQBAL AHMAD, JJ.

Bohra Hoti Lal—Appellant.

v.

Mithu Lal and *others*—Respondents.

Second Appeal No. 847 of 1933, Decided on 12th February 1935, from decision of Addl. Sub-Judge, Agra, D/- 28th February 1933.

Limitation Act (1908), Art. 132 — Mortgage—Money payable after one year— Mortgagee given option to sue for full amount in case of default in payment of interest after six months – Mortgagee need not avail of this option and can wait for full period stipulated—Mortgage.

The term of the mortgage was a period of one year and it was clearly stipulated in the mortgage deed that the principal, interest and compound interest will be paid to the mortgagee on the expiry of one year from the date of the mortgage. The covenant in the deed mentioned above gave an option to the mortgagees not to wait for the full period of one year and to put the mortgage-deed into suit after the expiry of six months in the event of the failure of the mortgagor to pay interest on the expiry of six months :

Held : that this, at best, was an option given to the mortgagee and it was open to the mortgagee not to avail himself of this option and to wait for the full stipulated period of the mortgage : 1932 *P C* 207, *Appl.* [P 422 C 1, 2]

Panna Lal—for Appellant.

Ambika Prasad—for Respondents.

Iqbal Ahmad, J.—This is a plaintiff's appeal and arises out of a suit for sale on the basis of a mortgage-deed dated 11th December 1918. The mortgage was executed by Mithu Lal, defendant 1, in favour of one Lachhmi Chand and was for a sum of Rs.1,500. The agreed interest was at the rate of 10 annas per cent per mensem compoundable with six-monthly rests. The debt was payable on the expiry of one year from the date of the execution of the mortgage-deed. But it was stipulated in the deed that:

"in the case of breach of covenant . . . . . and non-payment of a part or whole of the principal, interest and compound interest (the creditor) shall have the right to recover the amount due to him by filing a suit in Court. . . . . ."

It is common ground that default was made in the payment of interest on the expiry of six months from the date of bond and that no portion of the mortgage debt was paid up to the date of the suit. Hoti Lal, plaintiff-appellant, filed the suit on 10th December 1931, that is, within 12 years from the date of the expiry of one year from the date of the execution of the mortgage-deed. Hoti Lal alleged that in a partition between him and Lachhmi Chand the mortgage-deed in suit was allotted to his share and as such he was entitled to maintain the suit. The defendants to the suit were Mithu Lal and certain other persons alleged to be subsequent transferees of the mortgaged property. Bohra Lachhmi Chand, the original mortgagee, was also arrayed as a pro forma defendant. Kishan Lal, who was arrayed as defendant 5. was exempted during the pen-

dency of the suit in the trial Court and we are not concerned with him in the present appeal.

The suit was contested by Chatri Lal, defendant 2, on a variety of grounds. He contended inter alia that the suit was barred by limitation. The trial Court recorded findings on all the issues framed by him, but dismissed the suit on the ground that it was time-barred. The plaintiff filed an appeal in the lower appellate Court and in the memorandum of appeal assailed the findings of the trial Court on the question of limitation as well as on other points that that Court had decided against him. The lower appellate Court agreed with the trial Court in holding that the suit was barred by limitation and accordingly dismissed the appeal filed by the plaintiff. The lower appellate Court did not record any findings on the other questions raised in the memorandum of appeal. The plaintiff has come up in appeal to this Court and it is contended on his behalf that the view on the question of limitation taken by the Courts below is erroneous. In our judgment this contention is unanswerable and must prevail.

The Courts below were of the opinion that in accordance with the terms of the mortgage-deed the mortgage money became "due" within the meaning of Art. 132, Sch. 1, Limitation Act, on the expiry of six months from the date of the execution of the mortgage-deed. viz., on 1st June 1919, when admittedly default was made by the mortgagor in the payment of interest, and as the suit was not filed till more than 12 years after that date the suit was time-barred. This view of the Courts below is in conflict with the decision of their Lordships of the Privy Council in 1932 P C 207 (1). In that case it was held that, if in the event of the happening of a certain contingency option is given to the mortgagee to enforce his security at once without waiting for the full term of the mortgage, the option is exclusively for the benefit of the mortgagee. and if the mortgagee does not avail himself of the option, the mortgage money does not become due till after the expiry of the full term of the mortgage. In the case before us the term of the mortgage was period of one year and it was clearly stipulated in the mortgage-deed that the principal, interest and compound interest will be paid to the mortgagee on the expiry of one year from the date of the mortgage. The covernant in the deed mentioned above gave an option to the mortgagee not to wait for the full period of one year and to put the mortgage-deed into suit after the expiry of six months in the event of the failure of the mortgagor to pay interest on the expiry of six months. This, at best, was an option given to the mortgagee and it was open to the mortgagee not to avail himself of this option and to wait for the full stipulated period of the mortgage. The money secured by the mortgage-deed in suit therefore did not become due till 11th December 1919. and the suit was therefore within limitation.

We accordingly allow this appeal, set aside the decree of the lower appellate Court and remand the case to that Court with directions to readmit the appeal to its original number and to try and dispose of it according to law. The plaintiff is entitled to his costs of this appeal. Costs in the Courts below shall abide the result.

K.S. *Appeal allowed.*

1. Lasa Din v. Gulab Kunwar, 1932 P C 207=138 I C 779=59 I A 376=7 Luck 442 (PC).

A. I. R. 1935 Allahabad 422

NIAMATULLAH, J.

Nazir Singh and *others* — Defendants —Appellants.

v.

Lakhu Ahir and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1125 of 1934, Decided on 22nd January 1935, from decision of Addl. Sub-Judge, Ballia, D/- 9th May 1934.

(a) Civil P. C. (1908), O 26, R. 1 — Court appointing more than one commissioner — There is no error of law.

There is no error of law in appointing more than one commissioner. If the report of one commissioner is unsatisfactory in certain respects, it is permissible for the Court to remit the case to the same commissioner or to appoint another commissioner [P 423 C 1]

(b) Civil P. C. (1908), S. 100 — Finding of fact supported by evidence is binding in second appeal.

A finding of fact which is supported by evidence cannot be questioned in second appeal. [P 423 C 1]

(c) Agra Tenancy Act (1926), Ss. 44, 121 and 230—Occupancy tenant filing suit for possession on ground that Revenue Court had erroneously made it part of another member in boundary dispute — Civil Court has jurisdiction and S. 121 is no bar in absence of allegation that both parties hold under same landlord—Jurisdiction

Where an occupancy tenant who is aggrieved by the decision of the Revenue Court in a boun-

dary dispute, files a suit for possession on the allegation that the Revenue Court has erroneously made it part of another number, the civil Court has jurisdiction to entertain it and S. 121 is no bar in the absence of allegation that both parties are tenants of same landlord: 1932 *All* 465, *Dist.* [P 423 C 2]

(d) Jurisdiction—Question should be determined from allegations in plaint.

The question of jurisdiction is to be primarily determined on the allegations to be found in the plaint. [P 423 C 2]

Shiva Prasad Sinha—for Appellants.

Judgment.—This is a defendants' appeal arising out of a suit for possession of a strip of land. The plaintiff-respondents claimed it to be within boundary of their plot No. 772/1 with 15 "mahuwa" trees standing thereon. They claimed to be occupancy tenants in respect of the aforesaid plot. The defendants, on the other hand, pleaded that the land in dispute was part of their No. 772/2. It appears that there was a boundary dispute before the Revenue Court, and aggrieved by the decision of that Court the plaintiffs instituted the suit which has given rise to this appeal.

No less than four commissioners were successively appointed by the trial Court as the report of every one of them was contested by the party which considered it to be unfavourable. The parties led other evidence also. The suit was dismissed by the trial Court. The defendants' appeal to the lower appellate Court was also dismissed. In the present second appeal the only question of law that has been raised in the memo of appeal is that the trial Court was not justified in appointing one commissioner after another. I do not think there was any error of law in appointing more than one commissioner. If the report of one commissioner was unsatisfactory in certain respects, it was permissible for the Court to remit the case to the same commissioner or to appoint another commissioner. The lower appellate Court has taken into consideration the reports of all the commissioners together with other evidence in the case and arrived at a definite finding that the land in dispute was part of the plaintiff's plot No. 772/1. As already stated, this is a finding of fact and is supported by evidence. It cannot therefore be questioned in second appeal. The learned advocate for the defendant-appellants raised a question of jurisdiction which had not been taken in either of the Courts below or in the memorandum of appeal filed in this Court. I allowed the point to be argued, as it related to the jurisdiction of the Civil Court to take cognizance of a dispute like the one disclosed by the plaint in this case.

The learned advocate's contention is that the plaintiffs could have instituted a suit under S. 45, Agra Tenancy Act, and therefore the jurisdiction of the Civil Court to entertain a suit for possession is barred by S. 230 read with Sch. 4, Agra Tenancy Act. I do not think this contention has force. The plaintiff-respondents are occupancy tenants. They claim a portion of their No. 772/1 on the allegation that the Revenue Court erroneously made it part of No. 772/2 and that relying upon the demarcation of the Revenue Court the defendants took possession of the land. In my opinion such a suit could not have been instituted by the plaintiff-respondents under S. 44, Agra Tenancy Act, S. 121 of the same Act, is also referred to in this connexion and it is argued that the parties held under the same landholder and consequently a suit for declaration should have been brought in the Revenue Court. There is nothing in the plaint to suggest that both parties are the tenants of the same landholder. The question of jurisdiction is to be primarily determined on the allegations to be found in the plaint. I do not think S. 121 can in any way operate as a bar to the plaintiffs' suit in a Civil Court. Reliance has been placed on 1932 All 465 (1), to which I was a party. The facts of that case were quite different. A landholder had instituted a suit for ejectment and obtained a decree in spite of which the tenant stuck to the land and the landholder subsequently instituted a suit in the Civil Court treating the defendant as trespasser. It was held that if there was no break in the tenancy, the defendant continued to be a tenant. If there was a break in the tenancy but the defendant retained possession of the land in contravention of the Tenancy Act, and in disregard of the wishes of his landholder, the suit was one contemplated by S. 44, Agra Tenancy Act, in either of which case the jurisdiction of the Civil Court was barred. It depends entirely upon the frame of the suit and the allegations contained, therein. If the allegations are such as to make it a suit to which S. 44, Agra Tenancy Act, is applicable the jurisdiction of the Civil Court may be barred. If however the plaintiff

1. Dan Sahai v. Jai Ram Singh, 1932 All 465= 138 I C 486.

treats the defendants as a trespasser and having regard to the nature of the dispute the conditions required by S. 44 are not present, the jurisdiction of the Civil Court is not ousted. To uphold the contention put forward before me would be tantamount to holding that in no case a Civil Court has jurisdiction to take cognizance of a suit for possession of land, as defined in the Agra Tenancy Act. I am unable to subscribe to such a broad proposition.

The result is that this appeal fails and is dismissed under O. 41, R. 11, Civil P. C. Leave to appeal under the Letters Patent is refused.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 424

KENDALL, AG. C. J. AND BAJPAI, J.

Ram Prasad—Appellant—Applicant.

v.

Trilok Nath Minor—Opposite Party.

Privy Council Appeal No. 26 of 1934, Decided on 14th December 1934, for leave to Appeal to His Majesty in Privy Council.

Civil P. C. (1908), S. 109 (c)—For certifying case as fit one, issue must be of general importance.

In order to certify a case as being fit one for appeal to His Majesty in Council, the issue involved must be one of general importance.

Where the defendant was unable to plead before the High Court that he had discovered new and important matter, and this was one of the grounds on which the application for review was dismissed:

Held: certificate should not be given: 23 *All* 227; 1921 *P C* 25, *Ref.* [P 424 C 2]

Gopi Nath Kunzru and *Shah Jamil Alam*—for Applicant.

K. N. Katju—for Opposite Party.

Kendall, Ag. C. J.—This is an application for leave to appeal to His Majesty in Council from an order passed by a Bench of this Court rejecting an application for a review of judgment. It is admitted by Mr. Kunzru, who appears in support of the present application, that if it can be allowed at all it must be under Cl. (c), S. 109, Civil P. C., and not Cl. (a) or (b) of that section, that is to say, we should have to certify that it is a fit case for appeal to His Majesty in Council.

The circumstances in which the application for review was made are these. The applicant was the defendant in a mortgage suit, and the issue on which he had failed both in the trial Court and on appeal in the High Court was in regard to a payment of Rs. 9,000 said to have been made to the plaintiff, and said by the defendant to have been entered in the plaintiff's account books relating to money lending. During the proceedings the defendant summoned the account books of the plaintiff but the plaintiff died during the progress of the suit, and his son, who was brought on to the record as his representative, denied the existence of the account books. Subsequently the defendant discovered that some account books had been filed by the original plaintiff in some other litigation and had been in the possession of a receiver, but that they had been subsequently returned by the Court to the plaintiff's son. His contention in making his application for review was, not that those account books contained any definite entry which would show the payment of Rs. 9,000, but that the mere fact that the account books existed showed that the plaintiff or the plaintiff's son had been intentionally keeping them back, and this would have enabled the defendant to ask the Court to make a presumption that there was evidence in the account books which would have been against the plaintiff's interest.

It will be seen therefore that the defendant was unable to plead before this Court that he had discovered new and important matter, and this was one of the grounds on which the application for review was dismissed. We have however now to consider whether the issue raised is one that we could certify as being a fit one for appeal to His Majesty in Council. It must be conceded that such an issue would have to be one of general importance. The criterion has been laid down by Lord Hobhouse in the case of 23 All 227 (1), where he remarked that Cl. (c). S. 109, Civil P. C.:

"is clearly intended to meet special cases; such for example, as those in which the po int in dis pute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a doubtful process which could not be performed without special exercise of that discretion, evinced by the fitting certificate."

In a later case, 1921 P C 25 (2). Their Lordships of the Privy Council remarked that the certificates given under Cl. (c), S. 109 are of great consequence, that they seriously affect the rights of litigant parties, and that they ought to be given in such a form

1. Banarsi Prasad v. Kashi Krishna Narain (1901) 23 All 227=28 I A 11=7 Sar 825 (P C).
2. Radhakrishna Ayyar v. Swaminatha Ayyar 1921 P C 25=60 I C 85=48 I A 31=44 Mad 293 (P C).

that it is impossible to mistake their meaning upon their face, and in that case special leave to appeal was given on the ground that an important question of law affecting the whole community was raised, which had not hitherto been the subject of judicial interpretation. It was further remarked:

"There are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money.

Sub S. (c), S. 109, Civil P. C., contemplates that such a state of thing exists, and R. 3, O. 45 regulates the procedure."

Such being the grounds on which their Lordships have held that an appeal may be certified under Cl. (c), S. 109. we are clearly of opinion that the circumstances of the present case do not justify us in giving such a certificate. The application is therefore dismissed with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 425

Special Bench

THOM, IQBAL AHMAD AND ALLSOP, JJ.

An Advocate Cawnpore, In the matter of.

Misc. Case No. 65 of 1934, Decided on 21st January 1935.

(a) Practice—Judge must not be presumed to entertain feelings of hostility to person who appears before him either as civil litigant or as accused.

Per *Thom, J* —Because an accused person appears before a Judge in his Court it is the ludicrous to suggest that that Judge should be presumed to entertain towards him any feeling of hostility or that the Judge, impelled by malice, would pursue the party into his private life and use his influence to prejudice the party and undermine his interests or defeat his legitimate intention. [P 427 C 1]

–(b) Legal Practitioner — Counsel is not entitled to frame serious charge against party unless he is in possession of admissible and relevant evidence –But he need not test truth of witnesses whom he intends to put into witness-box—Pleadings.

Per *Thom, J.*—No counsel is entitled to frame a serious charge against a party to a litigation unless he is in possession of admissible and relevant evidence upon which, if accepted, counsel could reasonably ask the Court to hold the allegations true. It may well be that the evidence in support of the allegations is untrue and it is certainly not the duty of a counsel in the ordinary course to test the truth of the witnesses whom he intends to put into the witness-box; but at the conclusion of the evidence which he has led he should be in a position to submit as a reasonable proposition to the Court that the evidence which he has led if accepted establishes the allegations for which he had made himself responsible. If he is not in possession of such evidence to support them he is not entitled to make grave and serious allegations. [P 429 C 1, 2]

(c) Legal Practitioner— Too rigid test of conduct of counsel in drafting pleadings should not be emphasized—Only test is that allegations made should not appear manifestly reckless and unfounded—Pleadings.

Per *Iqbal Ahmad, J.*—It is imperative in the interest of administration of justice that too rigid a test of the conduct of an advocate in the matter of drafting pleadings should not be emphasized and that the test should be such as not to deter a counsel from fearlessly placing before the Court such allegations as their clients instruct them to make, so long as those allegations do not appear manifestly reckless and unfounded. It is no doubt the duty of counsel to use their own judgment, experience and discretion and not to make irrelevant or unduly insulting allegations in the pleadings; but it is equally their duty to embody the case of their clients in the pleadings fearlessly, provided the instructions received from the clients justify the case embodied in the pleadings. While on the one hand a counsel is expected to be careful and not reckless in drafting the pleadings he cannot on the other hand. assume the role of a Judge and refuse to embody allegations that his client instructs him to make unless and until he has examined the evidence on the subject. A counsel is in one sense the mouthpiece of his client, but he does not guarantee or pledge himself for his client's veracity. [P 433 C 2]

(d) Legal Practitioner—Counsel is not entitled to make scandalous and serious allegations against fellow citizen unless he has some basis upon which those allegations can be grounded—Pleadings.

Per *Allsop, J.*—On the one hand counsel must look to the interests of his client and not be deterred by fear or favour from making any allegations which in his interests it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded. [P 433 C 2; P 434 C 1]

(e) Practice — High Court generally accepts finding of Bar Council—But it is not bound to do so—Bar Council.

Per *Thom, J.*—Usually the High Court will accept, especially when there is no objection preferred by the Government Advocate, the finding of the Bar Council. But it is not bound by and in certain cases ought not to accept the finding of the Bar Council. [P 429 C 2]

B. S. Darbari—for Applicant.

Muhammad Ismail—for the Crown.

Thom, J.—On 24th January 1934, notice was ordered by this Court to go to Mr. C to show cause why he should not be proceeded against for professional misconduct.

For some reasons or other notice did not go to Mr. C. but the matter of the conduct was referred for enquiry to the Bar Council. The Hon'ble the Chief Justice appointed a Committee consisting of Mr. P. L. Benerji, Dr. N. C. Vaish and Mr. Murli Manohar, to enquire into Mr. C's conduct. Mr. C's conduct in connection with a certain case had been adversely commented on by the learned Judge who directed that notice should go to him on 24th January 1934.

The facts may be briefiy stated. They are fully set out in the report of the Bar Council Committee. Mr. W. C. de Noronha, a citizen of Cawnpore died upon 23rd November 1932. After his death an application for letters of administration with a copy of the will of the deceased, dated 20th November 1932, was made on 2nd May 1933,. in the High Court by Mr. W. C. de Noronha, a son of the deceased. One Mrs. Peters, who, it appears, had nursed Mr. Noronha through the long illness that preceded his death ,entered a caveat upon 17th July 1933. Mrs. Peters opposed the grant of letters of administration to the applicant. filed a written statement in support of her allegations against the grant of letters of administration. It is unnecessary at this stage to go into the history of this written statement. The learned Judge before whom the application was made did not consider that the written statement complied with the provisions of the Code of Civil Procedure and he directed that a proper written statement be filed by counsel for Mrs. Peters. In compliance with the direction of the learned Judge a written statement was filed upon 24th November 1933. In this statement there are certain charges made against the sons and son-in-law of the late Mr. Noronha and against Mr. Lyde, who was then joint Magistrate in Cawnpore, and Mr. Bhasin, an advocate practising in Cawnpore. These allegations have been grouped under four heads: (1) Conspiracy, (2) Forgery, (3) Undue influence, and (4) Murder. In their report the Bar Council committee stated:

> "There can be no doubt that allegations of conspiracy forgery, and murder were made against the sons and son-in-law of the late Mr. Noronha and that further undue influence was alleged against Mr. L. G. Lyde, Joint Magistrate of Cawnpore, and forgery against Mr. Bhasin an advocate of Cawnpore."

I do not consider it necessary to deal with the evidence upon which the charges of undue influence against the sons and sons-in-law of the late Mr. Noronha were based. In my opinion Mr. C, who was Mrs. Peter's legal adviser, and who accepts now full responsibility for the charges made in the written statement, had undoubtedly in his possession sufficient materials to entitle him to make allegations of undue influence against the sons and sons-in-law of the late Mr. Noronha, This Court is not asked at this stage to decide whether that evidence is sufficient to establish the allegation of undue influence, but, to my mind, there is no doubt whatever that Mr. C was in possession of information which entitled him to make an allegation of undue influence against the sons and sons-in-law of the late Mr. Noronha. The charge of undue influence against the joint Magistrate and the charge of murder against the sons and sons-in-law of the late Mr. Noronha and the charge of forgery against Mr. Bhasin stand however, in my judgment, in a different position.

It is not disputed that upon 20th November 1932, the joint Magistrate went to the house of the late Mr. Noronha, that he remained in the house for a number of hours and that, before he left, it was announced that Mr. Noronha had executed a will. Mr. C maintains that he was entitled to make the charge of undue influence against the joint Magistrate on the following facts, viz: firstly, Mr. Noronha had been an accused person shortly before the execution of the will on 20th November, in the joint Magistrate's Court; secondly, he was on terms of friendship with Mr. Noronha's sons, thirdly, he remained for 'a long time in the house of the late Mr. Noronha on the date upon which the will is alleged to have been executed; fourthly, subsequent to the execution of the will he returned to the sons of Mr. Noronha the keys, the Bible and the despatch case, which he had taken from Mr. Noronha's house on 20th November 1932, and which he had upon that date or upon the following day deposited with the Chartered Bank in Cawnpore. These facts, which are not in dispute, constituted in Mr. C's view sufficient grounds upon which to prefer a charge of undue influence upon a judicial officer. Having given this matter my fullest considerations I am unable to agree. It has been assumed that there was some hostility on the part of Mr. Lyde towards Mr. Noronha because Mr. Noronha had been an accused person in

his Court. I refuse to give judicial approval to the theory that a Judge must be presumed to entertain feelings of hostility to persons who appear before him either as civil litigants or accused in his Court. If that theory had any support in fact then His Majesty's Judges would probably constitute the most hostile section of the human race. Because an accused person appears before a Judge in his Court it is ludicrous to suggest that that Judge should be presumed to entertain towards him any felling of hostility or that the Judge, impelled by malice, would pursue the party into his private life and use his influence to prejudice the party and undermine his interests or defeat his legitimate intentions.

It is true that Mr. Lyde remained for some considerable time in the house of the late Mr. Noronha on 20th November 1932, during which period the will was executed. There does not appear however to have been any attempt on the part of the joint Magistrate to conceal what he was doing whilst in Mr. Noronha's house. According to the evidence which was in the possession of Mr. C, the joint Magistrate sent for the Civil Surgeon in order that it might be ascertained whether Mr. Noronha was in a fit state to execute a will. According to the evidence of Mr. C's own witnesses, two of them at least, if their statements be true, were actually in the room when the joint Magistrate and Mr. Bhasin were endeavouring to take down at Mr. Noronha's dictation the will which is alleged to have been executed on that date. It is a matter of admission that Mr. Noronha was then in a very weak state. His death occurred three days later and it is well known to those who have experience in the framing of wills, that, to take the instructions from a man who is upon the point of death, who is in a very weak condition and who has a large amount of property, is a task which cannot be completed within a short period, Mr. C himself knew that when Mr. Noronha's earlier will was executed in Simla on 30th September 1930, when Mr. Noronha was in full possession of his senses and faculties and when he was suffering from no incapacity, it took him four or five hours to convey the instructions in regard to the execution of the will.

It is a matter of admission that after the alleged execution of the will the joint Magistrate removed from the house the keys, the Bible and the despatch box already referred to. If he had been acting in concert with the sons. he would not have removed these articles. Not only does he remove them but he deposits them at the Chartered bank and he does it with the knowledge of the District Judge. According to Mr. C the despatch box was supposed to contain the will and the trust deed, which were executed on 30th September 1930, under which the sons of Mr. Noronha took no part of Mr. Noronha's estate. It is true that upon a subsequent date the keys and the despatch box and the Bible were returned to Mr. Noronha's sons. The joint Magistrate however did not act in this matter ex proprio motu; he acted under the direction of the District Judge. The District Judge held that he had no jurisdiction in the matter and suggested that these articles should be returned to those who were Mr. Noronha's legal representatives and who took his estate under the will which was executed on 20th November 1932.

Now upon these facts I find it impossible to hold that any responsible counsel was entitled solemnly to asseverate in a written statement that this judicial officer had been guilty of the offence of bringing undue influence to bear upon a weak and feeble old man who was on the point of death. Undoubtedly Mr. Lyde's conduct throughout quite legitimately could have been made the ground of cross-examination. If he had been cross-examined upon his conduct on 20th November 1932, I have not the slightest doubt that he would have been able to give a satisfactory explanation of the facts. Counsel would have been entitled to cross-examine, but I am clearly of the view that counsel was not entitled to frame against him so grave and so serious a charge upon the information which was in his possession.

With regard to the charge of murder the position of Mr. C is weaker still. It is quite clear from the information which has been laid before us during the hearing of this matter that Mr. C himself entertained grave doubts as to the propriety of framing a charge of murder. So far as I am able to judge from the information before us, the only two persons who ever stated that Dr. Noronha and Dr. D'Silva murdered the late Mr. Noronha are Mrs. Peters and Mr. C himself. Mrs. Peters obviously

could not speak of her own knowledge of what took place on the night before Mr. Noronha died. Her suggestion is that under the guise of an operation Dr. Noronha and Dr. D'Silva murdered the late Mr. Noronha. She was not present at the house at the time. Neither was Mr. C and when they make allegations of mudrer therefore they make them upon the evidence of witnesses who were able to speak of their own knowledge as to what took place upon 22nd November —the day before Mr. Noronha died. Only two witnesses give first hand information upon this matter, firstly, Mr. Bhagwan Din Misra, and, secondly, a nurse Miss Sarah Thomas. In his statement to Mr. C Bhagwan Din Misra does not in terms state that he was present when any operation was performed. It is a fair inference from the expression which he does use however that he was present. The matter is however not free from doubt. He does say that an operation was performed and that shortly afterwards Mr. Noronha became unconscious and that he never recovered consciousness. Miss Sarah Thomas states that she was nurse in attendance upon Mr. Noronha and that Dr. Noronha and Dr. Silva performed an operation upon the late Mr. Noronha the night before he died. In her statement to Mr. C she does not suggest that these two doctors murdered Mr. Noronha.

There are two significant facts which tell very heavily against Mr. C. One is that he did not ask either Mr. Bhagwan Din Misra or Miss Sarah Thomas if they were present when the alleged operation is said to have been performed. The second is that he did not ask either of these witnessess what was the nature of the operation which was performed. From Mr. C's statement to us it appears clear that he had entertained the suspicion, having taken the statements of these two witnesses that murder had been committed. Eventually he did make a charge of murder in the written statement. Before making it he did not consider it worth while to elucidate the matters to which I have referred. Before he framed the most serious charge which can be brought against any citizen, he did not think it worth while to send for these witnesses and ask them if they were present when the operation was performed and what was the nature of the operation. Mr. C explains that it was in the interests of the sons of Mr. Noronha that Mr. Noronha should die before he revoked the will which he is alleged to have executed on 20th November, and he further states that, according to the information which he had, Mr. Noronha was likely to revoke the deed which he had executed upon that date. That may well be so, but upon so slender a foundation he is not entitled to prefer a charge of mudrer, and I must frankly say that I am amazed that any responsible counsel could have, upon this flimsy evidence, framed so serious a charge.

Allegations of forgery were made in the written statement. These allegations were made against the sons and sons-in-law, of Mr. Noronha and against Mr. Bhasin, who was present when the will was alleged to have been executed. There is no doubt now that a document, which purported to be a will was executed on 20th November 1932. It is further within our knowledge that upon that date Mr. Noranha was in such a weak state that he was unable to affix his usual signature to the will and that instead of his signature his thumb mark appears thereon. The only evidence or information upon which the charge of forgery was framed appears to have been a story that shortly after Mr. Noronha died his thumbs were found to be black, and further, that one of Mr. Noronha's sons was seen to have two foolscap pages which were balnk but had thumb marks affixed to them shortly before Mr. Noronha died. Upon that evidence I am clearly of the view that Mr. C was not entitled to prefer a charge of forgery against a brother practitioner or indeed against any one. In the course of their report the Bar Council Committee referred to a decision of a Full Bench of the Allahabad High Court in 1924 All 253 (1) and the Committee appear to have accepted the statement of the law in that case. The passage referred to by the Committee is as follows:

" Members of the legal profession are under no duty to their clients to make grave and scandalous charges either against Judges or the opposite parties on the mere wish of their clients, They are not puppets compelled to obey the dictates of their clients where matters of good faith and honourable conduct are concerned. They are responsible to the Court for the fair and honest conduct of a case. They are not mere agents of the man who pays them, but are acting in the administration of justice, and in

1. *In re*, Dwarka Prasad, 1924 All 253=81 I C 177=25 Cr L J 689=46 All 121 (F B).

matters of this kind they are bound to exercise an independent judgment and to conduct themselves with a sense of personal responsibility. If they fail to act with reasonable care and caution they are unfit to enjoy the privileges conferred upon them by law and serious breaches must be visited with punishment."

So far as it goes, with respect, this appears to me to be a statement of the law which is unchallengeable. It is an axiom which no one will challenge that in the conduct of a case a counsel ought to act with caution and with circumspection. Mr. C however in support of his position referred to another Full Bench decision of this Court reported in 1925 All 641 (2) and relied especially upon a passage in the judgment of the learned Chief Justice which is as follows:

A counsel is entitled to accept the instructions of the client subject to this, that as a matter of prudence and for one's own reputation, it is not well to associate oneself with reckless charges of fraud and criminality or to indulge in abuse; and counsel should explain to clients that these charges, if unproved, gravely injure the case, and prejudice the Judge. Counsel is not supposed to go hunting here there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done nor is it the practice to do it."

In my judgment this statement of the law in no way conflicts with the earlier statement contained in the decision in the case reported in 1924 All 253 (1). Most assuredly a counsel is not expected to conduct an inquiry into the statements made by his client. But when the client makes a statement upon facts which cannot possibly be within his own knowledge, then it is undoubtedly the duty of counsel before he makes an allegation based on the information supplied by the client in a written statement to discover if there is evidence in support of this allegation. He is entitled to accept his client's statement of facts so far as these facts may be within the knowledge of the client. But if his client desires him to frame serious and grave charges in a written statement then undoubtedly it is the duty of the counsel before he does so to satisfy himself that there is reasonable evidence forthcoming in support of these allegations. It is somewhat difficult to lay down a general rule which will operate fairly in every case. but I think this at least may be stated: no counsel is entitled to frame a serious charge against a party to a litigation unless he is in possession of admissible and relevant evidence upon which, if accepted, counsel could reasonably ask the Court to hold the allegations true. It may well be that the evidence in support of the allegations is untrue and it is certainly not the duty of a counsel in the ordinary course to test the truth of the witnesses whom he intends to put into the witness box but at the conclusion of the evidence which he has led he should be in a position to submit as a reasonable proposition to the Court that the evidence which he has led if accepted establishes the allegations for which he had made himself responsible. If he is not in possession of such evidence to support them he is not entitled to make grave and serious allegations. such as are contained in the written statement which was filed by Mr C on behalf of Mrs. Peters. The Bar Council Committee upon a consideration of the information which was in Mr. C's possession when he framed the charges already referred to concluded by stating:

" We are of opinion that Mr. C did not act recklessly and without sufficient care. On the contrary we are of opinion that having regard to the circumstances of the case and the instructions of his client he was justified in approving the written statement and that he could not consistently with his duty to his client and in her interests do otherwise."

So far as the charges of undue influence against the joint Magistrate, forgery against Mr. Bhasin and murder against the sons and sons-in-law of the late Mr. Noronha are concerned, I am unable to agree with the conclusion of the committee. Without reservation, and without qualification I must say that in my judgment the finding of the Bar Council committee upon these charges is not justified. I am aware that usually this Court will accept, especially when there is no objection preferred by the learned Government Advocate the finding of the Bar Council. This Court however is not bound by and, in my view, in this case the Court ought not to accept the finding of the Bar Council so far as that finding relates to the three charges mentioned above. Having given the matter my fullest consideration I am of opinion that as counsel for Mrs. Peters in her opposition to the application to the letters of administration upon the will of the late Mr. Noronha Mr. C did not act with that caution, circumspection and propriety with which he should have acted, especially having in view the very serious charges which were contained in the written statement which he fil-

2. Vakil, *In the matter of*, 1925 All 641=88 I C 179=47 All 729.

ed. In my judgment Mr. C has not acted in this matter consistently with his duty to the Court and in consonance with the high traditions of the legal profession.

The Bar Council Committee hold that Mr. C has not been guilty of professional misconduct. I do not agree with that finding. I understand that my learned brothers are in agreement that in any event no punitive order should be passed. On this question I do not propose to dissent and having stated my view on the matter I do not suggest in the circumstances that this Court should take any action against Mr. C.

Iqbal Ahmad J.—I regret I am unable to agree with the observations made by my learned brother who is presiding over this Bench as, after giving the matter my best consideration. I have come to the conclusion that the finding recorded by the Bar Tribunal "that Mr. C did not act recklessly and without sufficient care" is perfectly correct. Indeed having regard to the circumstances of the case, to which reference shall presently be made, I have no hesitation in holding that Mr. C was justified in drafting the written statements on behalf of his client in the terms that he did, and that consistently with his duty to his client he could not do otherwise. The charge against Mr. C was that in the written statement drafted by him in testamentary suit No. 2 of 1933, on behalf of the objector Mrs. Peters he made accusations of conspiracy, forgery and murder against the petitioner and certain others and the charge of undue influence against Mr. Lyde, the City Magistrate of Cawnpore, and the charge of forgery against Mr. Bhasin, an advocate of Cawnpore, wiithout satisfying himself that there was any evidence to support the charges, and he was thereby guilty of professional misconduct.

In order to appreciate the finding recorded by the Bar Tribunal that the charge was not brought home to Mr. C it is necessary to state the facts in some detail. One Mr. W. C. de Noronha, a prominent citizen of Cawnpore, died on 23rd November 1932, leaving properties worth about Rs. 10 lakhs. Mr. Noronha was at the time of his death an old man of over 70 years of age and was suffering from diabetes and it appears from the statement of Major Clyde the then Civil Surgeon of Cawnpore that he had two carbuncles and his condition was grave more than two weeks before his death. It is common ground that the relations of Mr. Noronha with his sons were very bad since 1924 and the sons were living separately from the father. In this connection it may be pointed out that in the family Bible there are entries about the four surviving sons to the effect that they were disowned by Mr. Noronha "as most unfaithful and ungrateful." Mrs. Peters on whose instructions the written statements, the subject of charge, were prepared by Mr. C is proved to have been on terms of great intimacy with the late Mr. Noronha for several years, and she used to visit Mr. Noronha during his last illness till 14th November 1932 and was looking after and nursing him in his illness. It is admitted that the sons came to live in the house of Mr. Noronha on 14th November 1932 and continued to live in the house till the date of his death. The sons prevented Mrs. Peters from entering the house since they came to live there. We also find that on 19th November 1932, the sons or the sons-in-law of Mr. Noronha took possession of his keys and when Mr. Noronha came to know of this fact, he was upset, and desired that the Collector should come to his house. The parties in the testamentary case were at variance as to the reasons why Mr. Noronha desired to see the Collector but, for the purposes of the present case, it is immaterial to deal with the merits of the respective contentions of the parties on the point.

It is admitted on all hands that on 20th November 1932. Mr. Lyde came to the house of Mr. Noronha at about 12 noon and stayed there till about 7 p. m.. and it is alleged that during this interval a will was prepared by Mr. Bhasin advocate on instructions received from the late Mr. Noronha and was faired out and signed by Mr. Noronha and attested by witnesses. The genuineness and validity of this will was challenged by Mrs. Peters in the testamentary suit referred to above. Mr. Lyde took with him the attache case and the Bible from the house of Mr. Noronha and deposited the same in some bank. There is no evidence before us as regards the events that took place on the 21st November. On 22nd November one Major Tee who was a friend of Mr. Noronha visited him and it appears from his statement, that has been exhibited in the case, that during the course of the conversation that he had

with Mr. Noronha the latter told Major Tee that he had never executed any will on the date on which he was alleged to have done so. One of the sons of the late Mr. Noronha filed an application for letters of administration with a copy of the will of the deceased dated 20th November on 2nd May 1933, in this Court. A caveat was entered by by Mrs. Peters and on 17th August 1933 a written statement was filed on her behalf. The written statement is very brief and is divided into 8 paragraphs. We are not concerned with paras. 1 to 7 of the written statement. It is stated in para. 8 that:

" the affidavit dated 31st July 1933 contain all true facts in controversy and it may be treated as a part of my written statement."

The affidavit referred to in this paragraph is the affidavit of Mrs. Peters and in that affidavit the charges of conspiracy, forgery, murder and undue influence are set forth in great detail. The learned Judge who heard the testamentary case was of the opinion that the written statement and the affidavit were "hopeless for the purpose for which they are filed." The learned Judge accordingly granted leave to counsel for Mrs. Peters to amend the written statement or to entirely redraft it if he so wished. Several amended and additional written statements were thereafter filed on behalf of Mrs. Peters, and Mr. C takes full responsibility with respect to having drafted the same.

The question that we have to consider is whether Mr. C did act recklessly and without sufficient care in drafting the written statements mentioned above and whether he was guilty of professional misconduct in having drafted the written statements in accordance with the instructions given to him by his client. It is not disputed that the written statements were completely in accordance with the instructions given to Mr. C by Mrs. Peters. The question therefore remains whether Mr. C did recklessly and without taking sufficient care embody the allegations of conspiracy etc., in the written statements and was thereby guilty of professional misconduct. After having considered the facts of the case I have no hesitation in answering the question in the negative.

It is abundantly proved from the materials, to which detailed reference has been made by the Bar Tribunal in its finding. that Mr. Noronha had got a will prepared at Simla in 1930 by Mr. Beven Petman a Barrister of Lahore and that he had by that will devised the major portion of his properties for charities and had bequeathed two houses and a sum of Rs. 50,000 and a further allowance of Rs. 100 for life to Mrs. Peters. In the course of his submissions Mr. C suggested that that will was probably in the attache case and was removed by the sons, and I am not prepared to say that the suggestion is without force. There is also some evidence to show that along with the will Mr. Noronha executed a deed of trust for putting into immediate operation the clauses of the will as regards the bequest in favour of charity, so as to set at rest all objections to the validity of the will because of its non-registration. It is worthy of note that that no portion of the property was devised by this will in favour of the sons. The disputed will of 20th November 1932, no doubt also purported to devise properties of considerable value for charities, but the suggestion on behalf of Mrs. Peters in the testamentary suit was—and there was considerable force in the suggestion—that the provision as to that charitable gift was illusory and designed to leave the entire estate of the deceased to the sons as the provision to charity was void.

It is also in evidence that the late Mr. Noronha was an accused in a case under S. 379, Penal Code, that was pending in the Court of Mr. Lyde till 17th November 1932. That case was compromised on that date. We further find from the affidavit filed by Mrs. Peters in this Court in the testamentary suit that one of the sons and a son-in-law of Mr. Noronha performed an operation on Mr. Noronha on 22nd November and Mr. Noronha died the next morning. The following undisputed facts were therefore before Mr. C before he drafted the written statements: (1) Mr. Noronha was displeased with his sons and had turned them out of his house and disowned them so far back as in the year 1924. (2) In the year 1930 he had executed a will with all due publicity beqeathing the major portion of his property for charity and had also by the same will devised two houses and a sum of Rs. 50,000 to Mrs. Peters and had totally disinherited the sons. (3) There is absolutely no suggestion and much less any evidence of any reconciliation between the father and the

sons prior to 14th November 1932. (4) The sons either effected an entry in the house of Mr. Noronha contrary to his wishes or came to live in the house with his consent on 14th November 1932. (5) From the time that the sons came to live in the house of Mr. Noronha Mrs. Peters was not allowed to enter the house. (6) There is no evidence to show what led to Mr. Noronha to change his mind between the 14th November and 20th November—the date on which the will is alleged to have been executed. (7) The will is alleged to have been executed at a time when a Magistrate of Cawnpore before whom only three days before the alleged execution of the will the testator figured as an accused in a case under S. 379, Penal Code. was present. (8) There is no explanation as to why Mr. Lyde had to remain in the house of Mr. Noronha for about 7 or 8 hours. (9) No attempt was made to deposit the will in the office of the District Judge Cawnpore, during the lifetime of Mr. Noronha. (10) Even the ordinary precaution, that is usually taken when the testator is in such a weak statel of health as Mr. Noronha was, of getting the will registered, was not taken. (11) A respectable man like Major Tee had given a statement in writing to Mr. C that the testator denied having executed a will in favour of the sons. (12) One day before the death of Mr. Noronha an operation was performed by one of the sons who was one of the legatees under the will and the testator did not survive the operation for more than 12 hours. (13) The operation was performed on a patient who was suffering from chronic diabetes without taking the civil surgeon into confidence, who. it is admitted, was treating the patient during his last illness. (14) After the death of Mr. Noronha his thumb was found besmeared with ink.

The facts noted above speak for themselves and comment is superfluous. Apart from these facts Mr. C had the statements in writing of Bhagwan Din Misra, the record-keeper, in Mr. Noronha's firm, and of Ghani, a personal servant of Mr. Noronha, and of Miss Thomas who was a nurse in attendance of Mr. Noronha during the relevant period, and these statements did support the charges of conspiracy, etc., embodied in the affidavits of Mrs. Peters. Over and above these statements there were the affidavits of Mrs. Peters clearly formulating the charges of conspiracy, etc., mentioned above. In view of the facts and materials noted above Mr. C was, in my judgment not only justified, but clearly in duty bound to make the allegations that are embodied in the written statements. The measure of the responsibility of a counsel in drafting pleadings is set out in the Full Bench decision reported in 1925 All 641 (2). It was observed in that case that:

"a client who consults a counsel and who requires a plaint or written statement to be drafted instructs the counsel as to the facts of the desired document. It unfortunately does not always happen that those facts are true, but from the counsel's point of view that is not a material matter, and indeed if one looks at pleadings in cases generally it is obvious that a plaint and the written statement cannot both be true because an issue or issues arise out of the denials of the truth of the averments on one side or the other and that enables the case to be fought upon clear lines. A counsel is entitled to accept the instructions of the client subject to this, that, as a matter of prudence and for one's own reputation, it is not well to associate oneself with reckless charges of fraud and criminality or to indulge in abuse; and counsel should explain to clients that these charges, if unproved. gravely injure the case, and prejudice the Judge. Counsel is not supposed to go hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done, nor is it the practice to do it. Counsel have to depend upon the statement that the client makes, the penalty being that, if the client is not telling the truth, he may be probably lose the case. In those circumstances the rule is that the client is entitled to have the particular document drafted according to the instructions given."

In the case before us Mr. C went beyond the standard laid down by their Lordships in the case quoted above. He insisted on the statements of the personal attendants and of certain subordinates of Mr. Noronha being supplied to him before he consented to draw up the written statements. He took the trouble of going to Calcutta for the purpose of recording the statement of Major Tee. Mr. C read out all those statements to us and. coupled with the facts stated above, those statements supplemented by the affidavits of Mrs. Peters did, in my judgment, afford complete justification for the charges of conspiracy, forgery. undue influence and murder "in law" embodied in the written statements. The fact that the will of 20th November 1932, was not executed till about 3 days before the death of the testator and was in favour of the sons who had been disowned by the testator as "ungrateful" itself laid that document open to grave suspicions.

The testator was at the time of the execution of the will admittedly extremely weak and almost at the point of death. He must have been, because of the carbuncle, in great physical and mental distress. The City Magistrate of Cawnpore before whom only three days before the testator was an accused in a theft case was present all through the time that the will is alleged to have been drafted, faired out and executed. In view of these facts Mrs. Peters insisted that the charge of undue influence should be embodied in the written statement, and I am not prepared to hold that Mr. C could, as a responsible counsel, refuse to comply with the instructions of his client in the matter.

Similarly there were materials that did justify the charge of forgery. The fact of the nonregistration of the will coupled with the assertion that the thumb of Mr. Noronha was found besmeared with ink at the time of his death did constitute ample material for the charge of forgery. Again the charge of murder "in law" could not be characterized as reckless in the circumstances of the present case. It may be that there was no such evidence before Mr. C as could bring the charge of murder home to the sons of Mr. Noronha if they were prosecuted in a criminal Court on that charge. But I cannot overlook the fact that the written statement was being filed in a probate case and it may be that the allegation about murder "in law" did not amount to more than this that the sons by performing an operation did precipitate the death of the testator and, as such, could not take benefit under the will. In this connection reference may be made to the decision in (1914) P 1 (3).

In my judgment the Full Bench decision in 1924 All 253 (1), has no application to the case before us. That was not a case in which this Court was concerned with pleadings drafted by a counsel. In that case a junior counsel made "disgraceful charge of unfairness against the Magistrate," who was trying the case. The charge against the Magistrate appears to have been made by the counsel concerned on his own responsibility. The observations of their Lordships who decided that Full Bench case must therefore be taken with reference to the facts of the case before their Lordships and cannot govern the case before us.

I consider it imperative in the interest of administration of justice that too rigid a test of the conduct of an advocate in the matter of drafting pleadings should not be emphasized and that the test should be such as not to deter a counsel from fearlessly placing before the Court such allegations as their clients instruct them to make, so long as those allegations do not appear manifestly reckless and unfounded. It is no doubt the duty of counsel to use their own judgment, experience and discretion and not to make irrelevant or unduly insulting allegations in the pleadings but it is equally their duty to embody the case of their clients in the pleadings fearlessly provided the instructions received from clients justify the case embodied in the pleadings. While on the one hand a counsel is expected to be careful and not reckless in drafting the pleadings he cannot, on the other hand, assume the role of a Judge and refuse to embody allegations that his client instructs **him** to make unless and until he has examined the evidence on the subject. A counsel is in one sense the mouthpiece of his client, but he does not guarantee or pledge himself for his client's varacity. When I apply these tests to the present case I cannot but accept the finding recorded by the Bar Tribunal without any reservation.

Before parting with this case I may note that as a matter of practice this Court attaches greatest weight to the findings on questions of fact recorded by the Bar Tribunal and that in this case even the Government Advocate did not take objections to the findings of the Tribunal.

Allsop, J.—My learned brothers are agreed that no further action need be taken against Mr. C. The only question therefore which remains to be considered is whether his action in this matter as counsel for Mrs. Peters can be unreservedly approved. There seems to be no doubt at all about the law upon this question. On the one hand counsel must look to the interests of his client and not be deterred by fear or favour from making any allegations which in those interests it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow

3. Hall, In the estate of Hall v. Knight an ter, (1914) P 1=83 L J P 1=58 S J 30=30 T L R 1=109 L T 587.

citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded.

In the present case I understand that the question at issue about the validity of the will is still the subject of an appeal in this Court and I should therefore prefer to say nothing which may have a bearing upon the issue to be decided when the appeal is heard. I think it is sufficient for me to consider the allegation of murder which was made in the written statement which was put in by Mr. C on behalf of his client. I am not quite sure even now after hearing the arguments that Mr. C is really fully aware of the seriousness of the allegation that he made. It is surely no light matter to accuse a son of having hastened the death of his own father with the motive that that father should not be in a position to vary or repudiate a will which he had made. I have to consider in this case what ground or basis Mr. C had for his terrible charge which he made against Mr. Noronha's son and against a son-in-law. There was before him the evidence of two witnesses, one a nurse and the other a personal servant. The statements made by these persons were merely these that Mr. Noronha's son and son-in-law, who were both medical practitioners, had performed an operation upon Mr. Noronha and that next morning Mr. Noronha was dead.

The only other matter which might give rise to an inference was that it was possible that it was to the interests of these two persons that the will which was alleged to have been made should not be repudiated or in any manner varied. It is not even quite certain, as far as I can see, that it was to the interests of the son or the son-in-law that the will should not be varied or repudiated. There has been a mention of a previous will and an alleged deed of trust but I do not think that there is any evidence anywhere that either of these documents was properly executed. In so far as the previous will related to a charitable bequest, there can be no doubt whatsoever that it had no validity. If the will had been executed and was a valid will, it might have resulted in the passing of a sum of Rs. 50,000 to Mrs. Peters but the remainder of the property which consists of several lakhs would have passed in any case to the sons and possibly to any daughters who might be living.

In the will which was sought to be proved there was also a charitable bequest and although that bequest apparently had no validity it cannot be said that there was any very much greater benefit to the sons under the latter will than under the former one. At any rate, there was not so much difference that one could reasonably conclude that two respectable medical practitioners, namely, the son and the son-in-law of Mr. Noronha would commit a murder in order that the prior will should not have effect or that Mr. Noronha might make another will in more or less the same terms. It seems to me that there was no justification at all for the conclution that so serious a crime had been committed and I must note that no attempt was made to call in the police to establish that a criminal offence had been committed.

In considering the terms of the allegation I must mention that the charge was that a legal murder had been committed. I am prepared to consider that perhaps Mr. C when he made the allegations really meant to say that there had been some action which morally might amount to a murder and that he did not really intend to assert that a criminal offence had been committed. But taking the matter at its best it cannot be doubted that there was at least a hint and more probably an allegation that these two persons had deliberately hastened the death of Mr. Noronha with the object of material gain to themselves.

Mr. C in my opinion was under an obligation before he made a charge of this kind to be satisfied that there was some real basis for it. The mere fact that an operation had been performed and that Mr. Noronha died the next morning could not possibly give rise to any collusion that the operation was an improper one performed with the purpose of causing death.

There is no real evidence whatsoever in support of this charge. Mr. C did not even take the trouble to enquire from the witnesses whose statements were before him what the nature of the operation was. He knew also that Mr. Noronha had been under the treatment of the Civil Surgeon, a respectable medical officer who could have no interest one way or the other in disputes between Mr. Noronha's sons and Mrs. Peters. It does not appear that he ever enquired from the Civil Sur-

geon whether any operation had been performed or what its nature was or whether it was an operation which hastened the death of the patient.

I do not propose, as I have already said to consider the charges of undue influence against the joint Magistrate Mr. Lyde and of forgery against an advocate Mr. Bhasin. I may only say that prima facie it appears to me that there was very little basis for any charges of this kind. In my opinion. Mr. C was extremely reckless in framing the charges which he did. I give this opinion because I hope that he will not be set up in the light in which appears in this case as a pattern and an exemplar by the advocates practising in this Court and in the district Courts of this Province.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 435

BENNET, J.

Ganeshi Lal Kishna Lal—Defendants.—Appellants.

v.

Seth Mool Chand Nemi Chand—Plaintiffs—Opposite Party,

Civil Revn. No. 301 of 1934. Decided on 12th December 1934, against order of Sm. C. C. Judge, Agra, D/- 24th February 1934.

Civil P. C., (1908), O. 47, R. 1—Decree of Small Cause Court—Revision to High Court dismissed — Lower Court is competent to entertain application for review of judgment, as there is no merger of decree of Small Cause Court in the High Court.

A decree of a Small Cause Court is final and not appealable and although in certain circumstances it may be set aside or modified by a High Court in virtue of its revisional powers, it must remain a decree of the Court which originally passed it, when the High Court declines to interfere with it on the revision side and the lower Court accordingly is competent to entertain an application for review of the judgment. 1920 *Lah* 321 *Applied*; 1931 *All* 704; 1922 *Bom* 130 and 1934 *All* 134 *Dist.*[1] [P 436 C 1]

(b) Civil P. C., (1908), O. 47, R. 8—Review application granted—Court has discretion to rehear case.

It is open to the Court granting a review either to rehear the case or to make such order in regard to the rehearing as it thinks fit,

[P 436 C 1]

Chandra Bhau Agarwalla— for Applicants.

R. K. S. Toshniwal — for Opposite Party.

Order.—This is an application in a civil revision by a defendant against an order of a Small Cause Court allowing a review of judgment. The facts are that the predecessor of the Court below on 9th July 1932 dismissed the suit of the plaintiff. Subsequently there was an application by the plaintiff in revision in this Court which was dismissed. Later an application was made for review of judgment after the period of limitation had expired and the plaintiff the applicant for review, asked for the benefit of S. 5, Limitation Act. The application was based on the discovery of two post cards stated to have been written by the defendant and to have not been discovered at the time of the suit. Evidence was given that these post cards could not be discovered with due diligence and the lower Court has accepted that evidence. The lower Court has also allowed the application of S. 5, Limitation Act, on this ground that the matter only came to the knowledge of the plaintiff with the discovery of the letters and that the application was made within the period of limitation allowed from the date of the discovery. The first ground which is argued in ground No. 1 of revision is that the lower Court's judgment having merged in that of the High Court the lower Court was not competent to entertain an application for review. Learned counsel for the applicant refers to various rulings one of which 1934 All 134 (1). In that case there was an ex parte decree in the Small Cause Court for the plaintiff and the plaintiff applied in revision to this Court asking for future interest and this Court allowed the revision and added future interest to the decree. The decree of the Small Cause Court therefore merged in the decree of this Court and a new decree was framed by this Court. This case however is different from the present case where the application in revision was dismissed. In the present case the decree of the Small Cause Court dismissing the suit of the plaintiff granted the defendant costs in the Small Cause Court. The decree in the High Court dismissing the revision application of the plaintiff merely said that the application was dismissed and granted costs of the High Court to the defendant opposite party. There were thus two decrees in favour of the defendant. It was not a case where there was merger of a decree of the Small Cause Court in that of the High Court. As therefore were two separate decrees in the present case it is clear that there was no merger. Reference was also made for the applicant in

1. Gauri Shanker v. Jagat Narain, 1934 All 134 =148 I C 893.

review to 1931 All 704 (2). That was a case of this Court in second appeal confirming the decree of the Court below and therefore there was a merger. Similarly in 1922 Bom 130 (3) there was a merger in the case of a second appeal to the High Court. No ruling has been produced for the applicant in review to show that any High Court has held that there is a merger in the case of a High Court dismissing an application in revision. The contrary has been held in 1920 Lah 321 (4). It was laid down in that ruling that a decree of a Small Cause Court is final and not appealable and although in certain circumstances it may be set aside or modified by a High Court in virtue of its revisional powers it must remain a decree of the Court which originally passed it when the High Court declines to interfere with it on the revision side and the lower Court accordingly is competent to entertain an application for amendment. I consider that this ruling applies to the facts of this case and that the lower Court was competent to entertain the application in review of judgment.

The next ground which was argued was ground No. 7 that the order of the lower Court allowing the plaintiffs to produce further evidence besides the two letters could not be justified. Learned counsel for the applicant argued that the Court would be limited by the provisions of O. 47, R. 1 in making directions in regard to evidence. That rule does not purport to deal with this matter. On the contrary, R. 8 is the rule which applies and that rule states as follows:

"When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the rehearing as it think fit".

This rule shows that it was open to the Court either to rehear the case or to make such order in regard to the rehearing as it thought fit. It would no doubt have been open to the lower Court to make an order that no evidence should be produced except in regard to the two letters. It was however open to the lower Court to make a simple order for rehearing, as it has done. This matter being within the jurisdiction of the lower Court I do not think that I should interfere with that portion of the order in revision. The next point which was argued was ground No. 2 that the application was barred by time and there was no sufficient cause shown and the Court had not properly considered the question of limitation. On this objection is made that under O. 47, R. 1 the Court must find in the present case that there was the:

"discovery of new or important matter or evidence which after the exercise of due diligence was not within the knowledge of the plaintiff or could not be produced by him at the time when the decree was passed or order made".

In particular, it is argued that there is no finding of the lower Court that these letters are material. The lower Court has stated that:

"the plaintiff alleges that the letters are material and the Court then proceeds to state. There is no knowing yet of the worth of these post cards, but taking them to be such as sent by the defendant to the plaintiff it is just worth while to review the case on hard merits giving parties full latitude to produce such evidence as they may".

I consider this a finding that the letters are sufficiently important to justify the order for review. The next ground argued was No. 3 that no notice was issued to the defendant in the hearing of the application under S. 5, Limitation Act. The order shows that no formal notice was issued but that the defendant was heard at full length on this point. This appears to me sufficient. The 5th ground was also argued that the affidavit did not disclose sufficient grounds for review. The affidavit was supplemented by the deposition of the plaintiff which does disclose sufficient ground. I consider that no ground for interference in revision has been shown. I therefore dismiss this application for revision with costs.

K.S. *Application dismissed.*

2. Sheo Balak Singh v. Mahabir Singh, 1931 All 704=133 I C 432.
3. Shivappa v. Ramachandra 1922 Bom 130=63 I C 916 =46 Bom 1.
4. Khuda Bakhsh v. Allah Ditta, 1920 Lah 321 =58 I C 630=1 Lah 342.

A. I. R. 1935 Allahabad 436

GANGA NATH, J.

Arjun and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 61 of 1935, Decided on 12th February 1935, from order of Addl. Sess. Judge, Jaunpur, D/- 15th January 1935.

Evidence Act (1872), S. 114—Attachment made—Presumption is that all formalities have been complied with—Civil P. C., O. 21, R. 44.

In accordance with S. 114, Evidence Act when it is proved that an attachment has been made,

in the absence of any evidence to the contrary, it ought to be presumed that all necessary formalities were complied with : 1934 *P C* 217, *Rel on.* [P 437 C 2]

Sri Narain Sahai—for Applicants.

Order.—This is an application in revision by Arjun and four others against their convictions and sentences under Ss. 186 and 424. Penal Code, which were confirmed by the learned Additional Sessions Judge of Jaunpur. One Mt. Naurangi Kuar, wife of Ram Raj Singh had obtained a money decree from the civil Court against Arjun chamar. She applied for its execution by attachment of Arjun's crops, which were standing in the field. A warrant of attachment was issued to the Amin on 22nd February 1934 specifying certain plots, the crop of which was to be attached. The Amin was also authorised to attach any other property belonging to the judgment-debtor which may be pointed out by the decree-holder. In execution of this warrant the Amin attached the crop of the plots specified in the warrant and prepared an inventory, (Ex. B). The Amin appointed two Shiahanas to keep watch over the attached crop. On 27th February 1934, the Amin was ordered by the Court to reap and store the attached crop. The Amin went to the spot on 4th March 1934 and engaged some labourers and started the reaping of the crop. While this was being done the accused who are brothers and cousin attempted to stop the work but the Amin reasoned with them and they withdrew. After sometime they again returned and began to reap the crop of another plot which had not been attached. As soon as the bundles had been prepared by the labourers of the Amin of the reaped crop, which had been attached, the accused began to throw stones at the Amin and carried away forcibly all the crop that had been gathered. The amin made a report and the applicants were prosecuted and convicted under Ss. 186 and 424, Penal Code. The facts referred to above have been clearly proved by the evidence produced on behalf of the prosecution which has been believed by both the Courts.

The only point urged on behalf of the applicants is that the prosecution has not proved that the necessary formalities of attachment, as required under O. 21, R. 44, Civil P. C., were complied with. The evidence of the Amin, who made the attachment is to the effect that he made the attachment. In accordance with S. 114, Evidence Act, when it is proved that an attachment has been made, in the absence of any evidence to the contrary, it ought to be presumed that all necessary formalities were complied with. In 1934 P C 217 (1) their Lordships of the Privy Council observed:

"It is alleged that an attachment of the 250 kanals followed. The Judicial Commissioner in the present case has held that that attachment has not been proved because there was no direct evidence that a copy of the order of attachment was fixed in the Collector's office. Their Lordships are of opinion that there is evidence that the land was attached, and that in the absence of any evidence to the contrary, it ought to be presumed that all necessary formalities were complied with (see S. 114, Evidence Act)."

There being no evidence to the contrary as already stated it will be presumed that the attachment was validly made and all the necessary formalities, such as are required under O. 21. R. 44, Civil P. C., were complied with. The next point urged by the learned counsel was as regards the severity of the sentence. The applicants have been sentenced each to pay a fine of Rs. 15 under S. 186 Penal Code, and to undergo three months' rigorous imprisonment under S. 426, Penal Code. Both the offences of which the applicants have been convicted are serious and the sentences are by no means severe. There is no force in the application for revision. It is therefore ordered that it be rejected.

K.S. *Application Rejected.*

1. Mohammad Akbar Khan v. Mian Musharaf Shah, 1934 P C 217=151 I C 221=61 I A 371 =15 Lah 836 (PC).

A. I. R. 1935 Allahabad 437

BENNET, J.

B. B. & C. I. Railway, Bombay—Defendant—Appellant.

v.

Raghib Ali—Plaintiff—Opposite Party—Respondent.

Civil Revn. No. 498 of 1934, Decided on 20th December 1934, against decision of Sm. C. C. Judge, Agra, D/- 17th March 1934.

Provincial Small Cause Courts Act (1887), S. 25—Lower Court refusing restoration—High Court should not interfere in revision.

It is a matter of discretion as to whether the Court of Small Cause should or should not allow restoration. Where it refuses to allow restoration the High Court should not overrule it in revision: 1929 *All* 599 *Dist.* [P 438 C 1]

R. N. Gurtu—for Applicant.

B. Malik—for Opposite Party.

Order.—This is an application by a defendant in civil revision under S. 25, Small Cause Courts Act against an

order refusing an application for restoration of a suit. The order states:

"The suit was decreed ex parte on December 14, 1933, after waiting and waiting long enough for the defendant who went off to call his Vakil who never turned up. Under such circumstances I refuse to set aside the ex parte decree."

Learned counsel urged that on the day that the suit was decreed ex parte in the absence of his client, an application for restoration was made at 1-45 p. m., and two days later, an application with security was made as required by S. 17 Small Cause Courts Act. Learned counsel has failed to produce any ruling in which this Court has interfered in civil revision where a Small Cause Court has refused to allow restoration. In 1929 All 599 (1). there was an order for restoration by a Munsif and it was held by a Bench of this Court that in revision this Court could see if the grounds found were sufficient in law. That however is a different matter. In the present case the Court has held that the grounds alleged were not sufficient. It is a matter of discretion as to whether the Court below should or should not allow restoration. Where it refuses to allow restoration I do not consider that this Court should overrule it in revision.

Accordingly I refuse this application with costs..

K.S. *Order accordingly.*

1. Faqir Chand v. Harkishun Das, 1929 All 599 =117 I C 111=51 All 908.

A. I. R. 1935 Allahabad 438

KENDALL, J.

Sundar Lal and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 818 of 1934, Decided on 10th January 1935, from order of Sess. Judge, Shahjahanpur, D/- 4th August 1934.

Penal Code (1860), S. 300, Excep. 4—Sudden fight between two parties—Every one trying to hit one of opposite side—No thought of private defence—Held offence was culpable homicide.

There was in fact a sudden fight. Everyone was trying to hit one of the opposite side and nobody thought about any private right of self-defence.

Held : Offence committed was one of cupable homicide. [P 439 C 1]

L. M. Roy—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—The three appellants, Sunder Lal, Rati Ram and Ram Din, have been convicted of an offence under S. 304, Penal Code, and have been sentenced to three years' rigorous imprisonment each, and they have appealed against their convictions and sentences. The facts which the learned Sessions Judge has found to be proved are as follows: On the afternoon of 31st March 1934. Ram Sarup, the deceased, drove his cart through a field belonging to Sham Lal, and in consequence of this had a quarrel with Sham Lal and his sons, Ratti Ram and and Ram Din. Nothing happened at the time, and Ram Sarup went home. Later in the afternoon Ram Sarup was called from his house by the appellants, who told him to go and settle the matter, and he therefore went to Sheo Shanker's chabutra where the three appellants attacked Ram Sarup, hit him on the head and so killed him. During the attack Mahadeo and Balak Ram came up and attacked Ram Sarup's assailants, with the result that Rati Ram, Ram Din and Sheo Shanker, who was also present at the time, received injuries. Bhola Nath, the father of Ram Sarup, who had gone along with him to Sheo Shanker's chabutra made a report at the thana 7 miles away at 8 p. m., the same evening, in which he stated the case which has been believed by the Sessions Judge, with the exception that he made no mention of Balak Ram. The learned Judge considered that in these circumstances the three appellants were guilty of culpable homicide, as their offence came within the fourth exception to S. 300 Penal Code.

Mr. Roy, for the appellants, has argued that his clients acted in self-defence inasmuch as the evidence shows that they themselves were attacked by Ram Sarup and his friends, and that though they undoubtedly hit Ram Sarup on the head and caused his death, they only did so after they themselves had been attacked. I have considered the evidence, and there are certainly some circumstances which support Mr. Roy's theory of the fight. In the first place, it appears to me to be certain that there was a considerable fight. The medical evidence shows that Ram Din, appellant, received a bruise on the side of his head, another injury on his right shoulder and a third on his finger. Rati Ram was hit on the shoulder and Sunder Lal on the leg, and Sheo Shanker had both the bones of his right fore-arm broken and three bruises on the head as well as one on the upper-arm. In the second place, it is not

conceivable that the fight began by Ram Sarup being hit on the head and falling down dead, and that it then developed into a melee between the supporters of the two sides. The general fight must have taken place before Ram Sarup was knocked down, and it was only brought to an end when he was knocked down, and it was realised that one of the parties to the fight had been seriously injured. It follows therefore that the injuries to Ram Din, Rati Ram, Sunder Lal and Sheo Balak had been caused before Ram Sarup had been knocked on the head, and as it is almost incredible that Ram Sarup alone should have caused all these injuries, and as we know from the evidence that Balak Ram and Mahadeo were witnesses of the fight and also took part in it, the conclusion is irresistible that there were three, and possibly four, on each side, and it is at least possible that Ram Sarup's party were the aggressors. In fact one or two of the prosecution witnesses have said that Ram Sarup struck the appellants before they struck him.

Another part of the prosecution story which it is difficult to believe is that in which Bhola Nath says that the three appellants came to Ram Sarup's house and called him out to Sheo Shanker's chabutra. If they had intended to have a settlement with Ram Sarup they would in all probability have had it then and there. If Ram Sarup however went to Sheo Shanker's chabutra it seems that he went there accompanied by his friends, that the quarrel took place there, that there was a general fight and that Ram Sarup received blows in the course of that fight which resulted in his death.

I cannot agree with Mr. Roy however that in these circumstances the appellants have committed no offence as they were justified in striking Ram Sarup on the head in order to protect themselves. There was in fact just such a sudden fight as is contemplated in exception 4 to S. 300, Penal Code. Everyone was trying to hit one of the opposite side and nobody thought about the private right of self-defence. It is not at all clear, though it may be as I have said quite probable, that Ram Sarup's party were the aggressors, and in short, though I think the circumstances of the fight were different from what the learned Judge found to be true the law which he has applied is the right one, and the appellants are guilty of culpable homicide, though their offence is not so serious as that which the Judge has found to be proved. The result is that the sentences passed on them ought to be reduced.

I therefore allow the appeal to this extent that, while maintaining the convictions. I reduce the sentence passed on each of the appellants from three rigorous imprisonment to one year's rigorous imprisonment. The appellants are on bail and must surrender to their sureties.

K.S. *Sentence reduced.*

A. I. R. 1935 Allahabad 439

BENNET, J.

Durga Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 926 of 1934, Decided on 18th December 1934, from order of Dist. Magistrate, Shahjanpur, D/- 4th September 1934.

(a) Criminal P. C., (1898), Ss. 202 and 436—Full enquiry—District Magistrate can interfere.

Where there is a full enquiry, a District Magistrate can interfere. [P 440 C 1]

(b) Criminal P. C., (1898), S. 436—Power of Dist. Magistrate to interfere under S 476 is not limited to point of Law (Obiter).

Obiter the power of the District Judge to interfere under S. 436 is not limited to a point of law. [P 440 C 1]

(c) Criminal Trial—Prosecution as well as defence is entitled to fair hearing.

A case should be fairly heard by a Criminal Court. The revisional powers of the High Court should not be used to prevent criminal trials taking place. The prosecution as much as defence is entitled to a fair hearing and it is in the interests of justice that a fair trial should take place. [P 440 C 1, 2]

Saila Nath Mukerji and *N. C. Sen*—for Applicant.

Asst. Govt. Advocate — for the Crown.

L. N. Gupta—for Opposite Party.

Order.—This is an application in revision on behalf of one Durga Prasad. There was a complaint under Ss. 417 and 420. Penal Code, made against him which was dismissed under S. 203, Criminal P. C., by a Magistrate and further inquiry has been ordered by the District Magistrate. The grounds of revision are that the matter was of civil nature and that after an inquiry under S. 202, Criminal P. C., the District Magistrate should not interfere. Apparently the latter argument is that a District Magistrate should only interfere in the case of a complaint which is dismissed without inquiry. S. 202 however directs that there should be

inquiry in every case in which process was not issued for the accused. Therefore it appears to me that the argument in ground No. 2 is wrong as this argument alleges that the District Magistrate should not interfere where there has been a full inquiry under S. 202, Criminal P. C. It is, in my opinion, in the case of such an inquiry that a District Magistrate can interfere and that this is specifically laid down in S. 436, Criminal P. C. Learned Council in argument attempted to draw some distinction as to whether Magistrate should interfere on the merits of a case on a question of fact or whether he is limited to interference only on a point of law. Learned counsel argued that it was only on the point of law that a District Magistrate cound interfere. I find nothing in S. 436, Criminal P. C., to support this view; but in any case the point does not arise in this case because in my view the District Magistrate has interfered on a point of law. The order of the City Magistrate sets out that the accused made a promise to pay the balance within 15 days and the complainant stated that he would not have allowed credit to the accused, if he had known at the time that the accused was an insolvent and apparently if the accused had not concealed from him the fact that insolvency proceedings were pending against him. The accused has not apparently been declared an insolvent yet. The City Magistrate stated:

"Apparently it was not the duty of Durga Prasad to have told the complainant that insolvency proceedings had been pending against him.

Section 415, Penal Code, states in the explanation:

"a dishonest concealment of fact is a deception within the meaning of the section."

The District Magistrate states:

"I think there are good reasons for taking the view that on the facts the accused appears to be technically guilty under S. 420 and that the circumstances do not justify an inquiry being refused by a Criminal Court."

He therefore does not differ in regard to the facts, but he differs in regard to the law. Learned counsel for the applicant in revision did not convince me that the view of law taken by the District Magistrate was erroneous. Under these circumstances, I see no ground for interference in revision. I consider it desirable that a case should be fairly heard by a Criminal Court. I do not consider that the revisional powers of this Court should be used to prevent criminal trials taking place. The prosecution as much as defence is entitled to a fair hearing and it is in the interests of justice that a fair trial should take place. For these reasons I dismiss this application in revision.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 440

BENNET, J.

Manphool—Plaintiff—Appellant.

v.

Budhu—Defendant—Opposite Party.

Civil Revn. No. 376 of 1934, Decided on 12th December 1934, against order of 2nd Sub-Judge, Saharanpur, D/- 22nd May 1934.

Criminal P. C., (1898), S. 476-B—Appeal to Dist. Judge—No power to transfer the appeal to Sub Judge.

It is not open to a District Judge in whose Court an appeal is pending to transfer that appeal to the Court of the Subordinate Judge as the subordinate Judge has no jurisdiction to hear such appeal, neither under Criminal P, C., nor under Civil Courts Act: 39 *Cal* 774, 1933 *Pat* 179, 1928 *Oudh* 494, *Ref to*; 1927 *All* 555, *Dist.*

[P 441 C 1, 2]

S. K. Mukerji—for Applicant.

Nanak Chand—for Opposite Party.

Judgment.—This is an application in civil revision by the plaintiff Manphool against an order in appeal under section 476-B, Criminal P. C., passed by the learned Subordinate Judge. There was an order passed by the Munsif under S. 476, Criminal P. C., refusing to take proceedings under Ss. 209, 471, 463, 191 and 193, Penal Code, against Manphool on the complaint of Budhu defendant. This application was made by Budhu in connexion with the civil suit before the Munsif. Under S. 476-B, Criminal P. C., an appeal lay and Budhu brought an appeal in the Court of the District Judge. This was the correct Court in which such an appeal should be brought. The District Judge however purported to transfer this appeal under S. 24 (1) (a), Civil P. C., to the Subordinate Judge who has purported to dispose of this appeal. The question raised in revision is whether the Subordinate Judge had any jurisdiction to hear an appeal of this nature and whether the District Judge had any jurisdiction to order the transfer of this appeal instead of hearing it himself. It is laid down in S. 476-B that an appeal may be made:

"to the court to which such former court is Subordinate within the meaning of S. 195 (3)".

Section 195 (3) provides:

"For the purpose of this section a court shall be deemed to be subordinate to the court to-

which appeals ordinarily lie from the appealable decrees or sentences of such former court."

This is the portion of the section which applies in the present case. It is clear therefore that the section contemplates that the appeal should be to the Court of the District Judge from the order of the Munsif under S. 476, Criminal P. C.. The further question arises as to whether the power of transfer under S. 24, Criminal P. C., exists. The section provides in sub-S. 1 (a) that the District Court may transfer:

"any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same."

This sub-section involves the point that the matter transferred should be a suit appeal or other proceeding. Learned counsel argues that appeal means only a civil appeal. It may be further observed that the transfer must be to a Court which is competent to try and dispose of the same. It is not shown that the Court of the Subordinate Judge has any jurisdiction to try and dispose of the appeal in question. No such jurisdiction is given by the Criminal Procedure Code, to the Subordinate Judge and the Civil Courts Act, does not give the Subordinate Judge any such jurisdiction. The case is very similar to that of a revenue appeal. As a Subordinate Judge has no jurisdiction to try a revenue appeal therefore it is not open to the District Judge to transfer a revenue appeal to a Subordinate Judge under S. 24, Civil P. C. There is authority for the applicant in revision. This authority is shown in 39 Cal 774 (1), a Bench ruling where it was held that appeals under S. 195 (6) of the former Criminal P. C., could not be transferred to a Subordinate Judge by the District Judge. This ruling was followed by a learned Single Judge in 1933 Pat 179 (2).. A similar ruling has been laid down in 1928 Oudh 494 (3). For the opposite party reference was made to 1927 All 555 (4), but in that ruling the Court to which the transfer was made was the Court of an Additional Judge and not the Court of a Subordinate Judge and it was held that under S. 8, Civil Courts Act the transfer could be made. I hold therefore that it is not open to a District Judge in whose Court an appeal under S. 476-B, Criminal P. C. is pending to transfer that appeal to the Court of a Subordinate Judge as the Subordinate Judge has not got jurisdiction to hear such an appeal. Accordingly I allow this application in revision with costs and I set aside the order of the Subordinate Judge and direct that the appeal should be taken again on the file of the District Judge and should be disposed of by him according to law. The costs in the Court of the Subordinate Judge between Manphool and Budhu will abide the event. The court-fee will be returned to the applicant in revision.

G.R./R.K. *Application allowed.*

1. Ram Charan Chanda v, Taripulla, (1912) 39 Cal 774=13 I C 1007=13 Cr L J 191.
2. Dulari Koeri v. Fauzdar Khan, 1930 Cre 510=1933 Pat 179=142 I C 621=34 Cr L J 410.
3. Bismillah Khan v. Shakir Ali, 1928 Oudh 494 =114 I C 812.
4. Narain Das v. Emperor, 1927 Oudh 555=102 I C 485=49 All 792.

A. I. R. 1935 Allahabad 441

NIAMATULLAH, J.

(*Firm*) *Mithan Lal Inder Narain*—Defendant—Applicant.

v.

((*Firm*) *Hem Chand Kashmiri Lal* and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 557 of 1934, Decided on 25th January 1935, from decree of Small Cause Court Judge, Dehra Dun, D/- 28th August 1934.

Debtor and Creditor—Composition deed—Composition deed executed by creditors and heirs of debtor—One of creditors not joining in execution but his name mentioned therein—And he electing to abide by agreement—He can enforce agreement.

Where a composition deed was executed by the creditors and the heirs of the deceased debtor and one of the creditors did not join in the execution of it but his name was mentioned therein and he elected to abide by it.

Held : that he could enforce it, even though he was not a party in executing it. [P 442 C 1,2]

S. N. Seth—for Applicant.

Vishwa Mitra—for Opposite Parties.

Order.—This is an application for revision against a decree passed by the learned Judge, Small Cause Court, Dehra Dun, allowing the plaintiff's claim to a certain sum of money against the defendant, the applicant in this Court. One Parbhu Lal, who was indebted to a number of persons, died sometime before December 1930. Two of the creditors were the parties to this case. What should be considered to be composition deed was executed by the creditors and the heirs of the deceased debtor, which provided that the deceased had left a cloth shop and a house which should be sold and rateable distribution of the proceeds

of sale should be made among the creditors and that a creditor should be deemed to have been satisfied in full on receipt of his rateable share in the aforesaid sale proceeds. Those representing the debtors signed the agreement and so did the creditors, except the plaintiff. Sometime afterwards the defendant applicant had the house referred to in the agreement sold in execution of his decree and appropriated the sale proceeds. The plaintiff then brought the suit which has given rise to this revision for his share of the sale proceeds of the house, relying upon the agreement. The defendant contested the suit principally on the ground that the plaintiff was no party to the agreement and that he not having signed it could not enforce it. The agreement mentions the name of the plaintiff in the array of the executants, and the whole deed purports to be one on behalf of all the creditors, including the plaintiff. Under one of the "al-abds" meant for the signature of the plaintiff his signature does not appear but Janardhan Das, son-in-law of the deceased, at whose instance the composition was brought about, signed it. The agreement specifically provided that Janardhan Das was made responsible for obtaining the concurrence of the plaintiff to the arrangement embodied therein.

The lower Court probably intended to hold that Janardhan Das, who signed the agreement in place of the plaintiff, had an oral authority from him (the plaintiff) and that the plaintiff should therefore be considered to be a party to it. In my opinion the learned advocate for the applicant has succeeded in showing that this view of the lower Court cannot be sustained, even if that Court has so found it, which is not clear. I am however of opinion that it is not necessary to go into the question of Janardhan Das's authority to execute the agreement on behalf of the plaintiff. If the plaintiff subsequently elected to abide by the agreement and agreed to rateable distribution, he became a party thereto and could enforce it. The learned advocate for the applicant strenuously contended that there is no evidence to show that the plaintiff ever consented to the terms embodied in the agreement and that if the position had been the reverse of what it is the plaintiff could have successfully backed out of the arrangement. If the premises on which the learned advocate's conclusion is based be accepted, the contention has force; but it is pointed out by the learned advocate for the opposite party that there is definite evidence on the record to show that the plaintiff not long after the execution of the agreement in question expressed his willingness to abide by it. There is a receipt on the record which is signed by the applicant and which shows that shortly after the execution of the agreeement moveables were sold and the sale proceeds rateably distributed among the creditors, the plaintiff being one of them. Janardhan Das, who seems to have throughout acted on behalf of the plaintiff to whom he is related gave his evidence and swore that the plaintiff accepted his share of the sale proceeds above referred to. It is argued that Janardhan Das's evidence should not be accepted he being an interested person. I find however that no attempt was made to impeach his evidence in cross-examination on this point. I think Janardhan Das's evidence is true and should be accepted. This being so, there can be no doubt that shortly after the agreement the plaintiff elected to agree to the composition, embodied in the agreement in suit. This finding robs the argument put forward on behalf of the applicant of all force. After the plaintiff elected to abide by the agreement, it was not possible for him to resile from it.

In the circumstances stated above, the plaintiff is, in my opinion, entitled to enforce the agreement and to claim a share on rateable distribution of the sale proceeds of the house. It was argued on behalf of the applicant that it had been arranged that Janardhan Das should sell the house and the sale proceeds recovered by him would be rateably distributed, but that Janardhan Das did nothing to sell the house and that eventually the defendant had to execute his decree by sale of the house. There is nothing in the agreement to suggest that the responsibility of selling the house was thrown on Janardhan Das. The agreement is merely to the effect that the sale proceeds of the cloth shop and the house would be rateably distributed. This implies that whatever may be the means by which sale takes place, the sale proceeds would be divided in a certain manner among the creditors. It is perfectly immaterial whether the sale proceeds were recovered by the action of the defendant or by that of any other creditor. This contention has no force.

The revision fails and is dismissed with costs.

K.S. *Revision dismissed.*

A. I. R. 1935 Allahabad 443

BENNET, J.

Umrao Singh—Plaintiff—Applicant.

v.

Mangla and *others*—Defendants—Opposite Parties.

Civil Revn. No. 514 of 1934, Decided on 20th December 1934, against order of Sm. C. C. Judge, Meerut, D/- 6th August 1934.

Limitation Act (1908), Art. 66 — Simple money bond—Money payable on demand—Provision that interest to be paid half yearly and whole sum with interest payable after one year—Suit after 3 years of date bond but within 3 years from date fixed for payment—Held, it was not barred.

The plaintiff sued on a simple money bond executed on 1st April 1931. The suit was brought on 6th July 1934, that is more than three years after the execution of the bond. The bond set out firstly that the money was payable on demand and further on it set out that interest should be payable six monthly and that the whole snm with interest should repaid within one year. The suit was brought within three years from the date of payment of 1st April 1932.

Held: Art, 66. Limitation Act applied to the case and that the limitation ran from the period of one year mentioned and not from date of execution. The principle which applies in such case is to examine whether it was open to the debtor to make a payment before the end of the period of one year fixed. Clearly in the case of this bond, it was not open to the debtor to make a payment because the bond states that it was payable on demand, that is on demand of creditor. Until, the creditor made a demand the bond was not payable. This clause, therefore, gives the creditor an option but it did not give any option to the debtor. 1932 *P C* 207, *Appl*; 1933 *All* 235, 1920 *All* 353, *Ref.* [P 443 C 2]

Vishwa Mitra—for Appellant.

K. Masud Hassan—for Opposite Parties.

Order.—This is an application in civil revision by a plaintiff whose suit has been dismissed by a Small Cause Court on the ground that it was time-barred. The plaintiff sued on a simple money bond executed on 1st April 1931. The suit was brought on 6th July 1934, that is more than three years after the execution of the bond. The bond set out firstly that the money was payable on demand and further on it set out that interest should be payable six monthly and that the whole sum with interest should be paid within one year. The suit was brought within three years from the date for payment of 1st April 1932. Art. 66. Limitation Act. applies to the case and the question is whether the period of limitation should run from the date of execution on the ground that the bond was payable on demand or whether it should run from the period of one year specified in the bond as payable. The principle which applies in such cases appears to me to examine whether it was open to the debtor to make a payment before the end of the period of one year fixed. Clearly in the case of this bond, it was not open to the debtor to make a payment because the bond states that it was payable on demand, that is on demand of the creditor. Until the creditor made a demand the bond was not payable. This clause therefore gave the creditor an option. but it did not give any option to the debtor. There was a somewhat similar case in 1920 All 353 (1). In that case there was a promissory note payable on demand, and on the date of execution the defendant wrote to the Bank promising to pay within a year and apparently the Bank accepted that promise as part of the agreement between the parties. It was held that limitation would run from the expiry of the period of one year. I consider that the general principle governing these cases is to be deduced from a ruling of their Lordships of the Privy Council in 1932 P C 207 (2). In that case there was a mortgage deed with a period of twelve years for payment and provision that payment might be demanded in case of default of payment of interest. It was held that this was an option to the creditor and that limitation did not run until the period of twelve years should expire. This principle in that ruling was laid down in regard to mortgage bonds, but it has been extended to simple bonds in a ruling in 1933 All 235 (3).

For these reasons I allow this application in revision and set aside the decree of the lower Court and remand the suit for disposal on the remaining issue. The court-fee of this Court will be returned to the plaintiff. Costs hitherto incurred will be costs in the case.

K.S. *Revision allowed.*

1. Jwala Prasad v. Shama Charan, 1920 All 353 =52 I C 235—42 All 55.
2. Lasa Din v. Gulab Kunwar, 1932 P C 207= 138 I C 779=59 I A 376=7 Luck 442 (P C).
3. Lalta Prasad v. Gajadhar Shukul, 1933 All 235=149 I C 181=55 All 283.

* A. I. R. 1935 Allahabad 444

NIAMATULLAH AND BENNET, JJ.

In the matter of, *Income-tax of Madan Gopal.*

Civil Misc. Case No. 39 of 1934, Decided on 30th November 1934.

(a) Interpretation of Statutes—Same word occurring in same section should be given same meaning unless there is something in context to indicate a different meaning.

Ordinarily where the same word occurs in two different part of the same section, the same meaning should be assigned to it, but if there is anything in the context to indicate a different meaning or principle underlying the section makes it more logical to assign a different but legitimate meaning, it is permissible to construe the same word occurring in two parts of the same section differently. [P 445 C 1]

*** (b) Income-tax Act (1922), S. 55—'Individual' in proviso is used in wider sense than same word in section — It includes Hindu undivided family.**

The word 'individual' in the proviso is used in a slightly wider sense than the same word occurring in the section itself. It includes a Hindu undivided family. Hence a joint Hindu family which is a partner in another firm on which super tax has been assessed is not liable to pay super tax on that part of its income which represents profits received by it from the firm in which it is a partner. [P 445 C 2]

K. N. Katju and *Harnandan Prasad* —for Assessee.

K. Verma—for Commissioner of Income-tax.

Niamatullah J.—This is a reference under S. 66 (3) by the Income-tax Commissioner. There is a connected reference No. 40 of 1934. The assessee in the present case is a joint Hindu family represented by its Karta Lala Ramratan Das. The assessee in the connected case is a joint Hindu family represented by its Karta Lala Jaidayal. The two joint families entered into a partnership having equal shares and became a registered firm styled Jaidayal Madangopal. This registered firm consisting of the two joint families as partners became a partner in nine other unregistered firms. On a reference made by the Income-tax Commissioner on a previous occasion it has been held by a Bench of this Court that the registered firm (consisting of the two joint families) could not in law be a partner in the aforesaid nine unregistered firms. The result of this decision was that each of the two joint families was taken to be severally a partner in the nine unregistered firms and not as a component part of the registered firm.

A sum of Rs. 1,81,338 was received by the registered firm as its share of the profits from some of the unregistered firms of which it had become a partner. The share of each of the two joint families in such profit came to Rs. 90,669. This added to the other income of the joint family represented by L. Ramratan Das gave a total of Rs. 98,409, on which the Income-tax Department assessed a super-tax after making allowance for Rs.. 75,000 upto which a joint Hindu family is exempt from the payment of super-tax. An objection was taken on behalf of L. Ramratan Das to the sum of Rs. 90,669 being included as part of the income of his joint family for the purposes of supertax on the ground that the same was exempt from payment of super-tax under S. 55, Proviso, Income-tax Act. The objection was overruled. The Income-tax Commissioner was directed by an order of this Court dated 25th August 1933, to submit a case for the determination of the following question:

"Whether the applicant is liable to pay super-tax on that part of its income which represents profits received by it from the registered firms in its capacity as a partner in the firm Jai Dayal Madan Gopal?"

The Income-tax Commissioner has recorded his opinion as regards the proper construction of the word "individual" occurring in the proviso to Section 55 on which the decision of this case turns. S. 55 runs as follows: In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature. Provided that, where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share.

The learned advocate for the department has strenuously contended that the word "individual" occurring in the proviso must be assigned the same meaning as it bears in the main section. He points out that the word "individual" has been used in the section as not including a Hindu undivided family which is separately referred to, and contends that the same word occurring in the proviso must be taken

to be used in an exclusive sense. He also argues that the Legislature has not advisedly used in the proviso the word "person" which includes a Hindu undivided family S. 2 (9). As against this the learned advocate for the assessee lays stress on the fact that no reason can be suggested why a differential treatment should have been made in case of an individual, implying a man or a woman, and a Hindu undivided family should have been made liable to pay super-tax a second time. The learned advocate for the department suggested that the difference is due to the fact that a Hindu undivided family is exempt from payment of super-tax where its income does not exceed Rs. 75,000, while any other person in liable to pay super-tax on the excess over Rs. 30,000.

We have carefully considered the phraseology of S. 55 and its proviso and the policy underlying the whole Act and are of opinion that the word "individual" has been used in the proviso in a slightly wider sense than the same word occurring in the section itself. Ordinarily where the same word occurs in two different parts of the same section the same meaning should be assigned to it, but if there is anything in the context to indicate a different meaning or the principle underlying the section makes it more logical to assign a different, but legitimate meaning, it is permissible to construe the same word occurring in two parts of the same section differently. S. 55 lays down generally that every individual, joint Hindu family, company, unregistered firm (a registered firm is separately provided for) or other association of individuals is liable to pay super-tax in addition to the income-tax payable under the Act. As the section makes, inter alia, an unregistered firm liable to super-tax, the proviso is intended to make it clear that the component parts of such unregistered firm cannot be made to pay super-tax if the firm itself has already paid it. If the contention put forward on behalf of the department be accepted the result will be somewhat anomalous in a case in which an unregistered firm consists of partners one of whom is Hindu undivided family, as on the profits received by the individual partners none of them except the Hindu undivided family will be liable to pay super-tax, the firm itself having already paid it. The Hindu undivided family though similarly situated will be called upon to pay super-tax a second time. It seems to us that the proviso to S. 55 provides in case of super-tax what section 14 (2) (b) does in reference to the income-tax. The scheme of the Act appears to be that where the income of an assessee is part of income of a firm which has already paid income-tax and super-tax the assessee should not be called upon to pay any income-tax or super-tax on the amount received by him as his share of the profits of the firm. The use of the word "individual" in the proviso was not in our opinion intended to exclude from its benefit a Hindu undivided family. It cannot be denied that the word is wide enough to include a group of persons forming a unit. The context in which it occurs suggests to our mind that it has been used to indicate one of the component parts of an unregistered firm. It is followed by the words "having a share in the firm" which indicates that the word is intended to connote an "individual partner" be he a person or the legal entity, the Hindu undivided family.

The argument that only a single individual as distinguished from a Hindu undivided family was intended to have the benefit of the proviso because he is liable to pay super-tax on his income in excess of Rs. 30,000 while a Hindu undivided family is exempt from super-tax where its income does not exceed Rs. 75,000 does not impress us. The reason why a higher limit is fixed for a Hindu undivided family is obviously the consideration that its income is shared by all the coparceners whereas in case of an ordinary individual the income belongs to him exclusively.

For these reasons we think that the word "individual" in the proviso to S. 55 includes a Hindu undivided family and the difficulty of, adopting that construction is due to somewhat inartistic drafting of it. The result is that we answer the question referred to us in the negative. We assess the fee of the advocate for the Commissioner at Rs. 150. The costs of this reference shall be paid by the Department. The legal practitioner's fee, for which a certificate has been filed, shall be taxed as costs.

K.S. *Question answered.*

A. I. R. 1935 Allahabad 446 (1)

BENNET, J.

Ch. Tara Singh and *others*—Plaintiffs —Applicants.

v.

Mt. Sagiya — Defendant — Opposite Party.

Civil Revn. No. 470 of 1934, Decided on 19th December 1934, against order of Small Cause Court Judge, Meerut, D/- 21st May 1934.

Agra Tenancy Act (1926), S. 48—Plaintiff saying that defendant landlord has collected more rent from him — Case comes under S. 48 and is cognizable only by Revenue Court.

A case where the plaintiffs say that the defendant collected from them more rent than they should have paid is a case which comes under S. 48 of the Act and that suit is triable only by the Revenue Court: 1924 *All* 125, *Dist.*

[P 446 C 1]

S. B. L. Gaur—for Applicants.

K. N. Malaviya—for Opposite Party.

Order.—This is a civil revision by the plaintiffs against an order of a Small Cause Court directing the plaint to be returned for presentation to the proper Court on the ground that the suit was cognizable only by a revenue Court. The Court held that the suit lay under S. 48, Agra Tenancy Act of 1926. That section deals with a suit by a tenant from whom any sum of produce is exacted by his landholder in excess of the amount recoverable from him as an arrear of rent. The present plaint sets out that the defendant is a zamindar of one quarter share in the land of which the plaintiffs are tenants and that the yearly rent is Rs. 120 per annum and that Phundan Lal is the owner of the other three quarter zamindari share. Para. 2 sets out that the defendant collected for the years 1337 and 1338 Fasli arrears of rent of her own share and of Phundan Lal's share amounting to Rupees 254-9-0 and did not allow Rs. 30 remaining for Rabi. Prara. 3 sets out that later Phundan Lal got a decree for arrears of rent for this period of Rs. 242 against the plaintiffs. Para. 5 alleged that the plaintiffs had demanded from defendant the excess she had collected but she had refused to give it. This appears to me to be a very clear case under S. 48, Tenancy Act. and under S. 230 the jurisdiction lies only in the Revenue Court. Learned counsel referred to a ruling. 1924 All 125 (1), corresponding to S. 36 of Act 2 of 1901. That ruling laid down that the section would not apply to the case of a zamindar gathering produce of a grove for himself when the produce was not handed over to him by tenants.

The ruling has therefore no application to the present case as the plaint clearly sets out that the rent in question was paid by the plaintiffs to the defendant. Some argument was made on the meaning of the word "to exact" Oxford Dictionary as stating its meanin S. 48. The ruling quoted Murray's ing "to demand and enforce payment o.f" The ruling does not quote Murray fully as Murray states that the literal sense is to derive or force out and the various derivative senses are to demand, require etc. The first meaning no doubt is to demand and enforce the payment of or to extort. The second meaning includes the meaning "to insist upon," the third meaning to call for demand, require. It is clear that the word may or may not indicate force and may indicate mere insistence. It is clear to me that it is not intended that a suit of this nature should lie in the Civil Court if the demand is made with insistence or if it is enforced and that the suit should lie in the Revenue Court if the demand is made without insistence or without force. Such a position of affairs would be quite absurd. I consider that a case like the present where the plaintiffs say that the defendant collected from them more rent than they should have paid is a case which comes under section 48. Tenancy Act, and that that suit is triable only by the Revenue Court.

For these reasons I dismiss this application in revision with costs.

K.S. *Application dismissed.*

1. Ravi Pratap Narain Singh v. Ram Prasad Bharthi, 1924 All 125=74 I C 502=45 All 725

A. I. R. 1935 Allahabad 446 (2)

KENDALL, AG. C. J. AND HARRIES, J.

Ram Sarup—Applicant.

v.

Emperor — Complainant — Opposite Party.

Civil Revn. No. 73 of 1934, Decided on 17th December 1934 against order of Sub-Judge, Etah, D/- 14th October 1933.

Criminal P. C. (1898), S. 476-B — Complaint by Judge of Small Causes signed as Munsif—Appeal lies to District Judge alone—He has no jurisdiction to transfer appeal to Subordinate Judge.

An order embodying a complaint under S. 193, I. P. C., was signed by the presiding Officer as Munsiff and not as Judge of the Small Cause Court in which capacity the Officer was acting.

The result of the Presiding Officer signing the order as Munsif and not as a Judge of Small Causes had the effect of misdirecting the appeal to the Subordinate Judge instead of to the District Judge.

Held: that an appeal from this order lay to the District Judge alone as the Court passing the order was a Small Cause Court and the District Judge alone had jurisdiction to dispose of the appeal and not to transfer it to the Subordinate Judge. [P 447 C 2]

G. Agarwala and *K. N. Agarwala*—for Applicant.

Shiva Prasad Sinha—for Opposite Party.

Kendall, Ag. C. J.—This is an application for the revision of an appellate order passed by the Subordinate Judge of Etah in the following circumstances. Ram Sarup, the applicant, had made a statement in the course of a suit which was being tried on the Small Cause Court side by the Munsif of Kasganj, in consequence of which the presiding officer decided to make a complaint against him under S. 193, Penal Code. The order embodying this complaint was dated 18th March 1932, and it was signed by the presiding officer as Munsif of Kasganj and not as Judge of the Small Cause Court. The applicant made an appeal to the District Judge, who transferred this case, among others, to the Subordinate Judge for disposal, and the Subordinate Judge disposed of it in the order which is now the subject of the present application, dismissing the appeal.

It is urged in support of the application that the original complaint should have been made not by the Munsif, but by the Judge of the Small Cause Court because the matter was being tried by the Judge of the Small Cause Court and not by the Munsif; and as a consequence of this the appeal which should have been disposed of by the District Judge, and not transferred by him to the Subordinate Judge has been disposed of by a Court which has no jurisdiction. The fact that the complaint of 18th March 1932 was made by the Munsif as such and not as Judge of the Small Cause Court might not on the face of it have had any effect, and the irregularity, if there was one, might not have vitiated the order. It does appear to us however that the result of the Munsif's signing the order as Munsif and not as Judge of the Small Cause Court has had the effect of misdirecting the appeal to the Subordinate Judge instead of to the District Judge. The right of appeal in the circumstances is one that accrues to the applicant under S. 476-B, Criminal P. C., that is to say:

"He may appeal to the Court to which such former Court is subordinate within the meaning of Sec. 195(3)".

and S. 193 (3) shows that for purposes of this particular section:

"a court, in the case of a civil Court from whose decrees no appeal ordinarily lies, shall be deemed to be subordinate to the principal Court having ordinary civil jurisdiction witnin the local limits of whose jurisdiction such civil Court is situated."

Now a Small Cause Court is a Court from the orders and decrees of which no appeal ordinarily lies, and this applies whether the Court is a regular Small Cause Court appointed under the Small Cause Courts Act or is merely the Court of a Munsif invested with special powers as a Judge of the Small Cause Court under the Bengal, Agra and Assam Civil Courts Act. The appeal from that order therefore lay to the principal Court having ordinary original civil jurisdiction as provided in Cl. (c) of S. 195, Criminal P. C., that is to say, to the District Judge. No doubt the appeal was rightly made to the Court of the District Judge, but the Court that had to dispose of that appeal was one having jurisdiction to do so, and the Judge had no jurisdiction to transfer the appeal to the Subordinate Judge as he would have had under S. 22, Bengal, Agra and Assam Civil Courts Act, if the appeal had been one against the order of a Munsif.

It appears then that the applicant has been deprived of the right of appeal to the District Judge which the law allows to him, and we are unable to hold that there has been no substantial injustice in the case, because of course we are unable to say that the decision of the District Judge would necessarily have been the same as the decision of the Subordinate Judge. We are clearly of the opinion that it is necessary to set aside the order of the Subordinate Judge as being without jurisdiction; and we therefore allow this application and direct that the appeal be re-admitted by the learned District Judge under its original number and disposed of by him according to law. In the circumstances of the case, as this question of jurisdiction was not raised in the lower appellate Court and the applicant was himself to blame for the waste of time involved in making the present application, we make no order as to costs.

G.R./R.K. *Application allowed.*

A. I. R. 1935 Allahabad 448

NIAMATULLAH AND ALLSOP, JJ.

Tirloki Prasad—Appellant.

v.

Kunj Behari Lal— Respondent.

Second Appeal No. 12 of 1933, Decided on 11th January 1935, from order of Dist. Judge, Meerut, D/- 4th November 1933.

Civil P. C., (1908), S. 60 (c)—Agriculturist—Test is whether main source of income is derived from cultivation or not.

The test applied in deciding whether a person is an agriculturist is whether his main source of income is derived from cultivation or not, The term 'Agriculturists' used in Cl (c) of S. 60 of the Code of Civil Procedure is used in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation: 1932 *All* 499 *Rel on*. [P 448 C 2]

K. Verma and *K. N. Gupta*—for Appellant.

N. C. Vaish—for Respondent.

Allsop. J.—This is a second appeal from an order passed in first appeal by the learned District Judge of Meerut in the course of insolvency proceedings. The appellant Tirloki Prasad and his brother .Sri Ram, were adjudicated insolvents. The receiver seized a house No. 41. which is situated in the city of Meerut. The appellant Tirloki Prasad made an application that he was an agriculturist, that the house No. 41 was his residential house and that it was not subject to attachment under the provisions of Cl. (c). S. 60, Civil P. C., and sub-S. (5), S. 28, Provincial Insolvency Act. The Court of first instance found that the appellant was not, in the true sense of the term, an agriculturist and that S. 60, Civil P. C., Cl. (c) did not apply to him. In appeal the learned District Judge found that the appellant was, in a sense, an agriculturist; but he went on to say that the house was subject to attachment. because it was not appurtenant to a holding and was not occupied by an agriculturist as such.

In second appeal it has been contended that the statement of law which the learned District Judge made is not a correct statement and that a house if it is occupied by the agriculturist is not liable to attachment, even if it is not occupied by him as an agriculturist. It has also been contended that there is a finding of fact, which is binding on us, that the appellant is an agriculturist. We consider that the learned District Judge did not intend to find that the appellant was an agriculturist in the proper sense of the term as used in Cl. (c), S. 60, Civil P. C. He has said:

"No doubt the objectors (that is, the appellant and his brother) were not primarily cultivators, but of the fact that they were cultivators, i. e., agriculturists in respect of these plots, there is no room for doubt or dispute now."

By the expression "of these plots" he is referring to the fact that the appellant and his brother were admittedly in possession of a piece of land just outside Meerut City which had an area of 2 bighas 13 biswas and which was a grove, part of which was from time to time cultivated. From the terms used by the learned District Judge we consider that he took it for granted that anybody who cultivated any land anywhere was an agriculturist. That is not the meaning which has been applied by the Code to the term "agriculturist" in Cl. (c), S. 60, Civil P. C. We may refer to the case of 35 All 307 (1). There it was said in respect of a dispute upon this question that:

"the question arises as to what is his main source of income and whether or not he is an agriculturist within the strict sense of the term and occupies the house as such."

The test applied in deciding whether a person was an agriculturist was whether his main source of income was derived from cultivation or not. A similar view was held in 1932 All 499 (2). We entirely agree that this is the proper test. The term "agriculturist" used in Cl. (c), S. 60, Civil P. C., is used in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation. We do not think that in deciding the present appeal it is necessary to express any opinion about the proposition of law laid down by the learned District Judge in respect of the question whether a house can be attached if it is occupieid by an agriculturist in some capacity other than that of an agriculturist. We are satisfied that the appellant was not an agriculturist at all in the sense in which the term is used in S. 60, Civil P. C.

The appellant and his brother were the sons of a man who was a money lender and owned house property in Meerut City. He does not appear to have had any zamindari or any connexion whatsoever with agricultural land. After his death his money lending business was carried on by his son other than the appellant, and that son

1. Jamna Prasad v. Raghunath Prasad, (1913) 35 All 307=19 I C 125.
2. Sampat v. Ram Prasad, 1932 All 499=138 I C 67

had also a timber shop, and there were a number of houses which were let out to tenants and from which the brothers obtained income by way of rent. The appellant himself has made a statement in the course of these proceedings in which he has admitted that he obtained his share of the profits from the money-lending business and from the rent. He has admitted that, at the time when he and his brother were adjudicated insolvents, the rent from houses brought them in an income of something between Rs. 100 and Rs. 200 a month, and he has also admitted that there were profits from the money lending business and from the timber shop, although he cannot say how much. We should perhaps mention that he did not admit that he had any share in the timber shop; but at the same time he did admit that he obtained a satisfactory income at least from the rent of houses owned by him. The size of the grove, which has an area of just under three bighas, and the fact that upon this grove there were a large number of trees show that there could have been little cultivation and not much profit from it. It is clear to us that the appellant and his brother at the date of adjudication could, in no sense, be properly described as agriculturists, that is, persons who had, as their main source of livelihood, the profits from the cultivation of land. It has been suggested that we should consider the possession of the appellant not at the time when the order of adjudication was passed, but at the time when the receiver was proposing to sell the house in dispute. Under the provisions of the Provincial Insolvency Act, the property of an insolvent vests in the receiver at the date of adjudication, and if property is not to vest, it must be exempt from attachment under the provisions of section 60, Civil P. C., at that date. Once it has vested, it becomes the property of the receiver, and he is entitled to deal with it. In our opinion, the appellant was not an agriculturist, and the house in dispute vested in the receiver at the date of adjudication. That being so, there was no force in the objection, and the effect of the order of the Courts below was correct. We dismiss the appeal with costs.

K.S. *Appeal dismissed.*

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A. I. R. 1935 Allahabad 449

SULAIMAN, C. J. AND GANGA NATH, J.

In the goods of Lal Madho Prasad —

Testamentary Case No. 10 of 1934
Decided on 24th January 1935.

Administration, Letters of—Letters of administration cannot be issued unless Court-fee necessary is paid—Whether letters of administration is necessary absolutely or applied only by way of precaution is immaterial —S. 19 D, Court fees Act, has no application to question as to whether Court-fee is necessary—Court-fees Act (1870), S. 19-D and Sch. 1 Art. (xi).

Letters of administration cannot be issued to the applicant until the duty required by Art. (xi) has been fully paid. Art. (xi) does not say that there would be an exemption from the payment of duty where letters of administration are not absolutely necessary and they are only applied for either by way of precaution or for the sake of convenience. If a person chooses to apply for Letters of Administration whether absolutely necessary or not, he has got to pay the duty. S. 19-D merely provides that where letters of administration of the effects of a deceased person have been granted, they shall be deemed to be valid and available by the administrator even notwithstanding that the amount or value of such property is not included in the amount or value of the estate. That is to say, the holder of Letters of Administration is entitled to recover the amount or property, and the opposite party cannot resist his claim on the ground that full Court-fee had not been paid on the Letters of Administration. S. 19-D has no application to the point which arises in such a case. It implies that Letters of Administration have been issued and Court-fee already paid thereon, though not sufficient: 1924 *Bom* 228 (*F B*), *Diss; from*; 1915 *Bom* 18 *Foll.* [P 450 C 1, 2]

Banke Behari for K. N. Katju — for Applicant.

Judgment.—Lala Manmohan Das applied for the grant of Letters of Administration in respect of the assets of his deceased father Lala Madho Prasad who held some shares of the Imperial Bank which are in deposit in the Imperial Bank at Calcutta. On 25th October 1934 his application was granted and Letters of Administration were ordered to be issued to him. The office naturally demanded the payment of court-fee before furnishing the Letters of Adimnistration. To this the applicant objects.

Learned counsel for the applicant relies on a Full Bench ruling of the Bombay High Court in 1924 Bom 228 (1). No doubt this ruling supports the applicant to a great extent, but the learned Judges over-ruled a previous

1. Keshavlal Punjalal Sheth v. Collector of Ahmedabad, 1924 Bom 228=77 I C 749=48 Bom 75 (F B).

decision of their own Court in 1915 Bom 18 (2). The view expressed by Beaman and Hayward, JJ., in the last mentioned case was that if an applicant who is a member of a joint Hindu family applies for probate of a will of his deceased father bequeathing the joint family property to him, probate can be granted only on the assumption that the will was genuine and valid and that the testator had authority to make the bequest and that probate cannot be granted on the supposition that the property being joint family property the will itself was invalid and that if the applicant wants probate he must pay the duty. We are not able to see how this point is met in the judgment delivered in the Full Bench case. The judgment proceeds principally on an interpretation of S. 19-D, Court-fees Act, and on the view that the provisions of that section would not apply strictly to a joint family. That may be quite correct, but what, with great respect, we would say has been overlooked is that the duty is not payable under S. 19-D, but under S. 6, Court-fees Act, and under Art. (11), Sch. 1, S. 19-D, merely provides that where Letters of Administration of the effects of a deceased person have been granted they shall be deemed to be valid and available by the administrator even notwithstanding that the amount or value of such property is not included in the amount or value of the estate. That is to say, the holder of the Letters of Administration is entitled to recover the amount or property, and the opposite party cannot resist his claim on the ground that full court-fee had not been paid on the Letters of Administration. That section has no application to the point which arises in this case. S. 19-D implies that Letters of Administration have been issued and court-fee already paid thereon though not sufficient.

Section 6 requires that no document of any kind specified in the first schedule shall be furnished by any public officer unless in respect of such document there be paid a fee of an amount not less than that indicated by the relevant schedule. The office of this Court cannot issue Letters of Administration to the applicant until the duty required by Art. (11) has been fully paid. Art. (11) does not say that there would be an exemption from the payment of duty where Letters of Administration are not absolutely necessary and they are only applied for either by way of precaution or for the sake of convenience. If a person chooses to apply for Letters of Administration whether absolutely necessary or not he has got to pay the duty. In 1930 All 99 (3), it was laid down that there was no legal bar to the granting of a Succession Certificate to a member of a joint Hindu family who gets the rights by survivorship and not as heir and that if he chooses to apply for Succession Certificate or Letters of Administration as legal representative of the deceased person such certificate may be granted, of course, on payment of full fee.

The learned counsel for the applicant contends before us that the necessity for the application has arisen because the Imperial Bank refuses to hand over the shares without the production of Letters of Administration or a Succession Certificate. We are not concerned with the question whether the Imperial Bank is rightly or wrongly refusing to do so. It may be that under some rule under which shares are issued it is necessary that the share-holder should profess to own it on his own behalf exclusively; but if the Imperial Bank is wrongly refusing to hand over property belonging to the plaintiff the remedy of the plaintiff lies by suit. If he prefers to apply for Letters of Administration in order to comply with the wishes of the Imperial Bank there is no option, but to pay the full court-fee. Dissenting from the view expressed by the Full Bench in 1924 Bom 228 (1), and adopting the principle of the decision of Beaman and Hayward, JJ., in 1915 Bom 18 (2), we hold that the applicant must pay court-fee. If the court-fee is not paid Letters of Administration shall not be issued. We allow two months for payment of the court-fee. If the amount is not paid within the time allowed the case will be put up for consideration whether Letters of Administration should not be revoked.

K.S. *Order accordingly.*

2. Kashi Nath Pareshram v. Gourabai, 1915 Bom 18=28 I C 473=39 Bom 245.

3. Banwari Lal v. Maksudan Lal, 1930 All 99=122 I C 183=52 All 252.

A. I. R. 1935 Allahabad 451

ALLSOP, J.

A. Williams—Defendant—Appellant.

v.

(*Firm*) *Kallu Mal Magan Lal*—Plaintiff—Respondent.

Second Appeal No. 1002 of 1934, Decided on 18th December 1934, from decision of Sub-J., Jhansi, D/- 25th July 1932.

Negotiable Instruments Act (1881), S. 80—No interest mentioned in promissory note—Interest at 6 per cent should run from date of execution of instrument

Where no interest is mentioned in a promissory note, interest is payable at the rate of six per cent and should run from date of the execution of instrument: 1925 *Bom* 35, 1928 *Lah* 665, *Rel on*; 1931 *Cal* 140 *Not Foll.* [P 451 C 1]

G. S. Pathak—for Appellant.

Shankar Sahai Verma—for Respondent.

Judgment.—This is a second appeal against a decree passed by the learned Subordinate Judge of Jhansi in first appeal. The suit which gave rise to the appeal was instituted for the recovery of certain sums of money on the bsais of three instruments which were alleged to be promissory notes. In respect of one instrument which was executed by the wife of the defendant-appellant, no decree was passed. In respect of the other two instruments a decree was passed. The only dispute now is about interest upon the sum due on the basis of one of the instruments. About the other instruments there is no dispute. In the instrument which is in dispute, there is no reference to any payment of interest. The document is in these terms:

"Due to Kallu Bania for stores purchased the sum of Rs. 649-14-6 (Rupees six hundred and forty-nine annas fourteen and pies six) only."

The inconsistency is in the original. It is doubtful whether this can be called a promissory note, but it is so called by the plaintiff and this description was accepted by the defendant. The only question is whether interest should be paid on this sum of Rs. 649 odd because there is no mention of any covenant to pay interest in the instrument itself. I must presume for the purposes of this appeal that this is a promissory note, and under S. 80, Negotiable Instruments Act, interest is payable at the rate of 6 per cent per annum. The further question has arisen whether interest should be paid from the date of the execution of the promissory note or from some future date which may be considered to be the date of demand. The case of 1928 Bom 35 (1), is authority for the proposition that interest should run from the date of the execution of the instrument. In support of the same proposition there is another case, viz., 1928 Lah 665 (2). On the other side, my attention has been drawn to the case of 1931 Cal 140 (3). In the Calcutta case the learned Judge agreed with the view expressed in 1928 Bom 35 (1), that the money due on a promissory note becomes due at the date of execution if the promissory note is one which is payable on demand. In that view of the matter it would normally be assumed that interest would run from that date because under S. 80, Negotiable Instruments Act, the interest runs from the date when the amount due ought to have been paid. The basis of the decision in the Calcutta case is that the word "same" in S. 80, Negotiable Instruments Act, refers to "interest" and not to "amount due." If that was so the section would run:

"When no rate of interest is specified in the instrument interest on the amount due shall . . . be calculated at the rate of 6 per cent. per annum from the date at which the interest ought to have been paid by the party charged until tender or realisation of the amount due thereon . . . . . "

If this were the wording of the section, it seems to me that it would be meaningless because interest could not be calculated until it became due and interest could not become due so that it ought to have been paid before the date from which it could be calculated. I therefore consider that the view taken by the Bombay High Court in 1928 Bom 35 (1), is the proper view. In the result the appeal is allowed and the decree of the lower appellate Court is varied to this extent that instead of interest being charged on the first promissory note at the rate of 2 per cent per mensem, interest shall be charged at the rate of 6 per cent per annum. Interest shall run from the date of the execution of the promissory note. In other respects the order of the Court below shall stand. The appellant will get 3-4th of his costs in this Court and the order for costs in the Courts below shall stand.

K.S. *Appeal allowed.*

1. Ganpat Tukaram v. Sopana Tukaram, 1928 Bom 35=107 I C 257=52 Bom 88 (F B).
2. Khurshid Haq v. Ram Ditta Mal, 1928 Lah 665=107 I C 753.
3. Prem Lall Sein v. Radha Ballav Kankra, 1931 Cal 140=130 I C 134=58 Cal 290.

A. I. R 1935 Allahabad 452

GANGA NATH, J.

Dharup Raj Misir and *another*—Plantiffs—Appellants.

v.

Ram Audhesh Misir and *others*—Defendants—Respondents.

Second Appeal No. 1289, of 1932, Decided on 7th February 1935, from decision of 2nd Addl. Sub-Judge, Jaunpur, D/- 14 th July 1932.

(a) Hindu Law—Joint family—Father or manager can represent other members in suit.

A father or manager of joint Hindu family can represent his sons and other members of his family in a suit: 34 *All* 549, (*F B*), *Rel on.* [P 454 C 2]

(b) Hindu Law—Joint family—Father as manager can refer dispute to arbitration—Award thereon is binding on sons—Arbitration.

It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer dispute to arbitration and the award made on such a reference, if in other respects valid, will be binding on the sons unless it be shown that the father's act in referring the suit to arbitration was tainted with fraud or collusion or was otherwise done in bad faith: *Case law Referred.* [P 452 C 2; P 453 C 1]

B. S. Shastri—for Appellants.

B. Malik—for Respondents

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by them against the defendants-respondents for a declaration that decree No. 225 of 1930, of the Court of the Additional Munsif of Jaunpur, dated 17th December 1930, was not binding on them. The property which was in dispute in suit No. 225 of 1930, in which the decree in dispute was passed had been purchased by the father of the defendant Ram Audhesh for Rs. 200 in 1904 in his own name. A suit was brought by Ram Audesh against the father of the plaintiffs for a declaration that the property in dispute belonged to him (Ram Audesh) and that the defendants had no right in it. The parties referred the suit to one Shubkaran and the decree was passed on the statement of the referee (Shubkaran). The plaintiffs brought this suit on the allegation that their father was under the influence of bhang as well as in a fit of anger and was incapable of understanding his affairs when he referred the suit to Shubkaran. The suit has been dismissed by the Courts below on the finding that the decree is binding on the plaintiffs as the decree has not been obtained by any fraud or mis-representation. It was also found that their father was neither under the influence of any drug nor angry.

The first point for consideration in this case is whether a father of a joint Hindu family can represent his sons and other members of his family in a suit. It is a general rule of Hindu law that the manager represents the family in all transactions with the outer world provided these transactions are family matters. Indeed, if it were not so, it is difficult to understand how the affairs of the family could be carried on.. If this proposition is correct, there can be no good reason why the manager should cease to represent the family when the family has to institute or defend a suit in a Court of Justice. In the Full Bench case of 34 All 549 (1), where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family, who in that capacity had purchased the mortgaged property, it was held that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non-joinder of the other members of the family.

It being so, the next question is in which cases can members of a joint Hindu family challenge a consent or compromise decree obtained by or passed against the manager of the family. All the cases so far decided show that such a decree can be challenged only in the case of fraud or misrepresentation. In 1 All 651 (2), in March 1867, J sued for possession of a moiety of the share originally held by B's widow, then deceased, and for a declaration of his right to a moiety of the share held originally by D's widow. In June 1867, the parties to the suit effected a compromise agreeing to divide the estate into four lots on certain conditions. a decree was accordingly passed in the terms of the compromise. K. J's son, sued in 1876 in his father's life-time, to obtain the same relief as his father had sought in 1867 and a declaration that the arrangement effected by the compromise and the decree was ineffectual. It was held that, assuming that the estate was joint until 1867 K was, in the absence of fraud, bound by the compromise entered into by his father and his suit was not maintainable. It is also competent to the father of a

1. Hori Lal v. Nimman Kunwar, (1912) 34 All 549=15 I C 126 (F B).
2. Pitam Singh v. Ujagar Singh, (1875-78) 1 All 651.

joint Hindu family in his capacity of managing member of the family to refer disputes to arbitration and the award made on such a reference, if in other respects valid, will be binding on the sons. In 16 All 231 (3), the respondent and his father formed a joint Hindu family of which the father was the manager. It was observed that the father represented the family as such manager and in the absence of fraud or collusion which had not even been suggested in that case, his acts were binding on the other members of the family: 1 All 651 (2), referred to above was followed.

Similarly in 1927 Lah 362 (4), it was held that it was really not necessary to implead the sons as parties, as being members of a joint Hindu family with the original defendants they were effectively represented by the latter and would have been bound by the result of the litigation. It was further held that an award following on a reference made by a Hindu father is binding on his sons unless it be shown that the father's act in referring the suit to arbitration was tainted with fraud or collusion or was otherwise done in bad faith. The learned counsel for the appellants has relied on 6 Mad 284 (5). This case does not apply to the present case because that was a case of partition of an undivided family and it was held that no decree could be properly arrived at in such a suit without joining all the co-parceners. Moreover as against this case the Full Bench ruling of our own High Court is binding. The other case relied on by the learned counsel is 1929 All 365 (6). That was a case of relinquishment of right of redemption without any legal necessity and benefit to the family. The relinquishment was held not to be binding on the sons while in the present case no question of relinquishment of any property belonging to the plaintiffs arises. The third case relied on by the learned counsel is 1917 P C 95 (7). This case relates to the contingent right of a reversioner before it materialised. There it was held that a Hindu reversioner has no right or interest in praesenti in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise, until then it is a mere "spes successions." His guardian if he happens to be a minor, cannot bargain with it on his behalf, or bind him by any contractual engagement in respect thereof.

The arguments of the learned counsel for the appellants have been based on the assumption that the property in dispute was a part of the joint family property. It was not so. The property was claimed by the defendant as his own self-acquired property. The branches of the parties had separated long before the property was acquired. As already stated the property then in dispute was acquired by the father of the present defendant in his own name. The claim asserted by the plaintiffs' father in that suit was only a doubtful one. There was no case of any alienation of or relinquishment of any rights in any joint family property in which the plaintiffs had any right. The concurrent finding of both the Courts below is that there was no collusion, fraud or misrepresentation. The decree is therefore binding on the parties. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal dismissed.*

3. Jagan Nath v Mannu Lal, (1894) 16 All 231= 1894 A W N 60.
4. Guran Ditta v. Pokhar Ram, 1927 Lah 362= 104 I C 202=8 Lah 693.
5. Timmappaya v. Lakshminarayana, (1883) 6 Mad 284.
6. Mangali Pershad v. Babu Ram, 1929 All 365 =116 I C 875=51 All 659.
7. Amrit Narayan Singh v. Gaya Singh, 1917 P C 95=44 I C 408=45 I A 35=45 Cal 590 (P C).

A. I. R. 1935 Allahabad 453

BENNET, J.

Desa and *another* — Defendants—Appellants.

v.

Dhum Singh and *another* —Plaintiffs-and Defendant—Respondents.

First Appeal No. 23 of 1934, Decided on 28th November 1934, from order of Addl. Sub-Judge, Muzaffarnagar, D/- 15th September 1933.

(a) Agra Tenancy Act (3 of 1926), S. 85 (3)—Suit for damages for having cut down trees — Plaintiff alleging that proprietary right in trees belongs to him—Suit is cognizable by civil Court.

A suit for damages for trees having been cut by the defendant in which the plaintiff alleged that the proprietary right in the trees belonged to the plaintiff, can be correctly brought in the Civil Court. [P 454 C 2]

(b) Agra Tenancy Act (3 of 1926), Ss. 16, and 14—Exproprietary rights confer right of

occupancy—Latter implies right to cultivate land.

Ex-proprietary rights confer a right of occupancy. A right of occupancy implies a right to occupy, that is, a right to cultivate the land or use it in a manner equivalent to cultivation, such as to use for grove or pasturage. Hence the sale should allow the creation of the right of the former owner to hold the land either for agricultural purposes or as grove land or as pasturage at the favourable rates in S. 14, sub-S. (1), and with the security of tenure of an occupancy tenant. [P 454 C 2; P 455 C 1]

(c) Agra Tenancy Act (3 of 1926), S. 14—Existence of grove allows exproprietary rights to accrue in sir land.

The Agra Tenancy Act intends that the existence of a grove shall allow ex-proprietary rights to accrue in sir land without any let or hindrance: 1932 *All* 653, *Not Foll.* [P 455 C 1]

(d) Agra Tenancy Act (3 of 1926), S. 14—Right in scattered trees or in grove cannot be transferred even if included in sale certificate.

The statement in the sale certificate that all the rights of the defendants in scattered trees or in groves passed to the auction-purchaser cannot pass the rights in the grove in question because those rights are not capable of transfer owing to the provisions of S. 14 of the Act. [P 455 C 1]

Mukhtar Ahmad—for Appellants.

S. N. Gupta—for Respondents.

Judgment.—This is a first appeal from order by defendants 1 and 2. The plaintiffs brought a suit in the Court of the Munsif claiming damages from the defendants for having wrongfully cut down certain trees alleged to belong to the plaintiffs. These trees stood on a certain plot formerly the sir land of defendants 1 and 2. In 1927 there was an auction-sale of the zamindari share of defendants 1 and 2 and the plaintiffs purchased at auction-sale and received dakhalnama on 29th August 1927. This was after Act 3 of 1926. came into force. The land although sir had a grove standing on it planted by defendants 1 and 2. Subsequently they sold the trees to defendant 3, who cut them down. After the auction-sale rent was assessed by the Revenue Court on the plot as the exproprietary tenancy of defendants 1 and 2. The claim of the plaintiffs was that under the auction-sale the proprietary rights of defendants 1 and 2 in all their groves including the grove in suit passed to the plaintiffs and that the exproprietary tenancy of defendants 1 and 2 arose in the land only. This view of the law has been taken by the lower appellate Court following a case reported in1932 All 653 (1). by a learned Single Judge of this Court. The defendants have appealed alleging firstly that the suit was not cognizable by the Civil Court. It was argued that the plaintiffs could have sued in the Revenue Court under S. 85 (3) of Act 3 of 1926. This sub-section entitles a land-holder to sue a tenant for compensation for acts defined in S. 84 as detrimental to the land or inconsistent with the purposes for which it was let. I do not think that this section would be appropriate to the present plaint as the plaintiff claims that the proprietary right in the trees belonged to the plaintiffs. Accordingly I hold that the suit of the plaintiffs was correctly brought in the Civil Court. The second and third grounds of appeal argued that defendants 1 and 2 are grove holders and that the defendants have a right in the trees standing on the land.

I have considerable difficulty in accepting the view of law laid down in the ruling quoted. That ruling does not appear to deal with the following difficulty: S. 14, Act 3 of 1926, lays down that on the transfer by foreclosure or sale in execution of a decree or by voluntary alienation otherwise than by gift or exchange between co-sharers a landlord shall become a tenant with a right of occupancy in his sir and in the land which he has cultivated continuously for 10 years at the date of transfer. Sub-S. (8) states that for the purposes of sub-S. (1) the use of land as grove land shall not be deemed cultivation. Accordingly therefore in the case of land not sir the exproprietary rights would not arise if a grove stood on the land. but the section does not state that for sir the existence of a grove will prevent the arising of exproprietary rights. Clearly therefore in the present case the exproprietary rights did arise and the Revenue Court confirmed the existence of those rights by assessing exproprietary rent on the holding. Now, exproprietary rights confer a right of occupancy. A right of occupancy is not defined by the Act other than the definition in S. 16, but it is clear that a right of occupancy implies a right to to occupy that is a right to cultivate the land or use it in a manner equivalent to cultivation, such as to use for grove or pasturage. This follows from the definition of land in S. 3, sub-S. (2) as land which is let or held for agricultural purposes or as grove land or for pasturage. The sale therefore should allow the creation of the right of the former owner to hold the land

1. Yakub Ali v. Tajamul Hussain Khan, 1932 All 653=143 I C 217.

either for agricultural purposes or as grove land or as pasturage at the favourable rates in S. 14, sub-S. (1) and with the security of tenure of an occupancy tenant. Now, if the view of the lower Court were correct that on such a sale, the former owner would have a right only to the land and the right in the trees would pass to the transferee, then the situation would arise that the exproprietary rights would merely be theoretical and would be of no practical value to the former owner as long as the trees stood on the land. There is no provision in the Tenancy Act under which the former owner could insist on the transferee removing the trees and that it would be open to the transferee to keep the trees standing on the holding for many years until they cease to exist. The case therefore would be that where the former owner had used his sir land for the purpose of a grove, he would in fact on a sale obtain none of the benefits intended by S. 14, Tenancy Act, but where he used his sir land for cultivation, he would obtain all the benefits. I do not think that the section intended that such a difference should arise and if such a difference had been intended, I consider that sub-S. (8) would have made provision for such a difference. That sub-section as already noted does provide that for land other than sir land the existence of a grove prevents the accrual of exproprietary rights. The natural provision would be to have said that the existence of a grove on sir land would also prevent the accrual of ex-proprietary rights. As the Act does not say so I consider that the Act intends that the existence of a grove shall allow exproprietary rights to accrue in sir land without any let or hindrance and that the theory of law put forward by the lower Court is incorrect as that theory would in practice deprive the former owner of any benefit from his exproprietary rights. As regards the statement in the sale certificate that all the rights of the defendants in scattered trees or in groves passed to the auction-purchaser. I consider that this provision could not pass the rights in the grove in question because those rights are not capable of transfer owing to the provisions of S. 14, Agra Tenancy Act.

For the reasons which I have given, I allow this first appeal from order with costs throughout, and I set aside the decree of the Court below and restore the decree of the Court of first instance dismissing the suit of the plaintiffs. Leave is granted for Letters Patent appeal.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 455

BENNET, J.

Mt. Deba—Plaintiff—Applicant.

v.

Secy. of State—Opposite Party.

Civil Revn. No. 516, of 1934, Decided on 21st December 1934, against decree of Sub-Judge, Farrukhabad, D/- 21st April 1934.

(a) Court-fees Act (1870), S. 12(1)—Refund—Application for, shall be filed in Court in which plaint is filed—Suit need not be pending for deciding it.

Every question of refund in regard to a plaint shall be decided by the Court in which such plaint was filed. It does not lay down that the decision must be made only when the suit is pending. [P 456 C 1]

(b) Civil P. C., (1908), S. 115—Court having jurisdiction to decide application for refund of Court-fee not doing so—Revision is competent—Court-fees.

Where the lower Court which has jurisdiction to decide an application for refund of Court-fees fails to do so, revision lies to the High Court. And where such application is made after the suit has terminated the application should be treated as an application under O. 47, R. 1. [P 456 C 1]

Babu Ram Awasthi—for Applicant.

Muhammad Ismail — for Opposite Party.

Order.—This is an application in civil revision by a plaintiff under the following circumstances:

The plaintiff brought a suit in the Court of the Subordinate Judge of Farrukhabad for arrears of maintenance and a compromise was entered into and a decree was passed in terms of the compromise. The Subordinate Judge held that a court-fee of Rs. 715 should be paid which was on ten times the sum periodically payable, Rs. 150 p. m., taken for ten years as Rs. 18,000. Subsequently the plaintiff applied for execution and an appeal was heard by this Court, and this Court held that the decree was merely a declaratory decree and could not be executed. The plaintiff made an application to the lower Court for refund of Rs. 715 court-fee. The amount seems to be incorrect as there should be a deduction of Rs. 10 for a declaratory decree. The lower Court has held that it has no power to order the refund under S. 151, Civil P. C., and that the re-

medy of the plaintiff, if any, lies in the High Court. I consider that the case is governed by S. 12 (1), Court-fees Act, as the learned Government Advocate contends. That section prescribes that every question of this nature in regard to a plaint shall be decided by the Court in which such plaint was filed. It does not lay down that the decision must be made only when the suit is pending. I consider that under the circumstances of this case, the application of the plaintiff should have been treated as an application under O. 47, R. 1, for review of his order by the Subordinate Judge, the new and important matter discovered being that this Court had held that the decree was a declaratory decree. Under these circumstances the lower Court has failed to exercise a jurisdiction which the lower Court possessed, and therefore a revision lies to this Court. It was contended by the learned Government Advocate that under 1934 All 620 (1), a decision on a question of court-fee was not "a case decided." That ruling dealt with a decision while the suit was pending, but in the present case the decision is "a case decided" because the original suit has long ago terminated, and there is now no suit pending. I therefore allow this revision with costs and set aside the order of the lower Court and order that Rs. 705 should be repaid to the applicant Mt. Deba.

K.S *Revision allowed.*

1. Gupta & Co v. Kirpa Ram Brothers, 1934 All 620=149 I C 1183.

A. I. R. 1935 Allahabad 456

NIAMATULLAH, J.

Mt. Swaraswati and *another*—Defendants—Applicants.

v.

Wali—Plaintiff—Opposite Party.

Civil Revn. No 629 of 1934, Decided on 13th February 1935, against order of Munsif, West Allahabad, D/- 6th September 1934.

Civil P. C., (1908), S. 115—Court having jurisdiction to set aside award on proof of misconduct—No revision is competent even if Court took erroneous view of law—Arbitration, award.

The question whether a certain act amounts to misconduct on the part of the arbitrator is one arising in the case which the Court has every jurisdiction to decide. If in deciding that question the Court took an erroneous view of law, or made an incorrect inference from the facts, provided all that can be attributed to the Court is an error of judgment it cannot be said that there was any illegality or irregularity in the exercise of jurisdiction. [P 456 C 2]

Hyder Mehdi—for Applicants.

L. Zutshi—for Opposite Party.

Order.—This is an application for revision of an order passed by the learned Munsif, West Allahabad, setting aside an award made in a pending suit. The award was impugned by one of the parties on the ground that the arbitrator was guilty of misconduct. The lower Court upheld the objection, set aside the award and superseded the arbitration. The only ground for revision is that the alleged misconduct attributed to the arbitrator is not a misconduct in law and that, therefore the lower Court had no jurisdiction to set aside the award.

The ground on which the award was impugned was that the arbitrator made notes of evidence given in arbitration proceedings, but did not file such notes with the award, as he should have done under para. 10, Sch. 2, Civil P. C. It cannot be denied that according to the provisions contained in that paragraph, it was the duty of the arbitrator to have filed the notes of evidence made by him in course of the arbitration proceedings. The only question is whether the omission to do so amounts to such misconduct as vitiates an award. It is contended in revision that it was a mere oversight on the part of the arbitrator and that no misconduct is implied in his omission to file the notes of evidence. I do not consider it necessary to express any opinion as regards the merits of this contention, as in my opinion no question of jurisdiction arises and therefore the revision is incompetent. It cannot be disputed that the lower Court had jurisdiction to set aside the award on proof of misconduct. The question whether a certain act amounts to misconduct on the part of the arbitrator is one arising in the case which the Court has every jurisdiction to decide. If in deciding that question the Court took an erroneous view of law, or made an incorrect inference from the facts proved, all that can be attributed to the Court is an error of judgment. It cannot be said that there was any illegality or irregularity in the exercise of jurisdiction. Assuming therefore that the view taken by the lower Court on the question of law raised before it was incorrect, it is impossible to say that the lower Court acted without jurisdiction, or failed to exercise a jurisdiction vested in it by law, or acted illegally or with material irre-

gularity in the exercise of its jurisdiction. In this view, no interference in revision is called for. The application is accordingly dismissed with costs.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 457

BENNET, J.

Lal Behari Lal—Applicant.

v.

Chaubey Gulzari Lal and *another*—Opposite Parties.

Civil Revn. No. 246 of 1934, Decided on 12th December 1934, against order of Addl. Munsif, Agra, D/- 17th March 1934.

(a) Civil P. C. (1908), O. 21, R. 100—Application under—Court should allow parties to adduce evidence.

Where an application under O. 21, R. 100 is filed the parties should be allowed to produce whatever evidence they desire in support of their case: 15 *Cal* 521 and 1924 *Cal* 744, *Dist* [P 457 C 2]

(b) Civil P. C. (1908), S. 11—Issue must be heard and decided to operate as res judicata.

Section 11 requires that the issue should be heard and finally decided before it amounts to res judicata. [P 457 C 2]

B. Malik—for Applicant.

G. S. Pathak—for Opposite Parties.

Order.—This is an application in revision by a decree-holder Lal Behari Lal against an order dated 17th March 1934 passed by an additional Munsif on an application of the opposite party, Gulzari Lal, under O. 21, R. 100, Civil P. C. Lal Behari Lal held a decree against one Lalloo for possession of a house and the Amin went to obtain possession in execution of the decree and the objection in question was made. The Court held an enquiry and in its order it states:

"I have not allowed any oral evidence to be led by the parties as there is sufficient documentary evidence in the execution file itself and on the record".

The Court then held that it was satisfied that the objector had been wrongfully dispossessed of the property and the objection was allowed. In the revision the first ground taken is that the Court acted illegally and with material irregularity in the exercise of its jurisdiction in not allowing the applicant to adduce oral evidence in support of his case, that is, the applicant desired to produce oral evidence that the judgment-debtor and not the objector was in possession. Learned counsel for the opposite party has attempted to justify the order of the lower Court by reference to two rulings: 15 Cal 521 (1) and 1924 Cal 744 (2). These rulings merely say that the procedure of investigation in an objection of this nature either under the rule in question or under Rr. 60 and 61, O. 21, is of a summary nature and it is not prescribed how far the investigation should go. The rulings afford no justification for the order of the lower Court refusing to hear oral evidence.

Learned counsel for the opposite party then attempted to uphold the order of the lower Court allowing the objection of Gulzari Lal on the ground that the matter was res judicata in his favour. This ground had not been taken before the lower Court. The alleged res judicata arose, it is said, out of an order on 22nd December 1932. This order purports to deal with an application by the decree-holder and states that the application is not against the judgment-debtor but is against a third party and is therefore not maintainable and is dismissed. There was no consideration in this order as to whether the judgment-debtor or the third party, if that third party was Gulzari Lal, was in possession. Accordingly it does not appear to me that there was any decision of that issue which would amount to res judicata under S. 11, Civil P. C., as that section requires that the issue should be heard and finally decided before it amounts to resjudicata. I see no ground on which the order of the lower Court can be upheld and accordingly I set it aside and remand the case to the lower Court for disposal according to law, that is, the lower Court will allow the parties to produce whatever evidence they desire, oral or documentary, and will then dispose of the matter. Costs are allowed to the applicant in revision. Costs in the lower Court will abide the result. The court-fee of this Court will be returned to the applicant in revision.

K.S. *Application allowed.*

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1. Sardhari Lal v. Ambika Pershad, (1888) 15 Cal 521=15 I A 123=5 Sar 172 (P C).
2. Najimunnissa Bibi v. Nacharuddin Sardar 1924 Cal 744=83 I C 233=51 Cal 548.

A. I. R. 1935 Allahabad 458 (1)

GANGA NATH, J.

Sheo Pershad Misir — Plaintiff—Appellant.

v.

Karim Bux and *another*—Defendants—Respondents.

Second Appeal No. 1249 of 1932, Decided on 4th February 1935, from decision of 1st Addl. Sub-Judge, Jaunpur, D/- 21st October 1932.

Trustee — Trustee acquiring property in that capacity cannot claim adverse possession—Adverse possession.

No person, who has accepted the position of trustee and has acquired property in that capacity, can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself: 34 *Mad* 257, *Rel on.* [P 458 C 2]

K. N. Malaviya—for Appellant.

N. P. Asthana and *B. N. Sahai*—for Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendants to recover possession over a house described in the plaint. The plaintiff's case was that the house was purchased at an auction sale in 1895 by Jasodanand. Jasodanand obtained possession over it on 11th January 1896. The plaintiff claimed the house as his nephew and heir. The plaintiff stated that he had let the house to the defendants who had been occupying it as his tenants. The defendants contended that the plaintiff had never been in possession over the house. They admitted that Jasodanand had purchased the house but contended that he had dedicated it to an Imambara and that they were put in and have been in possession over it as a mutwalli. Both the Courts below found that no wakf was created. They also found that the defendants were not the plaintiff's tenants. but finding that the defendants had been in possession for more than 12 years the lower Court dismissed the plaintiff's suit.

As already stated, the defendant's case was that they had been in possession over the house in dispute as a mutawalli under a wakf created admittedly by the predecessor-in-title of the plaintiff. The defendants never claimed to have remained in possession over the house in dispute in their own right.

As already stated, the wakf was alleged to have been created by Jasodanand and the defendants according to their own case must have been appointed mutawalli by Jasodanand and put in possession as mutwalli by him. Both the Courts have found that no wakf was made by Jasodanand. The lower Court has remarked:

"I was therefore satisfied to hold that no waqf of the house in dispute was proved to have been made by Jasodanand to the least satisfaction of the Court."

The defendant remained in possession as a trustee and therefore could not claim any adverse proprietary rights in themselves. No person, who has accepted the position of a trustee and has acquired property in that capacity, can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed hiimself, vide 34 Mad 257 (1).

As no wakf is found to have been created the property must go back to the owner or his representative. S. 83. Trust Act, (2 of 1882) lays down:

"Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative."

The defendants have no right to keep themselves in possession over the property which admittedly belongs to the plaintiff against his wishes. It is therefore ordered that the appeal be allowed, the decree of the lower Court be set aside and the plaintiff's suit be decreed with costs. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal allowed.*

1. Srinivasa Moorthy v. Venkatavarada Ayyangar, (1911) 34 Mad 257=38 I A 129=11 I C 447 (P C).

A. I. R. 1935 Allahabad 458 (2)

KENDALL, J.

Gulab Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 980 of 1934, Decided on 6th February 1935, from order of Addl. Sess. Judge, Aligarh, D/- 27th October 1934.

Criminal P. C. (1898), S. 237 (1)—Accused and other persons charged with offence under S. 395, I. P. C.—Accused proved to have committed offence under S. 458 but other persons not found to have accompanied him—Conviction under S. 458 held was not illegal—Penal Code (1860), Ss. 395 and 458.

The appellant and certain other persons were charged with an offence under S. 395, I. P. C., and although it appeared in evidence that the acts of the appellant amounted to lurking house trespass by night after making preparations for assault, and causing grievous hurt in the course of that trespass, yet it did not appear

that he was accompanied by the other persons who were put on their trial with him and accused was convicted under Ss. 458 and 459.

Held : that the offence of which he was found to be guilty did not differ in nature from the offence with which he had been charged, and it was therefore not necessary for the Court to alter the charge, as the provisions of S. 237, Sub-S. (1), Criminal P. C., clearly cover the case.

[P 459 C 2]

Govt. Pleader—for the Crown.

Judgment.—The appellant. Gulab Singh. has been convicted by the learned Additional Sessions Judge of Aligarh of offences under Ss. 458 and 459 Penal Code, and sentenced to concurrent terms of three years' rigorous imprisonment under those sections. He has appealed from jail. and the appeal has been admitted on the ground that there appears to have been some irregularity by the Court in altering the charges which were originally framed under Ss. 395 and 307, Penal Code, to charges under S. 459, Penal Code, without explaining the altered charges to the accused or giving him an opportunity of meeting them, or giving the assessors an opportunity of expressing their opinion in regard to the altered charges.

If the learned Additional Sessions Judge had in fact altered the charge so as to make it one of an offence different in nature from that set out in the original charge sheet I am of opinion that the Court would have had no jurisdiction to convict the appellant without calling on him to answer the charge and without taking the opinion of the assessors as has been provided for in S. 227, Sub-S. (1), Criminal P. C. This is not however what happened. The appellant and certain other persons were charged with an offence under S. 395, Penal Code, and although it appears in evidence that the acts of the appellant amounted to lurking house trespass by night after making preparations for assault, and causing grievous hurt in the course of that trespass, yet it did not appear that he was accompanied by the other persons who were put on their trial with him. The offence of which he was found to be guilty did not differ in nature from the offence with which he had been charged, and it was, therefore, not necessary for the Court to alter the charge, as the provisions of S. 237, Sub-S. (1), Criminal P. C., clearly cover the case. Moreover, it does not appear that the Court actually did alter the charge. The charge sheet itself stands in its original form, and the only reason why it can be said that the Court altered the charge is the following sentence which was included in the judgment:

"I find that his conviction under Ss. 458 and 459 is possible without giving him a further opportunity to defend himself against charge under the two latter sections. I therefore alter the charges against him and charge him under Ss. 458 and 459, I. P. C. I convict him under these two sections . . ."

If the Judge had omitted the sentence italicised there would have been no difficulty about the procedure, and as it is clear that what he meant in the sentence was merely that he was about to convinct the accused under different sections from those under which he had been charged, it cannot be said that there has been any irregularity of the procedure.

The learned Judge has not stated in the judgment what the opinions of the assessors were, or whether he put it to the assessors that the appellant might be guilty of the minor offence even if he had not been guilty of the major offence with which he had been charged. This is an omission, but as I find from the record that the opinions of the assessors were duly taken it is obvious that the Judge has discredited them, though he has not stated so. It is however necessary to call the attention of the learned Additional Sessions Judge to the procedure set out in Ch. 19, Criminal P. C., and also to the provisions of S. 309, I have had to assume that it was explained to the assessors that if the appellant was not guilty of the major offence of dacoity. it was still open to them to find that he was guilty of the minor offence of lurking house trespass by night after making preparations to cause hurt. that they replied that they believed the appellant to be not guilty. and that the Judge after considering their opinion differed from them and found the accused guilty of the minor offence. This is what should have been done. and there is nothing on the record to show. nor has it been suggested by the appellant, that it was not done. but the judgment should have made it clear that it was done.

The result is that the appeals fails and is dismissed.

K.S. *Appeal dismissed.*

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NIAMATULLAH AND BAJPAI, JJ.

Ganeshi Lal—Defendant—Appellant.

v.

Shankar Lal and *others*—Plaintiffs—Respondents.

Second Appeal No. 71 of 1933, Decided on 21st January 1935, from decision of Dist. Judge, Agra, D/- 11th October 1932.

(a) Agra Tenancy Act (1926), S. 226—Mortgagee in possession is co-sharer.

A mortgagee in possession is a co-sharer within the meaning of S. 226 and a suit for profits by him against other co-sharers or vice versa is maintainable in the Revenue Court: 15 *All* 137, 1924 *All* 719, 1933 *All* 407, *Rel on.* [P 460 C 2]

(b) Agra Tenancy Act (1926), S. 226—Person entitled to share of profits of mahal is co-sharer.

A person who is entitled to a share of the profits of a mahal is a co-sharer for the purposes of a suit under S. 226. Where both the lambardar and the co-sharers suing for profits are mortgagees in possession, each is entitled to a share in the profits of the mahal held by them as mortgagees and they are, therefore, co-sharers. [P 460 C 2]

(c) Agra Tenancy Act (1926), S. 226—Village mortgaged with possession to parties who are given equal rights of possession — Adjustment of decree against mortgagor partly satisfied—Profits received by one or other of them can be taken into account when rights under decree are to be finally adjusted.

Where the village is mortgaged with possession to the parties who are expressly given equal rights as regards possession and enjoyment thereof, whatever may be the rights of the parties as regards the decree against the mortgagors part of which has been satisfied by the execution of the mortgage deed, it will be open to the parties to take into account the profits received by one or the other of them when their rights under the decree are to be finally adjusted. So far as the simple remedy of one co-sharer to receive profits from the lambardar is concerned, the entries in the khewat and the stipulations contained in the mortgage deed which are to regulate their relationship as co-sharers must be given effect to. [P 461 C 1]

Baleshwari Prasad and *Gopi Nath Kunzru*—for Appellant.

K. N. Katju and *S. B. L. Gaur* — for Respondents.

Judgment.—This is a defendant's second appeal and arises from a suit for profits, under S. 226, Agra Tenancy Act. The parties are mortgagees in possession under a deed of 30th July 1923, executed by Fateh Singh and others. Both the lower Courts have decreed the plaintiffs' claim. In second appeal before us it was contended that the suit is not one cognizable by a Revenue Court, as the parties, who are admittedly usufructuary mortgagees are not co-sharers within the meaning of S. 226, Agra Tenancy Act.

It appears that the parties to this suit had obtained a decree for Rupees 40,000 against the mortgagors Fateh Singh and others. The latter executed the mortgage-deed already referred to for Rs. 16,000 part of the decretal amount in respect of village Sowara, for which the profits are claimed. The deed expressly states that the plaintiffs are to be regarded as mortgagees in possession to the extent of half and the defendants are to be regarded as mortgagees in possession to the extent of the other half. There is an obscure clause in the deed which presented some difficulty to the mind of the learned District Judge but we do not think it to be desirable to interpret that clause, as our decision one way or the other may prejudice the case of the plaintiffs or the defendants which may hereafter arise in relation to their claims as decree-holders nor is it necessary to interpret that clause for the purposes of this appeal.

The plaintiffs are recorded as co-sharers of half of the mahal and the defendants are recorded as co-sharers of the other half. One of the defendants is admittedly a lambardar and has made collections. If a usufructuary mortgagee is a "co-sharer" within the meaning of S. 226 Agra Tenancy Act, there can be no doubt that a suit for profits by either of them against the other is maintainable in the Revenue Court; and if such a suit as maintainable, the plaintiffs are entitled to recover profits to the extent of half in terms of the mortgage deed to which both the defendants and the mortgagors were parties.

The word 'co-sharer" is nowhere defined in the Agra Tenancy Act and must be taken in its etymological sense. To our mind it is perfectly clear that a person who is entitled to a share of the profits of a mahal is a co-sharer for the purposes of a suit under S. 226, Agra Tenancy Act. A usufructuary mortgagee, is one who is entitled to the usufruct of the share mortgaged to him. Where both the lambardar and the co-sharers suing for profits are mortgagees in possession, each is entitled to a share in in the profits of the mahal held by them as mortgagees and they are therefore co-sharers. This view has prevailed in this High Court for a long time. It was held in 15 All 137

(1), that a mortgagee, in possession is a co-sharer whom a lambardar can sue in a Revenue Court for recovery of his share of revenue. In 1924 All 719 (2). it was held by a Bench of this Court that a usufructuary mortgagee of a co-sharer in possession of the share is entitled to maintain a suit against the lambardar for profits. More recently it was held in 1933 All 407 (3) that:

> **We hold both on principle and authority that a mortgagee in possession is a co-sharer within the meaning of S. 226, Agra Tenancy Act,**

It was next contended on behalf of the appellant that the rights of the parties to this case under the decree outstanding against the mortgagor are not equal and that as part of the profits is to be set off against the interest due under the decree, the parties should not be considered to be entitled to profits in equal shares. We think that effect cannot be given to this contention, even if it is well founded. as the stipulation contained in the mortgage deed which represents a contract between the mortgagees inter se and also between the mortgagees on the one side and the mortgagors on the other is clear. Whatever may be the rights of the parties as regards the decree against the mortgagors part of which has been satisfied by the execution of the mortgage deed in question there is no doubt that the village Sowara was mortgaged with possession to the parties who were expressly given equal rights as regards possession and enjoyment thereof. It will be open to the parties to take into account the profits received by one or the other of them when their rights under the decree are to be finally adjusted. So far as the simple remedy of one co-sharer to receive profits from the lambardar is concerned. the entries in the khewat and the stipulations contained in the mortgage deed which are to regulate their relationship as co-sharers must be given effect to.

The conclusion arrived at by the learned District Judge is the same as herein indicated. though his reasons are somewhat brief and not identical in all respects with our own. The result is that the appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

1. Lachman Singh v. Ghasi, (1893) 15 All 137= 1893 A W N 163.
2. Lachman Pande v. Tirbeni Sahu, 1924 All 719 =79 I C 538.
3. Muhammad Qamar Shah v. Muhammad Salamat Ali Khan, 1933 All 407=147 I C 926 =55 All 512.

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SULAIMAN, C. J. AND BENNET, J.

L. Ramsarup and *another*—Defendants—Applicants.

v.

L. Peare Lal and *others*—Plaintiffs—Opposite Parties.

Civil Revn. No. 84 of 1934, Decided on 2nd January 1935, against decree of S. C. C. Judge, Agra, D/- 13th January 1934.

Civil P. C., (1908), O. 2, R. 2—Instalment bond—Creditor entitled on default of instalment to sue for whole amount or for instalments due—Creditor waiving right to sue for whole amount and suing only for instalments—O. 2, R. 2 is no bar to future claim in respect of further instalment—

Where a creditor has an option either to sue for the whole amount or to sue for the instalments only, and he exercises his option of suing for the instalments only and waives the right to sue for the whole amount, there is no longer any cause of action left to him for suing for the whole amount. It follows that at the time when the suit is brought, he disentitles himself from suing for the whole amount, and therefore O. 2, R. 2, would not beabar to a future claim brought by him when further instalments fall due: 1929 *Mad* 871 and 1932 *P C* 207 *Ref*; 1922 *P C* 412 1923 *Bom* 201and 1922 *P C* 23 *Dist.* [P 462 C 2]

G. S. Pathak—for Applicants.

B. Malik and *S. B. L. Gaur*—for Opposite Parties.

Sulaiman, C. J.—This is an application in revision by the defendants arising out of a suit brought on an instalment bond for Rs. 5,000 payable in 10 years. The bond contained a provision that half yearly instalments of Rs.. 250 would to paid and on default of payment of any two instalments, the whole amount would become payable. and the creditors would be at liberty to sue for the entire amount. Defaults were made for 5 instalments, and a suit for recovery of these instalments, was filed in 1933. In the plaint the creditors expressly mentioned that they were abandoning their right to recover the whole amount in a lump sum. and that in future they would sue for the future instalments as they fell due. This suit was decreed. Later on they brought another suit for recovery of one further instalment when it fell due, and it was ultimately

withdrawn on condition of the plaintiff's paying the costs of the defendants. The plaint was returned to the plaintiffs, although they had not deposited the defendants' costs in the Court. They then brought the present suit in November 1933, for the recovery of that particular instalment. The defendants resisted the claim on two principal grounds: The first was that the present claim was barred by O. 2, R. 2, inasmuch as in the first suit the claim for this instalment had not been included. The second plea was that the condition under which permission to withdraw the suit was granted had not been fulfilled inasmuch as the costs had not been paid to the defendants before the institution of the suit. Both these contentions have been repelled by the Court below and the claim has been decreed.

So far as the question whether the plaintiffs have or have not failed to comply with the condition, under which permission was granted, is concerned, we are of the opinion that this is a mere matter of interpretation of the order passed by the original Court, and we should not interfere in revision. The lower Court has taken into consideration the fact that the learned Munsif, who had passed the conditional order, allowed the plaint to be withdrawn, and that the order did not clearly and expressly mention that the costs must be deposited before the fresh suit is filed. In view of these considerations, he has come to the conclusion that the payment of the costs was not a condition precedent to the institution of the suit. We would not interfere with the decree of the Court below on the ground of interpretation only.

The principal point for consideration is whether the present claim is barred by O. 2, R. 2, Civil P. C. In order to avoid multiplicity of suits the rule quoted above provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

The Court below has interpreted the instalment bond as giving an option to the creditors either to sue for the whole amount in case of two successive defaults or to sue for the instalments only. In the case of 1932 P C 207 (1), a mortgage deed, which was before their Lordships of the Privy Council contained a similar clause under which the creditor was given power in case of default to realise the entire mortgage money and interest in a lump sum. Their Lordships interpreted the document as containing a provision exclusively for the benefit of the mortgagees and purporting to give them an option either to enforce the security at once or if the security was ample to stand by their investment for the full term of the mortgage. We think that in the present case also the creditors were given an option either to sue for the whole amount at once or to sue for successive instalments as they fell due.

The learned advocate for the applicants strongly contends before us that inasmuch as the creditors were entitled to sue for the whole amount, the mere fact that they chose not to sue for the whole amount but sued for some instalments only, would not take them out of the scope of O. 2, R. 2. This argument necessarily implies that there is no real option to a creditor at all. He must either sue for the whole amount or at his peril sue for instalments only. If he sues for the instalments only, then his further claim for the whole amount would be barred by O. 2, R. 2. This would amount to nullify the option given to him under the deed. As a matter of fact, O. 2, R. 2, does not deal with cases where there is an option to sue for the whole amount and the option is waived before the suit is brought. It seems to us that where a creditor has an option either to sue for the whole amount or to sue for the instalments only and he exercises his option of suing for the instalments only and waives the right to sue for for the whole amount, there is no longer any cause of action left to him for suing for the whole amount. It follows that at the time when the suit is brought, he disentitles himself from suing for the whole amount, and therefore O. 2, R. 2, would not be a bar to a future claim brought by him when further instalments fall due.

Great reliance has been placed by the learned advocate for the applicants on two cases decided by their Lordships of the Privy Council, which however are both easily distinguishable. In

1. Lasa Din v. Gulab Kunwar, 1932 P C 207=138 I C 779=59 I A 376=7 Luck 442 P C.

1922 P C 23 (2). a suit was brought to realise the amount of interest due on a mortgage-deed after the term of the mortgage had actually expired. It was accordingly held by their Lordships of the Privy Council that a subsequent suit to recover the principal amount of the mortgage money was barred by O. 2, R. 2. Under the deed, there was a right to recover the whole amount if interest was not paid for six months, and there was also a right to recover the whole amount when the term of three years fixed for the mortgage deed expired. After the expiry of three years there was no longer any option left in the mortgagee to sue for one part of the amount and wait for the other. The whole cause of action had accrued. Their Lordships accordingly held that there was only one cause of action. which gave occasion for. and formed the foundation of. the suit and which enabled him to ask for the whole relief at once.

Similarly in 1922 P C 412 (3). the mortgage deed had provided that the whole amount would be recoverable if there was any default in the payment of interest for six months. as well as when the full period of two years expired. A suit was brought for the recovery of the interest that had fallen due after the expiry of the terms fixed in the mortgage deed and was decreed. A subsequent suit to recover the balance was held to be barred by O. 2. R. 2. Here too, the whole cause of action had arisen, and there was no question of any option in the mortgagee to sue for part or for whole. and therefore no question of any waiver arose. An already pointed out where there is an option. which can be exercised one way or the other. and the creditor chooses . to exercise it in one way, he must be deemed to have waived his right to exercise it in the other way, and therefore the cause of action that accrues to him is only to exercise his remedy in the way that he has chosen.

As regards the case of 1923 Bom 201 (4). it is sufficient to point out that in the plaint filed in the previous suit the creditor had not expressly mentioned that he was waiving his right to sue for the whole amount. The learned Judges apparently thought that there has been no waiver. and that therefore there had been a cause of action to recover the whole amount. Similarly in 1928 Mad 705 (5). there was possibly no option under the terms of the deed given to the creditor. In any case the same Bench differed from their own decision subsequently in 1929 Mad 371 (6).

We are therefore of the opinion that the view taken by the Court below that the present claim is not barred by the provisions of O. 2, R. 2, Civil P. C., is correct. The revision is accordingly dismissed with costs.

K S *Revision dismissed.*

2. Muhammad Hafiz v. Mirza Muhammad Zakariya 1922 P C 23=65 I C 79=49 I A 9=44 All 121 (P C).
3. Kishan Narayan v. Pala Mal, 1922 P C 412=72 I C 187=50 I A 115=4 Lah 32 (P C)
4. Shrinivas Laxman Naik v. Chambaspagowda, Basaugwra 1923 Bom 201=72 I C 290.
5. Mukyaprana Bhatta v V T N Kelu Nambiyar 1928 Mad 705=112 I C 270.
6. J P Rego v. Phillip Tauro, 1929 Mad 371=120 I C 853.

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BENNET, J,

Abdul Wahid Khan and *another*—Defendants—Applicants.

v.

Sher Muhammad Khan — Plaintiff—Opposite Party.

Civil Revn. No. 234, of 1934, Decided on 28th November 1934, from decision of Sm. C. C. J. Muzaffarnagar, D/- 4th December 1933.

Limitation Act (1908), Art. 83—Sale deed—Vendee not paying mortgagee and vendor forced to pay—Suit by vendor is governed by Art. 83 — Vendee can plead breach of contract by vendor in not giving possession as defence.

Where the vendee of a property who has agreed to pay a mortgagee fails to do so and the vendor from whom the mortgage amount is recovered files a suit against the vendee, the suit is governed by Art. 83 and limitation runs not from date of sale-deed butfrom date when vendor has actually been damnified. To such a suit the vendee can plead as a defence the breach of contract by the vendor in not giving possession. And this he is not precluded from doing even thought he has other remedies open to him. 34 *All* 429 *Dist*; 63 *I C* 87, 1926 *All* 605, 1933 *All* 386, *Rel on.* [P464 C 1, 2]

Punna Lal—for Applicants.

A. P. Pandey—for Opposite Party.

Order.—This is a civil revision by defendants against a decree of a Small Cause Court. The plaintiff executed a sale-deed of certain zamindari property in favour of the defendants on 3rd August 1926. That sale deed contained a covenant that the defendants would pay Rs. 250 of the sale price to a mortgagee of other property. The defendants did not pay and the mort-

gagee among other remedies obtained an order under O. 34, R. 6, and realised Rs. 192-13-6 from the plaintiff. The suit was brought on 20th September 1933. The defendants pleaded that they had not paid because the plaintiff did not carry out his part of the sale deed where it was provided that actual possession of certain plots should be given to the defendants. The Court below finds that there was mutation for the defendants in the khewat but that the name of the plaintiff remained in the khatauni for 1337 Fasli and that the plaintiff continued in actual cultivation. The lower Court considered that the defendants had a remedy against the plaintiff by a suit for ejectment or a suit for damages. For this reason the lower Court held that the failure to give possession was no defence. The defence also raised a point of limitation which was held against the defendants by the lower Court. In revision the question of limitation was urged and learned counsel argued that Art. 116, Limitation Act, would apply and as the sale deed was a registered document the period of limitation would be 6 years from the date of the sale deed as the covenant required that payment should be made by defendants. On that view the suit would be time-barred, as it was more than six years after the sale deed. The ruling on which the defendants rely in 34 All 429 (1), deals with a case where the plaintiffs had not actually paid any sum which the defendants should have paid and therefore the plaintiffs could not claim to come under Art. 83 in the suit because they had not yet been damnified. The ruling therefore is in my opinion. no authority for the question whether Art. 83 does or does not apply in a case like the present where the plaintiff has been actually damnified. In 1926 All 605 (2) and 63 I C 87 (3) and 1933 All 386 (4). it has been held that in a case like the present where the plaintiff has actually been damnified in consequence of a breach of agreement by the vendee to a sale deed. the suit will come under Art. 83. Limitation Act. Following those rulings I hold that the present suit was in time.

I now turn to the question of whether the failure of the plaintiff to give possession can be pleaded as a defence to the present claim. It is true that the defendants may have had other remedies by way of a suit for ejectment or a suit for damages, but the existence of other remedies does not, in my opinion, preclude the defendants from pleading the breach of contract by the plaintiff as a defence. The suit of the plaintiff is founded on the breach of contract of a condition in the sale deed. The defendants have shown to the satisfaction of the lower Court that the plaintiff himself also broke the conditions of that sale deed. Under these circumstances it appears to me that the defendants are entitled to put forward this ground as an adequate defence. The lower Court has found that the plaintiff continued in actual cultivation. that even 7 years after the sale deed the plaintiff still remained in possession of the plots which he was bound to hand over to the defendants in accordance with the terms of the sale deed. Learned counsel for the plaintiff-respondent has made some suggestion that because the sale deed refers in general terms to sir. etc., therefore some plots may be sir. but no such point was shown by the plaintiff to the lower Court either by way of pleading or evidence. It appears to me that the failure of the plaintiff to give the plots in question to the defendants is a sufficient answer to the claim of the plaintiff. The amount which the plaintiff has paid is not much being only Rs. 192-13-6. The onus lay on the plaintiff to show that the damage which the defendants sustained from failure to deliver possession was a smaller sum than that amount and the plaintiff did not show that this was so. Under the circumstances I consider that the suit of the plaintiff should be dismissed and I dismiss it with costs throughout.

K.S. *Application dismissed.*

1. Raghubar Rai v. Jai Rai, (1912) 34 All 429=14 I C 244.
2. Kedar Nath v. Har Govind, 1926 All 605=95 I C 913.
3. Suraj Misra v. Ghulam Hussain, (1920) 63 I C 87.
4. Unkar Singh v. Kashi Prasad, 1933 All 386=143 I C 821=55 All 490.

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SULAIMAN, C. J AND BENNET, J.

Commissioner of Income Tax, U. P.—Petitioner.

v.

Shri Vijayananda Gajpati Raj Bahadur—Opposite Party.

Privy Council Appeal No. 14 of 1934, Decided on 10th January 1935, for leave to appeal to his Majesty in Privy Council.

(a) Income Tax Act (1922), S. 66-A, Sub-Ss, (2), and(3)—Right of appeal is confined only to such cases as are certified to be fit by High Court.

The right of appeal is conferred only by sub-S. (2) which provides that an appeal shall lie to His Majesty in Council in anycase which the High Court certifies to be a fit one for appeal. Where the opinion of the Income-tax Commissioner has not been accepted by the High Court, he cannot claim to appeal to Privy Council as of right under S. 66-A, sub-S. (3). This sub-section deals with the procedure to be applied to appeals where such an appeal lies under the preceding sub-S. (2). [P 465 C 1, 2]

(b) Income-tax Act (1922), S. 66-A—Sub-S. (2)—Question whether income received as maintenance allowance is taxable — Case held to be fit one for appeal to Privy Council.

The question whether the income received as maintenance allowance is taxable or not, has been the subject of decision in India, but has not so far been considered by their Lordships of the Privy Council. As it is an important matter affecting public revenue and is a question which might frequently arise, it is a fit one for appeal to His Majesty in Council. [P 466 C 1]

K. Verma—for Applicant.

Tej Bahadur Sapru and *Ajudhiya Nath*—for Assessee.

Sulaiman, C. J.—This is an application for leave to appeal to His Majesty in Council in an income-tax matter. The value of the subject-matter in dispute is well over Rs. 10,000, and the opinion of the Income-tax Commissioner has not been accepted by the High Court on reference made to it. The learned advocate for the Income-tax Commissioner contends before us that he is, as of right, entitled to appeal to His Majesty in Council under S. 66 (a), Sub-S. (3), Income-tax Act. (Act 11 of 1922). In our opinion this contention is not well founded. The right of appeal is conferred only by Sub-S. (2) which provides that an appeal shall lie to His Majesty in Council in any case which the High Court certifies to be a fit one for appeal. This sub-section does not go on to say, as is provided in S. 109 (a) and (b), that an appeal shall lie from any decree or final order passed by the High Court in the exercise of its final appellate or original civil jurisdiction. It follows that the right of appeal is confined in only such cases as are certified to be fit by the High Court.

Sub-section (3) is quite different and lays down that the provisions of the Act relating to appeals shall apply in the case of appeals under this section in the same manner as they apply in the case of appeals from decrees. That obviously deals with the procedure to be applied to appeals where such an appeal lies under the preceding Sub-S. (2). We accordingly hold that no appeal would lie unless the case can be certified as being fit for appeal to His Majesty in Council.

The assessee is a younger brother of the Maharaja of Vizianagram, who holds an impartible Raj. Under certain deeds a monthly allowance of Rs. 10,000 is paid by the Raja to the younger brother, and it is this monthly allowance which is sought to be taxed by the income-tax officer. Under S. 12, Income-tax Act, all incomes are taxable unless otherwise exempted. The assessee claims exemption under S. 14 (1), under which any sum which is received by a member of a Hindu undivided family is exempted. The question in this case therefore was whether this income is a sum received by the younger brother "as a member of the Hindu undivided family." The Bench, differing from the view expressed by the income-tax officer came to the conclusion that the monthly allowance was such an income. This view has also been followed by the Madras High Court in 1934 Mad 608 (1). A similar view has been recently expressed by the Lahore High Court in 1933 Lah 284 (2). These cases have relied strongly on the observations of their Lordships of the Privy Council in 24 Mad 147 (3), 1921 P C 62 (4) and 1928 P C 68 (5). The learned counsel for the assessee urges before us that the allowance is received by the younger brother as a member of the undivided family. On the other hand, the learned counsel for the applicant relies on the second Pittapur case of 1918 P C 81 (6) and a more recent case of 1932 P C 216 (7), and contends that the right to maintenance is based on custom or grant and not coparcenary interest.

The main question in the case is whether the income received by the younger brother is income received by

1. Commissioner of Income-Tax, Madras v. Narayana Gajapathi, 1934 Mad 608=151 I C 926=57 Mad 1023.
2. Krishan Krishore v. Commissioner of Income-Tax, 1933 Lah 284=141 I C 415—14 Lah 255.
3. Raja Yarlagadda Mallikarjuna Prasad Nayadu v Raja Yarlagadda Durga Prasad Nayadu, (1901) 24 Mad 147=27 I A 151=7 Sar 761 (P C).
4. Baijnath Prasad Singh v. Tej Bali Singh, 1921 P C 62=60 I C 534—48 I A 195=43 All 228 (P C).
5. Konammal v. Annadama, 1928 P C 65=106 I C 354=55 I A 114=51 Mad 189 (P C).
6. Rama Rao v. Rajah of Pittapur, 1918 P C 81 =47 I C 354=45 I A 148=41 Mad 778 (P C).

him in his capacity of a member of an undivided Hindu family or whether it is received by him by virtue of some other right. The question is of some general importance, and, in our opinion, requires an authoritative pronouncement. The cases cited on behalf of the respondent are cases not dealing directly with the right to claim maintenance. but mostly with a right of succession to an impartible estate. Whereas 1918 P C 81 (6) was a case relating to maintenance. but certain observations made in it, have been subsequently explained away by their Lordships of the Privy Council. The last mentioned case of 1932 P C 216 (7) was also a case of succession. although the rights of co-parceners in an impartible estate were discussed at p. 1413.

The question whether the income received as maintenance allowance is taxable or not has been the subject of decision in India, but has not so far been considered by their Lordships of the Privy Council. As it is an important matter affecting public revenue and is a question. which might frequently arise. we think that this case is a fit one for appeal to His Majesty in Council under S. 66 (a). Sub-S. (2). We certify accordingly. We fix Rupees 200 as fee for the counsel for the Income-tax Commissioner.

K.S. *Certificate granted.*

7. Shiba Prasad Singh v. Prayag Kumari Debee, 1932 P C 216=138 I C 861=59 I A 331=59 Cal 1399.

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KENDALL, AND BAJPAI, JJ.

Banwari Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 831 of 1934, Decided on 22nd January 1935, from order of Sess. Judge, Azamgarh, D/- 18th July 1934.

*** (a) Criminal P. C., (as amended in 1923), Ss. 369 and 561-A—Order passed in revision by High Court—It cannot review it—S. 561-A does not modify S. 369 nor clothe Court with any fresh power.**

The High Court cannot review an order passed by itself in exercise of revisional jurisdiction. The High Court possessed no inherent power to review its judgment before the amendments of 1923. Consequently it cannot be said that S. 561-A either modifies the provisions of S. 369 or clothes the Court with any fresh power. *Case law discussed.* [P 468 C 1]

(b) Criminal P. C., (1898), S. 439—High Court cannot revise its own order passed in exercise of revisional power.

The revisional sections do not in themselves give the High Court power to revise an order of its own, and although it may be open to it to call for the record of a case which has already been dealt with in revision, there is no power to pass any order which would have the effect of setting aside or modifying an order passed in revision by itself. [P 468 C 2]

S. B. Johari and *B. S. Darbari*—for Applicant.

Asst. Govt. Advocate—for the Crown.

Kendall, J.—These three applications for revision have been referred to us because they raise an important question of law as to which the learned referring Judge was in some doubt. Applications for the revision of the orders passed by the lower Court had been already disposed of by him. They were applications made from jail. but although he had not had the advantage of hearing counsel on behalf of the applicant. he had considered the applications on the merits and had dismissed them. On fresh application being filed through counsel the question was raised of whether he had jurisdiction to review his own orders, and he ordered notice to be issued, and after hearing counsel passed the order under which the cases have been referred to us.

Section 369. Criminal P. C., as it now stands. is as follows:

"Save as otherwise provided by this Code or by any other law for the time being in force or in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed such judgment shall alter or review the same, except to correct a clerical error."

But Mr. Johri in dealing with this section has pointed out that although the general rule is against him, he may be saved by the expression "save as otherwise provided by this Code," for in S. 561 of the Code it has been enacted that nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuses of the process of any Court or otherwise to secure the ends of justice."

It is argued that this modifies the provisions of S. 369, and that even if the later section does not invest the Court with any fresh powers. it still recognises the inherent power which the Court already possesses.

In order to support his argument Mr. Johri has referred us to several

cases, only three of which however appear to be really germane to the present issue. In 1927 All 724 (1), a Single Judge of this Court had before him an application in revision which as he remarked was really "in effect an application in review," and although he finally rejected the application "on the ground that the matter has been decided, and that there was no flaw in the previous decision," there are some passages in his judgment which favour the present applicant. For instance, he remarked:

"I am not prepared to say that a Judge of this Court cannot review his judgment or decision. But it appears to me very clear that the application for review must come before the Judge who passed the decision which has to be reviewed."

This is evidently a reference to R. 8 Ch. 1 of the High Court Rules, to which the learned referring Judge has adverted, but the question we have now to decide is whether the same Judge who dealt with the earlier application for revision has any jurisdiction to review his own order, and in the decision from which we are now quoting it appears that Ashworth, J., was at any rate doubtful on that question. In 1928 Oudh 402 (2), a Single Judge of the Oudh Chief Court held that S. 561, Criminal P. C., is in no way limited or governed by S. 369 of the same Code, and that the High Court had power to reconsider the question of sentence when the ends of justice required it. It should be remarked here that the learned Judge has followed a decision of the Lahore High Court 1927 Lah 129 (3), which has since been overruled by a Division Bench of the same Court as we shall presently show. The third case on which Mr. Johri relies is an unreported decision of a Bench of this Court in which the learned Judges had in revision enhanced the sentence passed against the accused, but subsequently found that notice had not been served on the accused, and they therefore reviewed the case and held that the order passed enhancing the sentence was without jurisdiction.

On the other side, the learned Assistant Government Advocate has called our attention to a good many authorities which are very much to the point. In 7 All 672 (4), a Bench of this Court held that the High Court has no power under S. 369, Criminal P. C., to review an order dismissing an application for revision, and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government. This decision is dated 1885, and we must point out that S. 369, Criminal P. C., as it stood at that time has since been amended, but the decision of the Bench is authority for showing that at that time the High Court had no power to review such an order. In the case of 1916 All 183 (5), a similar opinion was expressed by a Bench of two Judges of this Court in 1915, and in 1922 a Single Judge held that the High Court had no power to review its own order dismissing a criminal appeal. 1923 All 473 (6). The most recent decision of this Court to which we have been referred is that of Bennet, J., in the case of 1935 All 60 (7), in which after a comprehensive survey of the decision of various High Courts, including that of the Oudh Chief Court the learned Judge held that the High Court has no power under S. 561 (A), Criminal P. C., to review its judgment in a criminal revision when once it has been pronounced and signed. He noticed the fact that S. 369 of the Code had been amended in 1923. Before that date the section read in the Criminal Procedure Code of 1898:

"No Court other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Ss. 395 and 484, or to correct a clerical error."

But it is clear from the earlier decisions of the Allahabad High Court to which we have referred that this section and also the similar section in the Criminal Procedure Code of 1882 were not interpreted to mean that the High Court had an inherent right of reviewing an order passed by itself in revision. It follows therefore that when the section was amended in 1923 in such a way as to show that the High Court had no power of altering or reviewing a judgment, except to correct a clerical error, the legislature did not attempt or intend to deprive the High Court of any inherent power which it had hitherto possessed. This point is of importance when we consider the application of S. 561 (A) which was also introduced into the

Sripat Narain Singh v. Gobbor Rai, 1927 All 724=106 I C 680.

2. Emperor v. Shiv Dat, 1928 Oudh 402=111 I C 573=29 Cr L J 893=3 Luck 680.
3. Gul Mahomad v. Pir Akbar Ali, 1927 Lah 129 99 I C 604=28 Cr L J 172.
4. Queen Empress v. Durga Charan, (1885) 7 All 672=1885 A W N 177.
5. Govind Sahai v. Emperor, 1916 All 183=32 I C 235=17 Cr L J 47=38 All 134.
6. Emperor v. Kale, 1923 All 473=74 I C 270=24 Cr L J 766=45 All 143.
7. Kunji Lal v. Emperor, 1935 All 60=151 I C 714=1935 Cr C 1020=35 Cr L J 1485.

Code in 1923. That section does not in terms invest the Court with any powers which it did not possess before. But it does refer to an inherent power of which the High Court is already in possession. We have given above the authority for holding that the High Court possessed no inherent power to review its judgment before the amendments of 1923. Consequently it cannot be said that S. 561 (A) either modifies the provisions of S. 369 or clothes the Court with any fresh power. The matter has been recently considered by a Bench of the Lahore High Court in 1928 Lah 462 (8). This decision overrules a previous decision of a Single Judge in 1927 Lah 139 (9) on which the Oudh decision in the case of 1928 Oudh 402 (2), was based. In discussing the effect of S. 369 the learned Judges remarked:

"This does not affect any powers inherent in the Court, as there never has been any inherent power in the High Court to alter or review its own judgment in a criminal case once it has been pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits. With this view all the Courts in India are in accord, and it is not disputed that this was the law prior to the addition S. 561 (A) of the Criminal P. C. by the Act of 1903."

It was however contended before the Bench that the introduction of S. 561 (A) had altered the law, and given to the High Court power to do something which it could not do before. But this contention was not accepted by the Bench, who pointed out that the High Court is not given nor did it ever possess any unrestricted and undefined power to make any order which it might please to consider was in the interests of justice. In this connection we may refer to a recent unreported decision of a Bench of this Court, namely, Criminal Appeal No. 134 of 1932. In this case 8 persons had been convicted by the lower appellate Court and they all made application in revision to the High Court. Some of these applications were summarily rejected by a Judge of this Court, but as counsel appeared in support of the others the case was argued fully, and the Bench after hearing counsel allowed these applications. It refused however to consider those applications which had already been dismissed and in which the circumstances were similar, evidently because it considered that it had no jurisdiction to do so.

There is another point of view from which the matter might be considered which is that there is really no right of revision, but the High Court and certain other Courts have power to call for and examine the records of the proceedings before an inferior criminal Court in order to satisfy themselves of the correctness and the legality or the propriety of any finding, sentence or order, and may then proceed in the manner prescribed by S. 435 and the following sections of the Code. It may be argued therefore that there is nothing that prevents a Judge of the High Court from sending for the record of an inferior criminal Court and revising an order passed by it. The revisional sections however do not in themselves give the High Court power to revise an order of its own, and although it may be open to it to call for the record of a case which has already been dealt with in revision, there is no power to pass any order which would have the effect of setting aside or modifying an order passed in revision by itself.

We are therefore of opinion that the Court has no jurisdiction to entertain the present applications, and we direct that they be dismissed.

K.S. *Application dismissed.*

8. Raju v. Emperor, 1928 Lah 462=110 I C 221 =29 Cr L J 669=10 Lah 1.
9. Mathra Das v. Emperor, 1927 Lah 139=99 I C 1039=28 Cr L J 239.

A. I. R. 1935 Allahabad 468

NIAMATULLAH AND ALLSOP, JJ.

Rashid Ahmad — Defendant—Appellant.

v.

Bansi Dhar—Plaintiff—Respondent.

Ex. First Appeal No. 136 of 1933, Decided on 11th December 1934, from decision of Sub-Judge, Moradabad, D/- 18th July 1932.

Execution—Sale of agricultural land—U. P. Notification No. 576-1-A. 93 applies to pending execution proceedings.—Civil P. C. (1908) S. 68.

The whole object of the U. P. Notification 576-1-A. 93 was to have sales of agricultural lands, ordered to be sold in execution of decrees, conducted under the immediate supervision of the Collector who might devise means of satisfying the decree without recourse to the necessity of selling the land. To hold that the notification applies only to execution proceedings instituted after its date would be to deprive it of much of its utility. It applies to pending execution proceedings also [P 467 C 1]

M. H. Faruqi—for Appellant.

Mukhtar Ahmad—for Respondent.

Judgment.—The appellant is the judgment-debtor in certain execution proceedings in which agricultural land belonging to him was ordered to be sold. The land was not ancestral within the meaning of the notification under which execution of decrees for sale of ancestral property had to be transferred to the Collector. It was however revenue paying land. All the execution proceedings had been taken in the civil Court and the sale alone was to take place through the Collector. The sale was fixed for 20th July 1932. Before it could take place the judgment-debtor made an application pointing out that under a recent notification (No. 576-I-A-93), the execution of decrees in which agricultural land is to be sold should be transferred to the Collector. The notification mentioned modifies the earlier notification of 1911 so as to extend its application to all agricultural land ancestral or otherwise. The judgment-debtor's objection was disallowed by the lower Court which held that the amending notification cannot have retrospective effect, the order for sale having been passed long before the notification.

The judgment-debtor has preferred the present appeal. It is argued on his behalf that the question is only one of procedure and the notification relied on by him must apply not only to the execution proceedings which may be instituted after it was issued but also to pending execution proceedings. We think that this contention is correct. The whole object of the notification was to have sales of agricultural lands, ordered to be sold in execution of decrees, conducted under the immediate supervision of the Collector who might devise means of satisfying the decree without recourse to the necessity of selling the land. To hold that the notification applies only to execution proceedings instituted after its date would be to deprive it of much of its utility.

For these reasons we hold that the appellant's objection was correct and the proceedings for execution of decree should be transferred to the Collector in terms of the notification referred to. The order of the lower Court is set aside and the case is returned to that Court with the direction that the procedure laid down by the rules for transmission of execution cases to the Collector be followed. The appeal is allowed with costs.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 469

GANGA NATH, J.

Sheo Sahai—Plaintiff—Appellant.

v.

Ganga Sahai and *others*—Respondents.

Second Appeal No. 957 of 1932, Decided on 13th December 1934, from decision of 2nd Addl. Dist. Judge, Cawnpore, D/ 14th November 1931.

Agra Tenancy Act (1926), S. 225—Suit for share of profits against lambardar — Plaintiff is entitled to future interest at 12 per cent.

In a suit for profits against the lambardar the plaintiff cosharer is entitled to simple interest at the rate of 1 per cent per mensem on his share of profits from the date when they became divisible till actual realisation: 1932 *All* 178 *Rel on.*

[P 469 C 2]

S. N. Verma—for Appellant.

R. C. Ghatak—for Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the respondent for his share of profits. He has been given a decree for Rs. 72-3-1 with interest at 12 per cent. per annum from the date on which the profits of 1335 F became due up to the date of the decree and future interest at 6 per cent. per annum and proportionate costs in both Courts.

It has been urged by the learned counsel for the appellant that the lower appellate Court should have awarded him future interest at the rate of 12 per cent. per annum and not at 6 per cent. I think the contention of the learned counsel is well-founded. There is no reason why the principle underlying S. 225. Tenancy Act, should not be applied to future interest after the decree up to the date of realisation. Accordingly, in a suit for profits against the lambardar the plaintiff cosharer is entitled to simple interest at the rate of 1 per cent. per mensem on his share of profits from the date when they became divisible till actual realisation. The same principle was held in 1932 All 178 (1).

It is therefore ordered that the appeal be partly allowed, the decree of the lower Court be amended inasmuch as the plaintiff shall get future interest also at the rate of 1 per cent. per mensem. Parties shall get and pay costs in proportion to their success and failure.

K.S. *Appeal partly allowed.*

1. Mohammad Abdul Jalil Khan v. Mohammad Abdul Salam Khan, 1932 All 178=137 I C 166.

* A. I. R. 1935 Allahabad 470

SULAIMAN, C. J. AND GANGA NATH, J.

Mangal and *another*—Plaintiffs—Appellants.

v.

Mathura Prasad and *others*—Pro forma Defendants—Respondants.

Second Appeal No. 1198 of 1933, Decided on 5th November 1934, from decision of Addl. Sub-Judge, Moradabad, D/- 4th March 1933.

*** Civil P. C. (1908), O. 21, Rr. 91, 92 (3) and 93—Auction purchaser cannot maintain separate suit for refund of purchase money on gronnd that judgment-debtor has no saleable interest.**

Order 21, R. 93 provides a speedy remedy for a refund of the purchase money in the only case in which an application for setting aside a sale on the ground of non-saleability of the interest is made within time and the Court is empowered under that rule to direct any person to whom the money has been paid to refund the amount. Such an order therefore can be passed against the decree-holder, against the judgment-debtor and any other person who might have taken away any part of the money deposited by the auction purchaser. But a separate suit is not allowed, presumably because it was considered that an auction sale being an involuntary sale, there could not possibly be a warranty of title given by the judgment-debtor; nor could a suit lie against the decree-holder for failure of consideration because the decree-holder himself was not the transferor. A sale takes place under the authority of the Court and without warranty of title. In such circumstances, neither in equity nor under the statutory provisions of the Code, is a suit maintainable : *Case law reviewed.*

[P 473 C 2]

Chandra Bhan Agarwala—for Appellants.

N. P. Asthana and *Shabd Saran*—for Respondents.

Sulaiman, C. J.—This is a plaintiffs' appeal arising out of a suit for refund of the amount deposited by the plaintiffs in Court as auction-purchasers of certain properties against the contesting defendants who had attached and taken the surplus of the decretal amount which remained to the credit of the judgment-debtors.

It appears that a suit had been filed by Digambar and others against the judgment-debtor and the decree-holder on 3rd July 1924, for declaration that the property did not belong to the judgment-debtor and was not liable to be sold. and for recovery of possession. While that suit was pending. the decree-holder put up the property for sale. and it was sold on 4th September. 1924, and purchased by the present plaintiffs. Before the period of 30 days expired and the sale could be confirmed. the auction-purchasers applied to the Court praying that the payment of sale proceeds may be held over till the decision of the civil suit. They however made no application under O. 21, R. 91 for the setting aside of the sale on the ground that the judgment-debtors had no saleable interest in the property at all. Their application was allowed by trial Court, but on the decree of the trial Court being reversed in appeal the money was taken away by the decree-holder, judgment-debtor. The auction-purchasers were made parties to the civil suit and the suit was first decreed by the trial Court, then it was dismissed by the lower appellate Court and was ultimately decreed by the High Court.

The auction-purchasers first made an attempt to recover the amount taken away by the decree-holders and applied under Ss. 144, 147 and 151, Civil P. C., for refund of the amount on the ground that the judgment-debtors had no saleable interest. The matter came up to the High Court and their application was ultimately dismissed. The judgment is reported as 1933 All 63 (1). We shall refer to it again later.

Having failed against the decree-holders. the auction-purchasers have now brought the present suit against the attaching creditor of the original judgment-debtors. The Courts below have dismissed the suit on the ground that it is not maintainable. As regards the broader question whether the auction-purchaser can maintain a separate suit for refund of the purchase-money on the ground that the judgment-debtor had no saleable interest at all. there is a slight conflict of opinion in the various High Courts. But in this Court the rule is now firmly established that a suit is barred altogether. In 1917 All 363 (2). it was clearly laid down that under the present Civil Procedure Code. an auction-purchaser, who has been deprived by means of a suit against the judgment-debtor of the property purchased by him. cannot obtain a refund of the purchase-money without getting the auction-sale set aside. The Bench quoted the observation of their Lordships of the Privy Council in 3 Cal 806 (3). that:

" Now it is, of course, perfectly clear that when the property has been sold under a regular

1. Sahu Deputy Shankar v. Mangal Sen, 1933 All 63=143 I C 429=54 All 948.
2. Nannu Lal v. Bhagwan Das, 1917 All 363=37 I C 9=39 All 114.
3. Dorab Ally Khan v. Abdool Azeez, (1880) 3 Cal 806=5 I A 116=3 Suther 519=3 Sar 818 (PC).

execution and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the sheriff or the judgment-creditor."

We may quote the next sentence of their Lordships as well:

"This however is because the sheriff is authorised by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction and to pass the debtor's title to it without warrantying that title to be good."

The learned Judge also laid emphasis on the provision in R. 92 that no suit shall lie to set aside the sale. This case was followed by another Division Bench in 1921 All 377 (4), where the change introduced in the new Civil Procedure Code, as compared with the older Codes, were discussed. It was pointed at p. 69 that:

"in an auction-sale however which takes place against the will of the judgment-debtor, there can possibly be no warranty of titie on behalf of the judgment-debtor. Nor does the decree-holder through the sale-officer, give any guarantee; he merely puts up for sale the rights and interest which the judgment-debtor might possess in the property. The auction-purchaser, who purchases the property therefore takes the risk, and if it turns out that the judgment-debtor really has no interest in the property sought to be sold, it is the misfortune of the auction-purchaser. Unless there be a special remedy provided for compensation, I fail to discover any rule of equity, which would entitle him to get back his money.'

Many difficulties that would arise if the contrary view were upheld were pointed out in that case; and it was further pointed out that if there were any rule of equity entitling an auction-purchaser to recover the amount, the same rule mright very well apply to a case where a smaller interest is owned by the judgment-debtor. The Full Bench in 1923 All 394 (5), distingushed the ruling in 1921 All 377 (4), and held that where the sale takes place under an invalid decree, there is a clear equity in favour of the purchaser entitling him to recover the amount back. The learned Judges pointed out that it is a well-established principle that the auction-purchaser is not bound to look beyond the decree. If a decree is in existence he is entitled to assume that it is a valid decree.

In the case of 1933 All 63 (1), referred to above, which arose out of the application made for the refund of the purchase-money by the auction-purchasers against the decree-holder, a Bench of this Court discussed the rulings of the various High Courts and pointed out that the view expressed by this Court in the case of 1917 All 363 (2), followed in 1921 All 377 (4), was followed by the Bombay High Court in 1922 Bom 206 (6), and by the Lahore High Court in 1925 Lah 467 (7), and by the Madras High Court in 1916 Mad 290 (8), and also by the Calcutta High Court in 1926 Cal 971 (9). They noted that two out of the three Judges in the Oudh case of 1930 Oudh 148 (10), have taken a contrary view. The learned Judges pointed out that the majority of the Oudh Bench had proceeded on the assumption that there was a warranty by the decree-holder that the property belonged to the judgment-debtor, and thought it unnecessary to discuss this proposition, as it has been well established in this Court that:

"as regards sales under a decree of a Court there is no warranty of title either by the decree-holder or by the Court."

The learned Judges relied on 23 All 355 (11), and distinguished the Full Bench case of 1923 All 394 (5), and considered the latter ruling not to be applicable because the decree under which the property had been sold in case was never set aside. As the question was reviewed by the Bench and the opinion expressed on the strength of the previous authorities there seems to be hardly any necessity to re-consider the point again. But we may however point out that the Calcutta Bench in 1926 Cal 971 (9), after a consideration of numerous authorities came to the conclusion that the only remedy open to the plaintiffs was to apply as provided in the Code for an order setting aside the sale and a consequential order for a refund of the purchase-money. They, no doubt, pointed out that where there was a misrepresentation or fraud, there might perhaps be some other remedy. In the case of Habibuddin the learned Chief Justice of the Lahore High Court considered the changes introduced in the new Civil Procedure Code, as compared with the Code of 1882, and came to the conclusion that the assumption

4. Ram Sarup v. Dalpat Rai, 1921 All 377=58 I C 105=43 All 60.
5. Bindeshri Prasad Tiwari v. Badal Singh, 1923 All 394=74 I C 873=45 All 369 (FB).
6. Balvant Ranganath v. Bala, 1922 Bom 205=67 I C 360=46 Bom 833.
7. Habib Uddin v. Hatim Mirza, 1925 Lah 467=86 I C 622=6 Lah 283.
8. Parvathi Ammal v. Govindasami Pillai, 1916 Mad 290=30 I C 827=39 Mad 803.
9. Rishikesh Laha v. Manik Molla, 1926 Cal 971=96 I C 64=53 Cal 758.
10. Bahadur Singh v. Ram Phal, 1930 Oudh 148 124 I C 641=5 Luck 552 (FB).
11. Shanta Chandar Mukerji v. Nain Sukh (1901) 23 All 355=1901 A W N 101.

made in some of the cases that there was:

"an implied warranty of some saleable interest when the right, title and interest of a judgment-debtor is put up for sale,"

was not warranted by any provision of the Code and emphasised that:

" that there is no warranty of title in respect of a Court sale can no longer be disputed, and it is also clear that apart from statute, there is no principle of law which would allow an auction-purchaser to maintain a suit for the recovery of the purchase money even when it is found that the judgment-debtor had no saleable interest at all in the property sold. The statute however allows the purchaser 'to recover his purchase-money provided that he can show that the judgment-debtor had no saleable interest and the Court sets aside the sale on that ground. The right of the purchaser being the creation of the statute, the remedy to enforce that right must be confined to that prescribed by the statute."

The Bench agreed with the view previously expressed by this Court as well as the Calcutta and Lahore High Courts and distinguished the Bombay case. On the other hand, a majority of the Judges in the Oudh Full Bench case already quoted expressed a different opinion and dissented from the Allahabad view. It is rather curious that although the Allahabad view was based to a large extent on the principles of O. 21, R. 92 (3), there seems to be no reference whatsoever to this sub-rule in the judgment of either of the two learned Judges. The majority apparently did not consider the point of view that this sub-rule bars a subsequent suit. because perhaps it was not pressed at the bar. The third learned Judge. who agreed with the Allahabad view. referred to this rule briefly, but not quite in the way in which it had been emphasised here.

This case seems to have been followed by a Full Bench of the Lahore High Court in 1932 Lah 401 (12), overruling their own previous case. In referring to the Full Bench of our Court 1923 All 394 (5), the learned Judge, who delivered the judgment in the case, remarked that he was unable to see any material difference between the case of a purchaser in a money decree who is deprived of the property for want of judgment-debtor's title in it and the case of a purchaser in a mortgage-decree. who is deprived of the property because the mortgagor had no right to mortgage it, and the grounds of objection to sale in both cases appeared to the learned Judges to be analogous. He therefore thought the distinction between the two cases pointed out by the learned Judges who decided the Full Bench case of this Court appeared to him to be without any material difference so far as the right of purchaser to refund is concerned. With great respect we would point out that the ratio decidendi of the Full Bench case has been entirely overlooked. The Full Bench proceeded on the ground that the decree itself had been set aside and was invalid, and not that the sale had passed no title although the decree was invalid. The distinction in our opinion is quite obvious. Where the decree is not set aside there is no equity in favour of an auction-purchaser if no warranty of title has been given. But where the decree itself is set aside, then there is no equity in the decree-holder retaining the amount which he has received by the auction. The learned Judges of the Lahore Full Bench also emphasised that in some Calcutta cases there was a reservation made that where an auction-purchaser at a Court sale had suffered loss through the fraud of the execution creditor or the breach of any duty which the execution creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which thereby he has sustained. But we may point out that a suit for compensation on account of fraud or misrepresentation or breach of warranty is one thing and a suit for a refund of the consideration on the ground that no sale has taken place is quite another. The Full Bench of the Lahore High Court conceded that there was "considerable difference of opinion on the point involved", and considered that:

" although the Court does not guarantee any title ..... there is an implied warranty of some title by the decree-holder the existence and extent of which however has not been determined or guaranteed by the Court."

It is on the supposition that there is no guarantee of title and yet there is some implied warranty of title that the decision proceeded. It seems to us that if there is no warranty of title given to the auction-purchaser then there can be no equity in favour of the auction-purchaser to claim a refund of his purchase-money when it is found that no title exists. And even if it be assumed that there was a guarantee that the judgment-debtor had some. even though a millionth part, of the interest sold the suit for damages for breach of warranty could not justify a decree for the return of the entire amount; but damages would have to be assessed at a value com-

12. Mehar Chand v. Milkhi Ram, 1932 Lah 401=138 I C 47=13 Lah 618 (FB).

mensurate with the small extent of the share which was guaranteed and which did not exist. On principles of equity it is difficult to support the proposition that a suit for refund lies when the interest of the judgment-debtor in the share sold is zero, but no suit liies when the extent of that share is some fraction, even though negligibly small. The real question is not of equity and justice when admittedly there is no warranty of title. The question is whether in view of the provisions of the new Civil Procedure Code, a civil suit for refund of this amount is at all allowed.

Now. O. 21 provides several grounds on which a sale of immovable property which has taken place can be set aside. It may be set aside under R. 89 when the whole amount is deposited in cash within the time allowed. It may be set aside under R. 90 on the ground of material irregularity or fraud in publishing or conducting it; and it may be set aside under R. 91 on the ground that the judgment-debtor had no saleable interest in the property sold. When R. 92 provides that where no application is made under Rr. 89, 90 or 91. or where such application is made and disallowed, the Court shall confirm the sale. Sub-R. (3) further provides that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made. The effect of this sub-rule, which has not been fully appreciated in some of the cases, is that a civil suit to set aside an order made under this rule is prohibited. Now, an order under R. 92 may be made either where the auction-purchaser does not apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest or on the ground where he so applies, but fails to prove that the judgment-debtor had no such saleable interest. In either case the confirmation of the sale prevents him maintaining a suit to set aside an order under this rule. Once the sale is confirmed it must be presumed that there is no defect in the sale either under R. 89, R. 90 or R. 91, and it follows logically that it must be presumed conlusively that there no defect of want of saleability of the interest of the judgment-debtor.

The cases which have been inclined to take the contrary view proceed on the ground of great hardship on the auction-purchaser. But where there is no warranty of title there can be no question of hardship at all. The auction-purchaser purchases property with open eyes. knowing full well that there is no guarantee of title. He cannot therefore complain if it turns out that the title which he thought he was purchasing did not in fact exist. Nor do we see any equity or justice in his favour as against the decree-holder. It might well be that if this auction-purchaser had not made the higher bid somebody else would have taken the property with the risk that it entailed. Where, of course, some facts have been concealed or there is fraud or misrepresentation, other than fraud or irregularity in publishing or conducting the sale, there may perhaps be some remedy by way of damages against the person responsible for the fraud or misrepresentation. But that is an entirely different question which cannot be confused with the question of the non-saleability of the interest of the judgment-debtor.

It seems to us that O. 21, R. 93 provides a speedy remedy for a refund of the purchase-money in the only case in which an application for setting aside a sale on the ground of non-saleability of the interest is made within time and the Court is empowered under that rule to direct any person to whom the money has been paid to refund the amount. Such an order therefore can be passed against the decree-holder, against the judgment-debtor and any other person who might have taken away any part of the money deposited by the auction-purchaser. But a separate suit is not allowed, presumably because it was considered that an auction-sale being an involuntary sale. there could not possibly be a warranty of title given by the judgment-debtor; nor could a suit lie against the decree-holder for failure of consideration because the decree-holder himself was not the transferor. It seems to us that there is some inconsistency in holding that the Court in selling the property does not guarantee any title and at the same time saying that there is an implied warranty of title that some interest exists on behalf of the decree-holder. A sale takes place under the authority of the Court and without warranty of title. In such circumstances, neither in equity nor under the statutory provisions of the Code, a suit is maintainable.

The question of handship, as already pointed out, is not of any great weight because. apart from the fact that there is no warranty of title and the purchase is made with eyes open, the auc-

tion-purchaser has generally plenty of time, as soon as the proclamation is issued to make enquiries about the title and then he has a further period of 30 days to satisfy himself as to the title of the judgment-debtor. Very often it is on account of the risk which he runs that bids are not offered upto the full market value of the property if title were guaranteed. If in spite of this he is either unable to discover the defect in title or fails to apply under R. 91, it is his misfortune that he took the risk in bidding for the sale. We have already mentioned that the auction-purchaser in the previous proceeding failed to obtain an order for refund in his favour as against the decree-holders. He however succeeded in getting an order for refund against the judgment-debtor personally. It is therefore unnecessary for us to consider how far the judgment-debtor himself can be made to refund the amount taken by him when he has no saleable interest at all either under S. 47 or S. 144 or S. 151, Civil P. C. The present respondents were not parties to the original litigation and they took away the money as attaching creditors of the property of the judgment-debtors.

In 1931 All 377 (13), it was held that where a decree-holder had himself purchased property at auction and then found that half of the property had gone out of his possession and applied for execution of his decree for half of the decretal amount, he was not entitled to ask the judgment-debtor to refund one half of the price which the decree-holder had chosen to pay. In that case it had been found that the judgment-debtor was entitled to only half of the property which was purchased by the decree-holder in full satisfaction of his decree and yet the Court did not grant the decree-holder any remedy against the judgment-debtor for compensation on account of the loss apparently suffered by the decree-holder. On the other hand, in the recent case of 1933 All 218 (14), another Division Bench of this Court had to consider the question of a refund of the purchase-money, where it was discovered later on that the share of the judgment-debtor was less than that which was purported to be sold. The application had been made under Ss. 144 and 151, Civil P. C. The Bench held that S. 144 had no application because the decree of the trial Court had not been reversed or modified, but they came to the conclusion that under S. 151 the Court had authority to order the rival decree-holders who had taken a share of the amount deposited by the auction-purchaser, who happened to be the executing decree-holder himself, to refund a proportionate amount taken out by them. The Bench considered that there was clear authority of this Court that in the case of a purchaser, other than the decree-holder, the only remedy of the purchaser for return of the purchase money was that provided for by O. 21 as there was no warranty of title at Court sales. It was remarked:

> "Though it is true that there is no warranty of title at Court sales and that what is sold is merely the right and interest of the judgment-debtor ..... and that it is no doubt too late in the day to question the rule."

But the learned Judges considered that where it is found that the judgment-debtor had no saleable interest in the property sold there was no equitable principle to justify the retention by the decree-holder of the price paid by the auction-purchaser in the event of the property purchased by him being lost to him. The question before the Bench was not whether a separate suit is or is not maintainable. The only question which arose in that case was whether the Court which had itself ordered a rateable distribution of the purchase-money among the rival decree-holders could re-adjust the amount on discovering that the whole of the property purchased by one of the decree-holders would not pass to him. We are therefore not called upon to consider any such case. But we may with respect point out that the observation goes to some extent against the previous rulings of this Court. It would be putting a decree-holder, who is himself responsible for attaching the judgment-debtor's property and putting it up for sale, in a better position than an innocent auction-purchaser who was not responsible for the putting up of the property to sale. An auction-purchaser would be prevented from maintaining a suit, whereas a decree-holder who either through his negligence or deliberate omission attached or put up the property, would be able to recover the amount from others when it is later on found that the property was not saleable. It seems to us that there is some conflict between this case and the case of 1931 All 377 (13), quoted by us above; but as it is not necessary for us in the present case to

13. Anand Krishna v. Kishan Devi, 1931 All 377 =132 I C 417=53 All 496.
14. Amba Lal v. Ram Gopal Madho Prasad, 1933 All 218=144 I C 492=55 All 221.

express any opinion on the question whether there is any remedy either under S. 147 or S. 151, Civil P. C., we would not commit ourselves at this stage. When a question arises directly in another case and it is found that there is real conflict between the two cases, the only proper course would be to refer the point to a Full Bench and not dissent from either of these rulings.

It has been strongly contended by the learned advocate for the appellant that although there may be no remedy by separate suit in a case where a sale has to be set aside, a civil suit is not barred where the sale is itself void and does not require to be set aside. It may be conceded at once that where a decree, in execution of which the sale took place, is itself found to be invalid, or where it is found that the sale officer had no authority to sell the property, the remedy of a separate suit would not be barred. The confirmation of the sale would itself be wholly invalid and not binding upon the auction-purchaser who was entitled to assume that the decree was valid and that the sale officer had authority to sell the property. Again, cases of fraud and misrepresentation stand on quite a different footing. But it is contended that where a suit is pending in respect of a property and the auction-purchaser, without notice of such suit, purchases it, the sale should be considered to be provisional and subject to the result of such litigation and if therefore it is finally decided against the judgment-debtor that he has no interest, the auction-purchaser should be allowed a refund of the amount. Now, it may be conceded that there is some distinction between him and an auction-purchaser who is sued subsequently by another claimant and loses the property. In the latter case he has an opportunity to defend the title of the judgment-debtor whose interest he has purchased. On the other hand, in a case where the auction-purchaser purchases a property at a time when the property is the subject-matter of litigation between a third party and his judgment-debtor and the claim is decreed without his knowledge, he is bound by the decree although he personally has not had an opportunity to defend the title of his judgment-debtor. He runs the risk of fraud or collusion on the part of his judgment-debtor after his interest has been sold at auction. But in the present case it is not necessary to consider the position of a bona fide auction-purchaser who, without notice and without knowledge of another litigation, purchased the property and then found himself bound by the result of such litigation without having had an opportunity to contest the claim. It may be that in some instances a case of fraud and misrepresentation may be made out when a suit for damages might lie.

But in the present case the position was that the present appellants became aware of the pendency of the litigation at least sometime before the expiry of 30 days from the auction-sale and before its confirmation. They actually moved the Court not to pay the sale proceeds to any one and up to that time they had full opportunity of applying for the setting aside of the sale on the ground that the judgment-debtors had no saleable interest. But they took no such steps. On the other hand, they got themselves impleaded as a party to the suit and defended the claim against the claimant. It was only after the then plaintiff succeeded in the High Court that the auction-purchasers thought of getting back the money which they had paid. Up to that stage they were doing their best to retain the property in their own possession. The appellants therefore cannot claim to be the persons who had no opportunity of defending the title of the judgment-debtors. As they purchased the property without any warranty of title however unfortunate their position may be they have no remedy to claim a refund because a refund can be claimed on the ground of breach of warranty only and on no other ground. It cannot be said that the money which they paid was taken away by people as money had and received on behalf of the auction-purchasers. The auction-purchasers paid the price of the doubtful interest which they had purchased at some risk. The surplus amount of the money deposited in Court was lying to the credit of the judgment-debtors it was attached by the creditors of these judgment-debtors who were the defendants-respondents in that case and it was taken away by them. We are unable to hold on the authorities that the plaintiffs have a cause of action as against the attaching creditors which entitles them to bring a separate suit and to claim a refund of part of the amount paid by them on the ground that the judgment-debtors had no title when in fact no warranty

of title was given. We therefore think that the view taken by the Courts below is correct; the appeal is accordingly dismissed with costs.

Ganga Nath, J.—We think that it would be appropriate for the execution Court to see that in drawing up the proclamation of sale, the particulars mentioned therein include reference to any litigation that may at the time be pending as regards the property sought to be sold so that the auction-purchasers may not be deceived or taken unawares. For such a purpose the decree-holder might well be asked to point out whether any such litigation is pending or not.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 476

KENDALL, AG. C. J.

Sri Nath—Plaintiff—Applicant.

v.

Mata Prasad and *others*—Defendants—Opposite Parties.

Civil Revn. No. 404 of 1934, Decided on 19th December 1934, against order of Sub-Judge, Mirzapur, D/- 1st February 1934.

Civil P. C. (1908), S. 115 and O. 17, R. 1—Question as to existence of sufficient cause for adjournment is one of fact.

Under O. 17, R. 1 the Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any one of them, and may from time to time adjourn the hearing of the suit. The question of whether there is sufficient cause for an adjournment is a question of fact, and the lower Appellate Court undoubtedly has jurisdiction to decide the matter. Whether the decision of the lower appellate Court on the merits is right or wrong, it must be held to be final on this point : 1923 *All* 392, *Applied.* [P 477 C 1]

Jwala Prasad Bhargava—for Applicant.

S. N. Verma—for Opposite Parties.

Order.—This is an application for the revision of an appellate order of the Subordinate Judge of Mirzapur, upholding the decision of the trial Court. A preliminary objection has been raised that the provisions of S. 115, Civil P. C., will not cover such a case as the present. The circumstances are as follows:

The plaintiff-applicant sued one Lachhu Ram in the Munsif's Court, and 27th April 1932, was fixed for issues. There were adjournments, first on the application of the defendant and then on that of the plaintiff until 11th July for which date the plaintiff summoned eight witnesses, but one of his witnesses, Ram Sagar, was unserved. The plaintiff however intimated that he was ready to go on with the case, but the defendant made an objection on the ground that all the witnesses should be heard on one day, and on this the plaintiff also asked for an adjournment, with the result that the hearing was postponed until 17th August, for which date both parties summoned witnesses. On this again Ram Sagar was not present, though he had been summoned, and another witness, Mahadeo Prasad, was stated to be in jail. The plaintiff therefore made an application to the Court to issue a commission to examine Ram Sagar, and this was allowed. On 16th September 1932, the plaintiff applied that the defendant had died and that his heirs might be brought on to the record. The heirs were impleaded, and 13th February 1933, was fixed for fresh issues and 19th April, for final disposal.

In the meanwhile proceedings had been taken for the issue of a commission for the examination of the witness Ram Sagar, and 12th April, had been fixed by the Commissioner for this purpose. On 11th April, however the plaintiff made an application to the Court of the Munsif, in which he stated that Ram Sagar had gone from Calcutta to Rangoon. At the same time the plaintiff applied for summoning his other witnesses, all of whom were local men, but he mentioned that Mahadeo Prasad, the witness who had previously been in jail, had been arrested the day before the application. The Munsif did not record any order granting an adjournment of the hearing, but it does appear that he sent a telegram to the Commissioner. We do not know how the telegram was worded, but we do know that in reply the Commissioner sent a letter to the Court dated 1st May, saying that he had fixed 21st May, for the recording of the evidence of Ram Sagar. The case was however taken up by the Munsif on 19th April, and was disposed of by him on the merits apparently under O. 17, R. 3. An appeal was made by the plaintiff to the Subordinate Judge partly on the ground that O. 17, R. 3, did not apply, and partly on the merits, namely, that an adjournment should have been allowed. The lower appellate Court however found that the suit had been adjourned more than once on the plaintiff's request, that the plaintiff had had seven weeks at his disposal to be ready, with his evidence since 13th

February 1933, and that therefore no good cause for adjournment was shown.

It has been argued in support of the present application, in the first place, that O. 17, R. 3, did not apply because the last adjournment, namely, that from 13th February, and 19th April, had not been made at the plaintiff's request. This is a very technical plea, because it is probable that the last order of adjournment was on 17th August 1932, the proceedings since then having been in suspension owing to the death of the defendant. But the matter does not appear to me to be of any importance, because the question that the Court had to decide on April 19, was whether an adjournment should be allowed or whether the suit should be disposed of. Under O. 17, R. 1, the Court may, if sufficint cause is shown at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit. The question of whether there is sufficient cause for an adjournment is a question of fact, and the lower appellate Court undoubtedly had jurisdiction to decide the matter. Whether the decision of the lower appellate Court on the merits is right or wrong, it must be held to be final on this point. This is the view expressed in a Bench decision of this Court in 1923 All 392 (1), on which the opposite party has relied. The facts are not exactly similar to those in the present case, but they are analogous, and the principle is the same. It has been argued however that this Court may look to the decision of the lower appellate Court, but to the decision, not of the Munsif, and if it comes to the conclusion that the Munsif acted either without jurisdiction or with material irregularity, it will be justified in interfering. It is claimed that the Court had by its telegram of 11th April, extended the time for the return of the commission which had already been issued, and that to proceed to dismiss the suit without considering the evidence of this witness was an irregularity. It is not clear from the judgment of the lower appellate Court whether the circumstances surrounding the issue of this telegram were brought to the notice of the Court by counsel for the plaintiff-applicant. But the evidence that is before me was before that Court, and the sending of the telegram was one of the facts on which the Court was able to base its decision. It has not been proved that the trial Court intended to grant an adjournment. It is quite possible that the telegram was issued at the instance of the plaintiff and on the chance that the commission might be returned in time for the hearing on 19th April, though the dates certainly make it unlikely that the commission could be returned in time. The mere fact however that the Court issued a telegram to the Commissioner does not prove that the Court intended to grant an adjournment and the lower appellate Court may have been perfectly right in holding that the trial Court had not acted irregularly in refusing to wait for the return of the commission in spite of the fact that the Commissioner had fixed a date for the evidence of this witness which was actually later than the date for the final disposal of the suit. When the suit was disposed of that date had not been intimated to the Court, and all that was known was that the Commissioner had apparently been told in the telegram of the Court to fix a later date.

It is therefore not clear that the Munsif acted irregularly, and I should not be justified in interfering on this ground either. The result is that the application fails and is dismissed with costs.

K.S. *Application dismissed.*

1. Yad Ram v. Sundar Singh, 1923 All 392=74 I C 778=45 All 425 (F B).

A. I. R. 1935 Allahabad 477

KENDALL, J.

Mohan Lal—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 842 of 1934, Decided on 16th January 1935 from order of Sess. Judge, Cawnpore, D/- 31st April 1934.

(a) Criminal Trial — Accomplice — His statement is subject to suspicion but of great value in certain cases — This by itself is not sufficient to base conviction unless corroborated — Evidence Act (1872), S. 114.

The statement of the accomplice is, of course, subject to suspicion, but in certain cases it is of great value in evidence. But such a statement, unless supported by reliable evidence of another kind to corroborate it, is not sufficient in itself to form the basis of a conviction. Evidence of corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The corroboration

need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime. [P 478 C 2]

(b) Criminal Trial — Evidence of accomplice—Sessions Judge should not discard it completely merely because of his apprehension that High Court will take different view.

A Sessions Judge should regard the evidence of an accomplice as evidence that must be considered in certain circumstances, as of the existence of which he must be the judge and it is not to be completely discarded merely because he may have an apprehension that the High Court may take a different view from his, or that the High Court would utterly refuse to consider it at all merely on the ground that it is the evidence of an accomplice. [P 448 C 2]

(c) Criminal Trial — Identification — Accused mixed with five other prisoners — Accused identified by three witnesses out of nine identifying witnesses—Held, three were good identifying witnesses.

The appellant was mixed with five other under-trial prisoners, so that the chances of any one of the witnesses picking out the right man supposing that he was not really in a position to identify him—were five to one. There were nine witnesses for identification of whom three identified wrong persons and three of these failed to identify anybody at all, and the other three identified the present appellant correctly:

Held: that each of these three had five chances in six of picking out of a wrong man, and each of the three stood the test satisfactorily. The mathematical standard that is to be observed by a Court of appeal in testing the trustworthiness of such witnesses is by no means perfect. But it is the only general standard that can be applied.

Held further: that in the present case undoubtedly these three witnesses were very good identifying witnesses. [P 479 C 1]

Saila Nath Mukherji—for Appellant.

Government Pleader—for the Crown.

Judgment. — The appellant, Mohan Lal, has been convicted by the learned Sessions Judge of Cawnpore of an offence under S. 395, Penal Code, and sentenced to seven years' rigorous imprisonment. The dacoity in question took place on the night between 24th and 25th May 1933, and a number of those who took part in it have been tried and convicted. The present appellant however was not arrested until about a year after the dacoity, and he was put up for identification in jail about a month after his arrest. These details are of some importance. The fact that a dacoity had taken place having been proved as a result of the former case, nothing remained in the present case. but to show that the appellant had been present at it, and that the evidence of identification was beyond suspicion. There was an approver in the case a man named Sadasukh and he named the present appellant as one of the dacoits. The learned Judge however though he appears to have believed the statement of this approver, has preferred not to rely on him. After pointing out that his statement does not agree with that of some of the witnesses for the prosecution, he comes to the conclusion that those other witnesses are probably unreliable and that the approver is telling the truth. The reason why he has decided not to rely on the statement of the approver is that he has discussed the value of the evidence of an accomplice elaborately in other cases, and has come to the conclusion that:

"It is a waste of time, because the High Court invariably disposes of the whole contention; in one single sentence the man is an accomplice. That is all. It is enough."

This is not a correct statement of what the High Court does. The statement of the accomplice is, of course, subject to suspicion, but in certain cases it is of great value in evidence. But the Courts have held that such a statement unless supported by reliable evidence of another kind to corroborate it is not sufficient in itself to form the basis of a conviction. The matter has been discussed very recently by a Bench of this Court in the case of 1933 All 31 (1), and the extent to which corroboration is necessary is clearly set forth in the words of Lord Reading in (1916) 2 K B 658 (2), in which his Lordship remarked:

"We hold that the evidence of corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. . . . . The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

Mr. Hunter the learned Sessions Judge will find that the law as set forth by Lord Reading in this judgment has been followed not only by this Court, but by other High Courts in India. He must in future regard the evidence of an accomplice as evidence that must be considered in certain circumstances, as of the existence of which he must himself be the Judge, and it is not to be completely discarded merely because he may have an apprehension that the High Court may take a different view from his, or that

1. Nazir v. Emperor, 1931 All 31=1933 Cr C 42 =143 I C 67=34 Cr L J 489=55 All 91.
2. Rex v. Baskerville, (1916) 2 K B 658 = 86 L J K B 28=80 J P 446=115 L T 453.

the High Court would utterly refuse to consider it at all merely on the ground that it is the evidence of an accomplice.

As the learned Judge has not relied on the statement of the approver however it is not necessary to go into this matter further in connexion with the present case. The Judge has relied on the fact that the dacoity was committed, which cannot now be controverted, and the evidence of three witnesses, Ghasita, Sheoraj and Jhuria, who identified the appellant as having been one of the dacoits. Mr. Saila Nath Mukerji, who appears for the present appellant in this Court has of course laid stress on the fact that the identification proceedings took place more than a year after the dacoity, and that the task of the witnesses in identifying the appellant was therefore more difficult than it is in most cases. There were in fact nine persons who were brought forward as witnesses for the prosecution to identify the appellant. The appellant was mixed with five other under-trial prisoners, so that the chances of any one of the witnesses picking out the right man—supposing that he was not really in a position to identify him—were five to one. Three of these witnesses identified the wrong man, three failed to identify anybody at all, and the three whom I have named above identified the present appellant correctly. It is suggested that the trustworthiness of these three should be considerably reduced by the consideration that six other witnesses were called to identify the appellant at the same proceeding and failed to do so. But I know of no authority for gauging the trustworthiness of any individual witness in this way. Each of these three had five chances in six of picking out a wrong man, and each of the three stood the test satisfactorily. The mathematical standard that is to be observed by a Court of appeal in testing the trustworthiness of such witnesses is by no means perfect.. But it is the only general standard that can be applied, and in the present case undoubtedly it gives us the result that these three witnesses were very good identifying witnesses.

Part of the defence was devoted to showing that the appellant might have been shown to these witnesses before the identification parade, or that some information might have been given to them which would enable them to pick out the appellant from among the other persons at the parade. The Judge has considered this in some detail, and the conclusion that he has come to is that it was not impossible that the witnesses should have seen the appellant before the parade or that the prosecuting authorities should have given to them some illegitimate means of identifying the appellant, but that it is very unlikely that any such action was taken, and it was never suggested by the appellant himself that such action was taken. In the nature of things there must be some opportunities for foul play of this kind in some cases; but unless it is to be presumed that the prosecuting authorities are invariably dishonest, there is no reason for presuming so in this particular case.

To take the three witnesses who have been relied on individually, Ghasite deposed that he was awakened by the dacoits who were beating Din Dayal, who was sleeping by the side of the witness near the doorway, that although it was a dark night, there was a lamp, and that he was able to identify four or five dacoits including the present appellant who, he said, was going in and out of the house during the dacoity. Sheoraj and Jhuria, the other witnesses, deposed that they were sleeping on the roof when the dacoity began, and that the dacoits took them from the roof and made them sit by the door. Jhuria stated that the present appellant was wearing a dhoti and had no beard, but otherwise not one of the three witnesses gives in evidence any reason for remembering the appearance of the appellant. All three denied having seen him before the dacoity, and a good deal of stress has been laid on this by Mr. Saila Nath Mukerji, who contends that there is plenty of evidence to prove that the appellant had been a member of the Congress and had frequently been present at Congress meetings in the neighbourhood of the village in which these three witnesses reside. It is argued that they must have had opportunities of seeing the appellant at these meetings, that their statements that they had never seen him before must be untrue, or even if they are true to this extent that they did not know who the appellant was, that they must have nevertheless been familiar with his appearance, and that this would enable them to pick him out from among the other persons in the parade, if they had been informed beforehand that the person whom they were required to identify was the man who had been present at the Congress meetings. All

this is of course quite possible, but I can find no justification whatever for presuming that it actually did happen. The only reason and it is a very small one for disbelieving the evidence of anyone of these witnesses is that Sheoraj stated in cross-examination that he had never been to Sheorajpur, whereas Jhuria stated that he himself had been to Sheorajpur where he had stayed with Beni Ram, and that Sheoraj sometimes went to the same place. It is possible that Sheoraj was going too far when he said that he had never been to Sheorajpur, but it is also possible that Jhuria was mistaken in saying that he (Sheoraj) had been there, for he does not say that he had ever seen him there. The statement is certainly not sufficient to justify a Court in discarding the whole of the evidence of Sheoraj on the ground that he was lying. These witnesses having been believed, and no sufficiently strong reason having been shown to me why the decision of the learned Sessions Judge should be reversed, I must hold that the case has been fully proved against the appellant and that there is no force in the appeal. It is therefore dismissed.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 480

SULAIMAN, C. J. AND BENNET, J.

Nawab Singh — Judgment-debtor — Appellant.

v.

Mithu Lal and *others*—Decree-holders —Opposite Party.

Execution Second Appeal No. 769 of 1933, Decided on 16th January 1935, from decision of Sub-Judge, Etawah, D/- 27th April 1933.

(a) Civil P. C (1908), O. 21, R. 32—Decree for injunction—Separate suit for damages is not the only remedy of decree-holder.

There is a specific provision in O. 21, R. 32, Civil P.C., which provides for the execution of a decree for injunction. Therefore the only remedy of a decrre-holder is not to bring a separate suit for damages. [P 480 C 2]

(b) Civil P. C. (1908), O. 39, Rr. 1 and 2—Decree for injunction—Judgment-debtor failing to do act—Attachment can continue for three months.

Where the injunction is for the doing of an act, and the judgment-debtor has failed to do the act, the attachment can continue for three months and if in the meantime the judgment-debtor carries out the directions contained in the decree and in that way obeys the decree, his property cannot be sold. But where the injunction is for restraining him from doing an act and the judgment-debtor has already done the act in disobedience of the injunction he has made it impossible for himself to obey the decree. No doubt, the property cannot be sold until three months have expired after the attachment, but after the expiry of this period it will still be impossible for the judgment-debtor to show that he has obeyed the decree inasmuch as he has really irrevocably disobeyed it. [P 481 C 1]

(c) Civil P. C. (1908), O. 21, R. 32—Decree for injunction — Judgment-debtor by his own act making it impossible to obey decree —He is liable to pay compensation.

Where the judgment-debtor has, by his own act, made it impossible for himself to obey the decree, he cannot escape from the liability to pay compensation which will be enforced after the attachment has subsisted for three months; if, however it be impossible to award the decree-holder any compensation, then the only remedy which must be adopted would be to detain him in civil prison. [P 481 C 1,2]

(d) Civil P. C. (1908), O. 21, R. 32—Decree for injunction against several persons jointly—All jointly and severally responsible for disobedience—Death of one will not justify reduction of amount which decree-holder is entitled to get as compensation.

Where the injunction is against all the defendants jointly and they were all jointly and severally responsible for its disobedience as well as for the profit which they have made out of the plaintiffs' lands by holding the fair on such lands, the mere fact that one of them was dead will not justify a reduction of the amount which the plaintiffs are entitled to get as compensation. [P 481 C 2]

Shiva Prasad Sinha—for Appellant.

N. P. Asthana and *B. N. Sahai*—for Respondents.

Judgment.—This is a judgment-debtor's appeal arising out of an execution proceeding. A decree was passed against him prohibiting him permanently by injunction from holding a fair on certain lands. The fair yields a considerable income. The defendant accordingly deliberately chose to disobey the injunction issued by the Court and held a fair and made a profit out of it. The decree-holder accordingly executed the decree against him. The Courts below have allowed Rs. 300 compensation to the decree-holders and some cash has been attached.

In appeal it is contended that the decree for injunction was not executable. We are unable to accept his contention. There is a specific provision in O. 21, R. 32, Civil P. C., which provides for the execution of a decree for injunction. It is futile to argue therefore that the only remedy of a decree-holder is to bring a separate suit for damages.

Under Sub-R. 1 a decree for injunction can be executed by the detention of the judgment-debtor in ci-

vil prison or by the attachment of his property or by both. This provision obviously applies to both kinds of decrees whether they be for an injunction ordering the defendant to do something or for restraining him or prohibiting him from doing something. Sub-R. 3 then provides that where any attachment has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and the decree-holder may be given compensation out of sale proceeds.

The learned advocate for the judgment-debtor contends before us that the first offence of disobedience of an injunction does not involve any serious penalty and although the attachment may continue, his property cannot be sold so long as he does not disobey the order a second time. He cannot dispute that if there is no other remedy the decree-holder would at least have the judgment-debtor detained in civil prison on account of his first disobedience.

It seems to us that where the injunction is for the doing of an act, and the judgment-debtor has failed to do the act, the attachment can continue for three months and if in the meantime the judgment-debtor carries out the directions contained in the decree and in that way obeys the decree his property cannot be sold. But where the injunction is for restraining him from doing an act and the judgment-debtor has already done the act in disobedience of the injunction he has made it impossible for himself to obey the decree. No doubt, the property cannot be sold until three months have expired after the attachment, but after the expiry of this period it will still be impossible for the judgment-debtor to show that he has obeyed the decree inasmuch as he has really irrevocably disobeyed it. If this were not the interpretation then the result would be that where there is an injunction restraining a defendant from demolishing a house. and he deliberately disobeys the injunction and demolishes the house no compensation can be awarded to the decree-holder in execution because the judgment-debtor will be able to say that he has not demolished the house a second time after the attachment. In our opinion where the judgment-debtor has, by his own act, made it impossible for himself to obey the decree he cannot escape from the liability to pay compensation which will be enforced after the attachment has subsisted for three months. If however it be impossible to award the decree-holder any compensation, then the only remedy which must be adopted would be to detain him in civil prison.

The next point urged is that the amount of compensation awarded to the decree-holders is too high and that that there should have been a proportionate reduction on account of the death of one of the defendants who disobeyed the decree. The injunction was against all the defendants jointly and they were all jointly and severally responsible for its disobedience as well as for the profit which they have made out of the plaintiffs' lands by holding the fair on such lands. The mere fact that one of them was dead will not justify a reduction of the amount which the plaintiffs are entitled to get. We are therefore unable to accept this contention. The result is that the appeal fails and is dismissed with costs.

After this order was dictated our attention was drawn to the case of 1934 Cal 402 (1), where it was held that O. 39, Rr. 1,2 and 3, apply to both clauses of injunctions, namely, mandatory as well as prohibitory.

K S. *Appeal dismissed.*

1. Hem Chandra Naskar v Narendra Nath Bose, 1934 Cal 402=151 I C 723=61 Cal 148.

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* A. I. R. 1935 Allahabad 481

SULAIMAN, C. J., AND RACHHPAL SINGH, J.

Ram Sakal Mullah and *another*—Plaintiffs—Appellants.

v.

Nageshar Mullah and *another*—Defendants—Respondents.

Letters Patent Appeal No. 33 of 1933, Decided on 10th December 1934, against decision of Kendall Puisne Judge, Allahabad, D/- 15th September 1933.

(a) Ferry—Exclusive right can be claimed if there is franchise by Crown.

According to English Law, an exclusive right of ferry can only be claimed by a person holding a grant from the Crown. The foundation of that right. which is in the nature of a monopoly, is the obligation undertaken by the ferryman to the public and in consideration of that the Crown grants him the exclusive right which cannot be disturbed. In India also an exclusive right of ferry in the nature of a monopoly can be claimed if there is a franchise by the Crown.

[P 484 C 1]

(b) Ferry—Right to own private ferries is recognized in India.

The right to own private ferries is recognized in India for a very long time. [P 484 C 1]

*** (c) Ferry—Private ferry—Owner cannot claim exclusive right by way of monopoly.**

A person owning a private ferry in India cannot claim an exclusive right of ferry by way of monopoly. A person owning land on one bank of a river can acquire a right by easement which would entitle him to use the land belonging to another owner on the other side of the river for the purpose of embarking and disembarking passengers. There is however no law in this country which would entitle him to restrain competition. He cannot prevent the owner of the land on the other side of the river from starting a rival ferry which is run between lands owned by him on both banks of the river. In other words, there is no right to a monopoly. Such an exclusive right can be claimed only under a Crown grant : *Case law discussed.* [P 484 C 2; P 489 C 1]

(d) Ferry—Franchise of ferry is not indissolubly connected with land.

The franchise of a ferry is not indissolubly connected with land, and a franchise can be given to a person independently of it. But when a right to ferry is acquired as an easement, then, it would be a right appurtenant to land. [P 485 C 2]

(e) Easements Act (1882), S. 4—Essential feature.

One of the essential features of a right of easement is that the person of inherence must be owner or occupier of certain land for the beneficial enjoyment of which the right is claimed. [P 486 C 1]

(f) Ferry—Right of ferry is not lost by some one plying ferry in neighbourhood.

Right of ferry is a very valuable right to the riparian owners in India and that right is not lost because some one in the neighbourhood has been plying a ferry between the land of others with which they have no concern. [P 487 C 2]

A. P. Pandey—for Appellants.

K. Verma—for Respondents.

Rachhpal Singh, J.—This is a Letters Patent appeal by the plaintiffs against the decision of a learned Single Judge of this Court dismissing their appeal arising out of a suit for an injunction.

The plaintiffs instituted a suit in the trial Court claiming an exclusive right to ferry across the river Sarju between two ghats. One of these ghats is situate on the land belonging to the zamindars of Bansthana village while the other is across the river on the land belonging to the zamindars of Mobarakpur.

The plaintiffs came to Court on the allegations that they, and before them their ancestors, had been plying a ferry between the aforesaid two ghats and had thus had acquired an exclusive right to it as against every one, that the defendants had started a rival ferry without any right and were preventing the plaintiffs from carrying on their trade. It may be stated here that the plaintiffs are licencees from the zamindars of Bansthana.

The defendants denied that they had set up a new ferry. Their case was that their ferry, which had been started with the permission of the zamindars of Mobarakpur, had been in existence since a very long time, that this ferry was worked between two ghats situate on the lands belonging to the zamindars of Mobarakpur and Taranpur, that some years ago, the Taranpur village disappeared through the action of the river Ganges when on both sides of the river Sarju the land of the zamindars of village Mobarakpur appeared and that they have been plying their ferry between ghats on the land owned by the zamindars of Mobarakpur which they are entitled to. The trial Court found that the plaintiffs had been plying a ferry between the ghat on the Basthana land and the ghat on the land of the Mobarakpur for over 20 years and had thus acquired a right in the nature of an easement as against the owners of Mobarakpur. It decreed the suit. The learned Subordinate Judge who heard the appeal did not give any finding on the question as to whether or not the plaintiffs had acquired an easement to ply their ferry between the two ghats. He however held that a right by way of monopoly could only be acquired by a grant from the Crown and therefore the plaintiffs, who had no such grant in their favour, could not claim an exclusive right as against the whole world or against the zamindars of Mobarakpur. He therefore dismissed the suit of the plaintiffs.

Against that decree, the plaintiffs preferred a second appeal to this Court which was heard by a Single Judge. The learned Judge came to the conclusion that the plaintiffs had acquired an easement to ply their ferry between the two ghats, but as the river had changed its course and there had been a permanent alteration of the servient as well as the dominant heritage, the easement was extinguished under the provisions of S. 44. Easement Act, of 1882. He therefore dismissed the appeal and the present appeal has been preferred against his decision.

Before we proceed further, it is necessary to understand what is the nature of a right of ferry. A ferry is

created by royal grant, or in modern days by Act of Parliament; or exists by prescription, which implies a royal grant. Halsbury's Laws of England, Vol. 14 p. 557 (Edn. 1). A public ferry is a public highway of a special description whose termini must be in places where the public have rights, such as towns or vills, or highways leading to towns or vills. Halsbury, Vol. 14 pp. 555 and 556. The owner of the ferry has the right to levy toll from passengers. In England there are no private ferries as we have them here in India. That is to say, there can be no private ferry the owner of which would be entitled to exact toll from passengers.

Two cases decided by the House of Lords will be very helpful in understanding the nature of the right of ferry and in deciding under what circumstances a monopoly can be claimed for the exclusive right of ferry. The first case is (1916) A C 57 (1). The plaintiffs in that case owned a ferry under a franchise from the Crown. The defendants opened a new ferry for new traffic at a distance of 600 yards from the old ferry. The decision was that the defendants' ferry was for "new and different traffic" and therefore the defendants' ferry was not a disturbance of the plaintiffs. In this case, some very important observations relating to the right of ferry were made and they may be quoted here with advantage. At p. 68 of the Report Lord Haldane observed:

"What is the legal character of this right? The question of what principle underlies and defines the right of exclusive ferry is not an easy one. The expression monopoly has been used in this connexion. Of course, in one sense the ferryman has a monopoly ..... The right of the ferryman is to carry and to take a toll for carriage, and his right is coupled with an onerous obligation to maintain the ferry. It may well be that his exclusive right is given to him as a consideration for his undertaking this obligation, and that it is thus that he becomes entitled to what has been popularly called a monopoly. The origin of the right is the prerogative of the Crown, which is the guardian of the public interest."

At p. 76. the rights of a ferryman holding a Crown grant are thus described:

"He is entitled to a monopoly of his line of ferry, and he has a cause of action against any one who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same point ....."

At p. 77. there are observations as regards the limit to be placed on the right of the ferryman claiming a monopoly. Lord Haldane observes:

"But every such monopoly ought to be strictly construed. Just as it does not preclude the setting up of a bridge to serve new though adjacent traffic, because such an interference with what the convenience of the public requires under the new conditions is held not to have been within its purview, so if there is a sufficiently large and defined class, containing a substantial number of people who would naturally cross the river at points and with objects different from those which obtained with the class of people who frequented the old ferry, the former class would be outside the monopoly."

At p. 104. Lord Sumner quotes with approval the observations made by Story, J., in the case 11 Geters (36 U. S.) 618 (2). They are:

"How stands the law, in relation to grant by Crown of fairs, market and ferries? ..... The authorities are abundant to establish, that the King cannot make any second grant which shall prejudice the profits of the former grant. And why not? Because the grant imposes public burden on the grantee, and subjects him to public charges, and the profits constitute his only means of remuneration, and the Crown should not be at liberty directly to impair, much less to destroy the whole object of its grant. When the Crown grants a ferry from A to B without using any words which import it to be an exclusive ferry, why is it ..... that by the common law the grant is construed to be exclusive of all other ferries between the same places or termini; at least, if such ferries are so near that they are injurious to the first ferry, and tend to a direct diminution of its receipts? Plainly, it must be because, from the very nature of such a franchise, it can have no permanent value, unless it is exclusive; and the circumstances that during the existence of the grant, the grantee has public burdens imposed upon him, raises the implication that nothing shall be done to the prejudice of it, while it is a subsisting franchise."

The next case to which I wish to make a reference is (1930) A C 549 (3). I quote the following passages from the judgment of Lord Macmillan at pp. 552 and 553:

"My Lords, the question of the precise legal character of ferry is discussed with much learning in the case of Hammerton B. Earl of Dysart, Although it may be inaccurate to describe the right of the grantee as a monopoly in the strict legal sense, it was fully recognized in that case that a franchise of ferry entitles the owner to protection from the competition of rivals who seek to disturb him in the enjoyment of his privilege by diverting traffic which he would otherwise convey ..... The ferryman has undertaken a publice burden in considera-

1. Hammerton v. Dysart, (1916) 1 A C 57=85 L J Ch 33=59 S J 665=31 T L R 592=113 L T 1032.

2. Charles River Bridge at Boston, Mass., (1837) 11 Peters (36 U S) 618.

3. Bournmouth-Swange Motor Road and Ferry Co. v. Harvey and Sons, (1930) A C 549=99 L J Ch 337=94 J P 217=46 T L R 439=143 L T 313.

tion of the Crown's grant of the right to take tolls, and he would have a legitimate grievance if the public, while enjoying the benefit of the obligation, were allowed to destroy the consideration for which it was undertaken . . ."

Thus it will be seen that the law in England on the point is quite clear. According to it, an exclusive right of ferry can only be claimed by a person holding a grant from the Crown. The foundation of that right, which is in the nature of a monopoly, is the obligation undertaken by the ferryman to the public and in consideration of that the Crown grants him the exclusive right which cannot be disturbed.

In India also an exclusive right of ferry in the nature of a monopoly can be claimed if there is a franchise by the Crown. One of the earliest cases on the point is 4 Cal 599 (4). The next case in which such a right was recognised is 18 Cal 652 (5). A very recent case on the point is 1931 All 587 (6). All these cases related to rights under Crown grants and it was held that where a Crown grant was established, an exclusive right of ferry by way of monopoly could be successfully asserted. The right to own private ferries has been recognised in India since a very long time. As regards the public ferries, the law relating to them is enacted in Bengal Regulations 6 of 1819 and the Northern India Ferries Act (Act 17 of 1878). Ss. 19 and 20 of the latter confer certain powers upon the Local Government over private ferries in connection with the safety of passengers.

Private ferries may be of two kinds: One is a ferry plied by an owner on his own land on either side of the river. Such a right is a "right of property." The land on both sides of river is owned by zamindars and they can ply private ferries on their own land and levy tolls. The other ferries are those started by a person who is the owner of the land on one side of the river. He may run a ferry and use the land on the other side of the river belonging to another under a grant by the latter. Or, he may acquire that right by easement. In addition to these two kinds of ferries, there may be a ferry worked by a stranger who owns no land on either side of the river but who may have been plying a ferry between two points from a very long time without the permission of the zamindars owning lands on both the banks of a river and without any objection on their part.

The principal question which we have to consider is whether a person owning a private ferry in India can claim an exclusive right of ferry by way of monopoly? After a consideration of the question, I have come to the conclusion that the answer to the question must be in the negative. I have explained above that in England, a person plying a ferry under a royal grant can claim such a right for the reason that when the grant is made to him he undertakes certain obligations and the grant is made in consideration of the duties which he undertakes to discharge for the convenience of the public. The case of a private ferry in India stands on a different footing altogether. Unlike the owner of a ferry under a royal grant, he undertakes no duties towards the public. He may work the ferry for a short time and then stop it or work it whenever he likes. There is, as already mentioned statute law in India regarding public ferries, but there is no law defining the mode of acquisition of ferry rights relating to private ferries. All that we can say is that in the Northern India Ferries Act of 1878, the existence of private ferries is recognised.

One of the earliest cases on the point is 10 Suddar Dewanny Adawlat (Cal) 153 (7). The facts were these: A zamindar had made a ferry bridge in substitution of a private ferry. A theka was given to another person of this ferry bridge. The plaintiff sued for the theka money. The defence was that no toll could be collected unless sanctioned by law. The majority of the learned Judges expressed the following opinion:

". . . . . private ferries are recognized as legal by S 13, Regn. 6 of 1819. We therefore see no reason why a zamindar . . . . . should not receive the ferry fee which is legally leviable upon transit by water . . . . . "

All that this case decides is that the owner of a private ferry can levy toll which is a point now well settled. The next case on the point is 16 W R 281 (8). The learned Judges who decided this case held that:

"it is recognized that there are proprietary rights in a private ferry of such a nature that another party may not so interfere with the

4. Luchmessur Singh v. Leelanund Singh, (1875) 4 Cal 599=3 C L R 427.
5. Nityahari Roy v. Dunne, (1891) 18 Cal 652.
6. Dhanpat Pandey v. Pasput Pratap Singh, 1931 All 587=135 I C 545=53 All 764.
7. Rajiblochun Roy v. Kumri Bibi, (1854) 10 Sudder Dewanny Adawlat (Cal) 153.
8. Hur Kishor Das v. Gokool Joogul Kishor Sah, (1871) 16 W R 281=12 Beng L R 293n.

profits arising therefrom as would be the result by running a boat if not exactly on the same line, at least within such a distance as for all practical purposes would be the same as it were on the same line."

The facts of the case are not stated in the judgment. The learned Judges give no reasons for holding that the owner of a private ferry has a monopoly After this, we come to the case of 22 W R 296 (9), in which it was held that a rival ferry cannot be set up so as to interfere with the proprietary rights in an existing ferry, that is to say, under circumstances involving direct competition with such ferry. The next case on the point is 6 Cal 608 (10). In this case it was held that an exclusive right in the nature of a monopoly could be acquired by the owner of a private ferry as an easement. I may however quote here certain observations made by Garth, C. J., which are to be found at p. 610 of the Report. He observed:

"I confess, if the question had been res integra I should have doubted whether such an extensive and an exclusive right as the plaintiffs claim is not illegal, as being contrary to public policy. But I find that such rights have long been recognized as private property, from times anterior to the Permanent Settlement, and I therefore forbear to throw any doubt upon their legal validity."

The next important case on the point is 18 Cal 652 (5), in which all the rulings referred to above were considered. The question as to whether a person owning a private ferry could claim a monopoly was discussed at great length. At pp. 661, 662 and 663 the learned Judges made the following observations:

"But whether we search the law as it was before the acquisition by the British Government, or the Regulations before or after the year 1793, there is no indication that any person was entitled to claim a right of ferry, that is to say, to a monopoly, by prescription or by any means other than a grant from the Crown Since then the only law under which a person can acquire ownership by prescription is that in Part 4, Act 15 of 1877, but that portion of the law we think would hardly apply to a right such as is claimed in the present suit, that is to say, not a right merely to land, or water, or air, nor a right to ask for payment of ferrying a traveller across a river, but an additional right, namely a right to a monopoly, a right to prevent other people from exercising a right which they would ordinarily possess ..... But in 16 W R 281 (8), it was said that the Legislature recognized proprietary rights in a private ferry of such a nature that another party may not so interfere with the profits arising therefrom as would be the result by running a boat, if not exactly on the same line, at least within such a distance as, for all practical purposes, would be the same as if it were on the same line. No doubt that would be so in the case of a Crown grant, but no such distinction of the kind has been made in this case, and the declaration is without any limitation. There is no authority given for the general proposition, and we do not know of any ..... No doubt that the Dewani and the Regulations recognized ferries in the sense that engagements to pay tolls were not absolutely illegal, and so they did in regard to ground rents in the markets; but not in the sense that the owners possessed a monopoly ....."

It appears to me that the view taken by the learned Judges who decided the case reported in 18 Cal 652 (5), as regards the claim of a private ferry owner to a monopoly is correct and should be followed: I wish to respectfully dissent from the contrary view taken in the cases reported in 16 W R 281 (8). 22 W R 296 (9) and 6 Cal 608 (10). In the case before us, we are not dealing with the rights of an owner of a private ferry who is the owner of lands on both banks of the river. Here, we have a case where on one side there are the zamindars of Bansthana who owned land on one of the banks of the river. The land on the other side of the river is owned by the zamindars of Mobarakpur. The plaintiffs, as licencees from the zamindars of Bansthana, claim a right of ferry as an easement between the two ghats. The defendant, as licencees from the zamindars of Mobarakpur, claim a right to run a rival ferry. For the purpose of disposing of this case, we may assume that the zamindars of Bansthana, through the plaintiffs, have acquired an easement to run a ferry between the two ghats mentioned in the plaint. The question is what is the nature of the right acquired under such an easement. Before we proceed further, I wish to state that the franchise of a ferry is not indissolubly connected with land, and a franchise can be given to a person independently of it. But when a right to ferry is acquired as an easement, then, it would be a right appurtenant to land. In Hammerton v. Dysart to which a reference has already been made, Lord Haldane pointed out the distinction between a right to ferry under a franchise and a right claimed under an easement at p. 68 of the Report thus:

"The title (under a Crown grant) is not like that to easement, which pertains to one tenement and affects another ....."

9. Narain Singh Roy v. Nurendro Narain Roy, (1874) 22 W R 296.
10. Parmeshari Proshad Narain Singh v. Mahomed Syud, (1881) 6 Cal 608=7 C L R 504.

An easement is defined in S. 4, Easement Act (Act 5 of 1882) as follows:

"An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of the land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon or in respect of, certain other land not his own."

One of the essential features of a right of easement is that the person of inherence must be the owner or occupier of certain land for the beneficial enjoyment of which the right is claimed. In the case before us, we assume that the zamindars of Bansthana owned land on one side of the river Sarju. On the other side there was the land of the zamindars of Mobarakpur. We further assume that the zamindars of Bansthana acquired a right by easement as against the zamindars of Mobarakpur to embark and disembark passengers on their land. We also assume that the effect of this acquisition was that they got a right to ply a ferry between the two ghats mentioned in the plaint. Did the zamindars of Bansthana acquire a right of monopoly as against the zamindars of neighbouring villages or even against the zamindars of Mobarakpur entitling them to prevent them from starting rival ferries? I am not aware of any rule of law under which such an extensive and exclusive right can be claimed against all the neighbouring owners or against the whole world. In the case reported in 6 Cal 608 (10); White, J., made the following observations which are to be found at p. 613:

"Now, as any man may set up a ferry over a river which passes between his own village and that of another riparian owner, no one who works such a ferry can exclude his neighbour from doing the like thing, unless the former has acquired the right of property in the working of his ferry. This right may be acquired as against his neighbour by proving a grant from him or his predecessor in title, granting the right of embarking and disembarking passengers on his land or it may be acquired, as against all the world, by proof of long uninterrupted user."

Now, if these observations mean that the ferry owner obtains a exclusive right to run a ferry between his two ghats and to embark and disembark passengers on the land of another across the river, then, I am in agreement with the view. I also agree that this right acquired by an easement can be asserted by him against all the world. By this I mean that no other person can set up a rival ferry between the two points between which the person claiming has been running his ferry. And no one can interfere with his right to embark and disembark passengers on the landing place for his boats. On the other hand, if these observations mean that no neighbouring owner of the land can start a rival ferry, not between these two points, but between different points, then, I regret that I find myself unable to agree with them. In other words I am not prepared to hold that a person who has obtained an easement to ply a ferry between two points can treat the land owned by all the neighbouring owners for miles and miles around his ferry as servient tenement. The Indian Easements Act does not recognise any easement of such an extensive and exclusive nature under which the rights of neighbouring owners may be adversely affected.

One of the essential conditions of an easement is that there must be a dominant and a servient heritage. No servitude could exist, unless the dominant and the servient tenements were sufficiently near to allow the one to receive a benefit from the subjection of the other. Gale on Easements, Edn. 10, p. 18.

Now, let us suppose that a man proves that he has been plying a ferry between his own land and the land belonging to another across the river for over 20 years. What is the nature of the easement which he acquires? In my opinion he acquires the following rights: (1) A right to ply his ferry between the two points. (2) A right to embark or disembark passengers across the river on the land of another. (3) An exclusive right to ply his ferry between the two points. It appears to me that these are the only rights which he acquires under his easement. It was contended before us that in addition to the above mentioned rights, he acquires another which is to prevent all others from starting a rival ferry near his ferry. I find myself unable to agree with this contention. An easement acquired as against the owner of Mobarakpur in respect of embarking and disembarking passengers on their land, can never adversely affect the rights of another riparian owner owing land on both sides of a river at a distance of say three miles from the ferry of the person claiming an easement. The question for consideration in such a case would be this. Has the plain-

tiff. who has been plying a ferry between two points, acquired an easement entitling him to prevent another man owning lands on both the banks of a river to sep up a rival ferry at a distance of three miles between his own land? I am clearly of opinion that there can be no such right. You cannot assert an easement as against a person against whom you have never attempted to assert a right. The plaintiffs, when they started to run a ferry, began to assert a right against the owners of Mobarakpur to embark and disembark passengers on their land on the opposite side. The owners of the neighbouring lands were not in any manner affected by this. It was a matter of indifference to them. They have every right to start ferries of their own.

Now can the plaintiffs say that they have a right to prevent the neighbouring owners of the land to start their own ferries? The only ruling which lends support to the contention raised by the appellants is the case reported in 6 Cal 608 (10). The two points decided in that case were: (1) The right of establishing a private ferry and leving tolls is recognized in India. (2) 20 years is the shortest period within which such a right of ferry can be established. Now, in the case before us, there is no difference between the parties on these two points. The difficulty arises because of certain observations made by Garth, C. J., and White, J., to the effect that such an exclusive right can be obtained against the whole world. Now, let us examine what the facts were in that case. The plaintiffs in that case owned a ghat on one side of the river which was situate on the land of village Buch on the eastern bank. On the western bank was the ghat of the defendant in village Kishtwara. The plaintiffs claimed that they had been plying a ferry between these two ghats for a number of years and had thus acquired an exclusive right of ferry. The defendants denied the right of the plaintiffs and set up a case that they were entitled to carry passengers between the two ghats. The learned Judges who decided the case held that in case it was found that the plaintiffs had been plying a ferry between the two ghats for over twenty years, it was not open to the defendants to start a similar ferry. It will be clear from these facts that the real question in that case as to which of the two parties had the right to ply a ferry between the same points. The general question as to whether the person acquiring a right of ferry between the two points could prevent other neighbouring owners of land from starting ferries of their own at other point was never in the issue. It would therefore appear that the observations made by the learned Judges to the effect that such an exclusive right could be claimed against every one were obiter dicta and not binding. The learned Judges say that the right acquired becomes a "right of property." This may be. But the question is what is the extent of that "right of property?" That right is a right to embark and disembark passengers on the land belonging to the servient owner on the opposite bank of the river. But it will be too much to say that it entitles the plaintiffs to prevent neighbouring owners from exercising their own right to start ferries between the lands owned by them. As pointed out by the learned Judges who decided the case reported in 18 Cal 652 (5), it is one thing to say that you have acquired a right to ply a ferry between two points and to exercise that right against the servient owner. But it is a totally different thing to say that you have acquired a monopoly entitling you to prevent other neighbouring owners of the land from their exercising their undoubted right from starting new ferries.

It was argued that if a rival ferry is started near the ferry of the plaintiffs, then, their profits would be decreased. This may be. But the important question which has to be considered is whether by acquiring a right of easement to ply a ferry between two points the plaintiffs have got a right entitling them to exclude other owners from exercising their own right. Before a person can ask that another person should be prevented from exercising his own right he must show that he did something owing to which the right of the latter has been lost for ever.

Right of ferry is a very valuable right to the riparian owners in India and it appears to me that there is no warrant for saying that that right is lost because some one in the neighbourhood has been plying a ferry between the land of others with which they have no concern. On behalf of the appellants reliance was placed on a ruling of their Lordships of the

Privy Council 19 Cal 253 (11). At p. 262 their Lordships made the following observations:

"It is recognised law in India that a man set up a ferry on his own property, and takes toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others."

This is a proposition of law which is beyond dispute. At another place their Lordships on the same page observed:

'.....he can only set up an exclusive right against the plaintiffs by showing that either he had dispossessed them for twelve years, or that he has held adversely to them for more than twelve years, or that he has enjoyed what he claims, for twelve years, as an easement and as of right."

On the strength of these observations it is contended that an exclusive right of ferry in the nature of a monopoly can be acquired in India. I do not think that these passages lay down that an exclusive right of ferry by way of monopoly can be acquired in India. In fact there are observations of their Lordships in this case which make it abundantly clear that in that case no right of monopoly, like the right claimed before us, was asserted. At p. 262 their Lordships observed:

"Whatever the defendant may think himself entitled to, he has not in this suit claimed to possess in such a sense as would entitle him to restrain competition."

Again, at p. 253, their Lordships observed:

"He has not excluded any cosharer. It is not alleged that he has used the river for passage in any such way as to interfere with the passage of other people. It is not alleged that, even in the time of the bridge, there has been any obstruction at the landing places. It is not alleged that the defendants proceedings have prevented anyone else from setting up a boat for himself or his men, or even from carrying strangers for payment."

These observations of their Lordships very clearly show that no right of monopoly, as is claimed before us, was set up by the defendant in that case. The facts of that case go to show that no such question was involved. The dispute in that case was between cosharers in respect of profits which one of them had realised by plying a ferry between two points. The facts of that case were these: There is a river called Bagmati. This river runs through the land of village Baigra. The plaintiffs owned fourteen anna share in the aforesaid village while the defendant owned the remaining two-anna share. On the western bank of the river, there was a factory situate in Komtowl village styled Kotowl indigo factory. This factory had been purchased by the defendant. The predecessor of the defendant, who owned a two-anna share in village Baigra had started a ferry which had been in existence for a long time. The defendant and his predecessors had been realising the tolls and had been appropriating the same to the exclusion of the other cosharers of the village. In reply to the suit the defendant asserted that he had acquired an exclusive right to the ferry by prescription. On the facts found in that case their Lordships came to the conclusion that the defendant had failed to make out a case that he had acquired an easement. But nevertheless their Lordships held that the claim of the plaintiffs must fail because one cosharer in an undivided state was perfectly entitled to use a portion of joint property and earn profits on the ground that he had incurred expenditure or risk for that purpose. At p. 262 their Lordships were only considering the question as to whether or no a cosharer could set up an exclusive right of ferry against his other cosharer on the ground that he had acquired that right as an easement. It was in connection with this matter that they used the words "exclusive right." These words were not used in the sense that the defendant was setting up a right of monopoly, but were used in reference to the plea of the defendant that as he had acquired a right of easement so his cosharers could not claim to prevent him from appropriating those profits exclusively or to restrain him from plying the ferry. In my opinion, therefore this ruling of their Lordships of the Privy Council does not help the plaintiffs.

The next case on which reliance was placed on behalf of the appellant is 1915 All 270 (12). In that case it was found that the defendants, the proprietors of village Bahiama had been plying a ferry between their village and village Rampur since over twenty years. The plaintiffs in that case who were the owners of village Rampur started a rival ferry. A learned Judge of this Court following the case reported in 18 Cal 652 (5), dismissed the suit of the plaintiffs. The following observations in that judgment clearly go to show that the case before us is distinguishable from it:

11. Lachmeswar Singh v Manowar Hossein, (1892) 19 Cal 253=19 I A 48=6 Sar 133 (PC).

12. Jwala Singh v. Abdul Razaq, 1915 All 270=29 I C 692.

"The case, in my opinion, resolves itself into the question whether the plaintiffs have acquired any right to an easement or to a right in the nature of an easement on the Bambiana side of the river, when that right involves a right to embark or disembark passengers on another's land'

The defendants in that case had acquired a right by easement to embark and disembark passengers on the land of the plaintiffs (the proprietors of Rampur). The plaintiffs started a rival ferry which was plied between their own land and the land on the opposite bank of the river which belonged to the defendants. They further wanted to use the land belonging to the defendants for the purpose of embarking and disembarking passengers. The Court held that the plaintiffs had not been able to prove that they had acquired such a right either under a Crown grant or by prescription and so their claim was dismissed.

Another case cited on behalf of the appellants is 1920 Pat 38 (13). All that is necessary to say is that it in no way helps the appellants. The case lays down that a right of ferry can be established by acquisition of an easement and this is a point about which there is no controversy between the parties to the suit before us.

For the reasons given above, I hold that in India, a person owning land on one bank of a river can acquire a right by easement which would entitle him to use the land belonging to another owner on the other side of the river for the purpose of embarking and disembarking passengers. There is however no law in this country which would entitle him to restrain competition. He cannot prevent the owner of the land on the other side of the river from starting a rival ferry which is run between lands owned by him on both banks of the river. In other words, there is no right to a monopoly. Such an exclusive right can be claimed only under a Crown grant.

Having considered the legal aspect of the case, it is now necessary to determine whether the case before us, has been correctly decided. A perusal of the plaint shows that the case of the plaintiffs was that the defendants were attempting to ply a ferry between the same points, and on the same line between which the plaintiffs had been plying a ferry. For the purpose of deciding this case it may be assumed that the plaintiffs have got a right, by easement, to run a ferry between point A (land of Bansthana) and Mobarakpur as shown in the plan attached to the plaint. The question for our consideration is whether the defendants have started a new ferry between the same points. In my opinion, on this point the finding of the learned Judge of the lower appellate Court is against the plaintiffs. He has remarked that:

"The plaintiffs' case was that they had two ferries which they used to ply."

He referred to the evidence of Ram Shukal, plaintiff who deposed that he plied two ferries, one from ghats between Bansthana and Nazirabad and the other between ghats at Bansthana and Sagarpali. He held that the ghat in dispute (between Bansthana from point marked A and Mobarakpur) was other than the ghats that the plaintiffs had laid claim to. The learned Subordinate Judge referred to the evidence of one Ram Lakhan Rai, who later on wanted to deny the existence of ghats between Bansthana and Sagarpali unsuccessfully. The learned Subordinate Judge believed the evidence which was produced on behalf of the defendants to the effect that the defendants had been plying a ferry with the permission of the zamindars of Mobarakpur between the ghats in suit which are both situate on the land, belonging to the zamindars of Mobarakpur. As according to the finding of the Judge of the lower appellate Court, it is found that the defendants are working a ferry between points from those between which the plaintiffs claimed to have been plying a ferry, the suit must fail.

For the reasons given above, I would dismiss the appeal with costs.

Sulaiman, C J.—I concur in the conclusion of my learned brother and would like to add only a few words.

The right to ply a boat can be acquired by easement or by custom as well as by grant, express or implied. But the exclusive right of ferry over a land can be by grant only. The owner of lands on the one side of the river cannot by mere user acquire an exclusive right of ferry across the river, when the land on the other side belongs to other zamindars. The right of ferry is a right to embark and disembark passengers on the two sides of the bank. Such a right obviously cannot be restricted to particular spots so as to be destroyed if the level of the water sinks or rises.

13. Pardip Singh v. Secy. of State, 1920 Pat 38=57 I C 516=5 Pat L J 500.

So long as the parts of the banks of the river lie on a public way across which passengers are entitled to travel, the exclusive right of ferry can be enjoyed irrespective of the exact height of the water level. But such a right of ferry does not. in my opinion. include a right to land passengers at other places on the opposite bank belonging to other people, away from the track of the public way. So long as the person possessing a right of ferry lands his passengers on any part of the public way, he is well within his rights. But he cannot claim a right to land passengers on other people's lands over which a right of way does not exist.

It follows that if a river changes its course the right of ferry may be seriously affected. The right to go along a public high way includes the right to go across a river or a stream which intercepts it. So long therefore as the track of the public way is identical, the shifting of the river course makes no difference. But if the result of a change in the course of the river is to alter the landing places which would require the chalking out of a new pathway, the right must be deemed to be non-existent.

But a franchise of a ferry is not necessarily connected with the proprietorship of the land; but where acquired as an easement it must, of course, be appurtenant to the land. The exclusive right of ferry would ordinarily imply a right to prevent other people from plying boats between certain parts of the banks on both sides of the river even though the lands belong to them. Without proof of a right acquired by grant, it would be not possible for a claimant to prevent others from plying boats between their own lands, even if their lands happen to be quite close to the land over which the right of ferry exists.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 490

BENNET, J.

Tej Singh and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 772 of 1934, Decided on 11th December 1934, from order of Sess. Judge, Agra, D/- 25th August 1934.

(a) Penal Code (1860), S. 99—Private defence—Attachment effected legally under good order—Accused is not entitled to right of private defence—Omission to record reasons in order of appointment of vakil to effect attachment held did not make attachment illegal—Civil P. C. (1908), O. 21, R. 105.

A vakil was appointed to make the attachment and it was effected quite properly. It was contended that no reasons were given for appointing him instead of amin or bailiff.

Held: that the provision in O. 21, R. 105 for recording the reasons may be taken to be not mandatory but directory. The order therefore for the appointment of the Vakil to make the attachment before judgment was a good order and the attachment was not illegal or without jurisdiction. That being so, no right of private defence arose for the accused person. 1924 *Cal* 1, *Rel on*. [P 491 C 2]

(b) Civil P. C., (1908), S. 62 (2), (3)—Zenana quarters need not be in possession of judgment debtor—It is enough if decree holder considers that there may be property of judgment debtor.

There is no limitation that the particular room in question must be in the occupancy of the judgment-debtor. Such a limitation is introduced into sub-S. (2) where there is provision for breaking open doors. But in Sub-S. (3) which deals with entering parda quarters, there is no such limitation that the rooms should be in the occupancy of the judgment debtor. The Code apparently contemplates that it is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in those rooms. [P 492 C 1]

(c) Hindu Law—Partition — Mere separation in residence does not amount to partition.

A mere separation in residence does not amount to any partition in Hindu Law. [P 492 C 1]

Nanak Chnnd for Applicants.

Assistant Government Advocate — for the Crown.

Order.—This is an application in criminal revision on behalf of three persons Tej Singh, who has been sentenced to Rs. 50 fine, and Wazira and Phul Chand, who have been sentenced to Rs. 15 fine and six months' rigorous imprisonment. The convictions are under Ss. 147, 323 and 325, Penal Code. The latter two persons are servants of the mother of Rawat Raj Kumar. There was a civil suit in the Small Cause Court, Ghanshyam Singh, v. Rawat Rajkumar filed on 12th August. On the same date an application was made for attachment before judgment under O. 38, R. 5 (3) and an order was issued that the attachment should be made by Pandit Ramnath Nagar vakil. On 13th August, the vakil and the plaintiff proceeded to the house of the defendant to make the attachment. The Sessions Court has found that the Rawat's mother informed them that the attachable property was not in the zenana quarters. At-

tachment then was carried on in the remainder of the house. This led to a quarrel and subsequently to an attack. The muharrir of the vakil was injured. The vakil returned to the thana and made a report. The Sub-Inspector and the tahsildar went to the Rawat's house and in the neighbourhood they found the plaintiff lying injured and the tahsildar took his statement and the Sub-Inspector began his enquiry. Four or five men were found injured. The complainant gave a list of 89 persons. Thirteen were prosecuted. The case was committed to Sessions. This Court quashed the committal order. Another Magistrate again committed it to Sessions. This Court set that order aside and the case was eventually completed by another Magistrate, and after various revisions, the appeal has been decided by the lower Court two years after the event. Four people were convicted by the Magistrate and one has been given the benefit of the doubt by the Sessions Court. There are thus three applicants in revision before this Court. The first ground of revision is that the appointment of a Commissioner for attachment was illegal and without jurisdiction. The attachment before judgment was made under O. 38, R. 5 (3), and R. 7 states that save as otherwise expressly provided the attachment shall be made in the manner provided for the attachment of property in execution of a decree, i. e., under R. 43, O. 21. R. 105, O. 21, provides that such attachment shall be made through a civil Court amin or bailiff unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the hand-writing of the presiding Judge himself in the order for attachment. In the present case the order of the Small Cause Court Judge did not give the reasons. Those reasons indeed are obvious because any one familiar with the procedure of civil Courts knows that the civil Court amins and bailiffs have a programme drawn up of their duties for several weeks in advance as they have to conduct sales for which dates are fixed by the execution Courts. As the application required immediate attachment, it was clear that the Court could not secure an amin or bailiff to make the attachment and therefore the Court had to employ a vakil. Learned counsel however alleges that owing to the omission to record reasons the procedure was illegal. The further argument to be derived from that is that the accused had a right of private defence, which has been found against them by the Sessions Court. Now S. 99, Penal Code, provides as follows:

"There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

I consider that in the present case the vakil was at the time a public servant acting in good faith under colour of his office and the mere omission to record the reasons in the order appointing him has no bearing in this case and does not give rise to any right of private defence. No authority was shown by counsel for his proposition that the omission to record reasons would make the attachment illegal. There is, on the contrary, the authority of 1924 Cal 1 (1), where it was held that the omission of Magistrate to record separately the reasons for the issue of a warrant under S. 90, Criminal P. C., does not make a warrant invalid and that the words "after recording its reasons in writing" are not mandatory but directory. Similarly it appears to me that the provision in O. 21, R. 105 for recording the reasons may be taken to be not mandatory but directory. The order therefore for the appointment of the vakil to make the attachment before judgment was a good order and the attachment was not illegal or without jurisdiction. That being so, no right of private defence arose for the accused persons. The second ground of revision deals with the same point.

The third ground alleges that the plaintiff and vakil were wrong in taking a large party of armed persons and that they were the aggressors, and the fourth ground alleges that this party acted illegally in forcing their entry into the private zenana deorhi of the mother of the Rawat who was living separately from her son, and in illegally seizing and removing property from her zenana exempt under the law from attachment and assaulting her female attendant in the zenana, and the fifth ground alleges that this amounted to house trespass and gave the applicant a right to act in self-defence, and the sixth ground is similar. As regards the allegations of fact in these grounds it has been found

1. Government of Assam v. Sahebulla, 1924 Cal 1=75 I C 129=24 Cr L J 881=51 Cal 1.

by the lower appellate Court that the party did not enter the zenana but that the vakil and the complainant went into the house and the Rawat's mother informed them that the attachable property was not in the zenana quarters and attachment was then carried out in the remainder of the house and it was attachment in the remainder of the house that led to the attack. Learned counsel endeavours to show that this finding of fact is wrong and he undertook to show this from the evidence for the prosecution. He referred to a passage in the evidence of the complainant that there was attachment of four beds and three lanterns that were put in the upper storey. He attempts to show that the whole upper story was zenana quarters, but he has failed to show this. I find no reason therefore to differ from the lower Court on the finding of fact.

The grounds of revision appear to me to assume that for an attachment there is no right to enter zenana quarters. In S. 62, Civil P. C., it is laid down that a person executing a process under the Code directing or authorizing the seizure of moveable property may enter a zenana quarter if sufficient notice is given to the woman or women concerned to withdraw and reasonable facilities are allowed for the withdrawal of these women. Learned counsel argues that this would not give a right to enter the zenana quarters in the occupation of the mother of the Rawat because as he says she is living separately from her son. I do not find that in S. 62 (3) of the Code there is any limitation that the particular room in question must be in the occupancy of the judgment-debtor. Such a limitation is introduced into Sub-S. (2) where there is provision for breaking open doors. But in Sub-S. (3), which deals with entering parda quarters, there is no such limitation that the rooms should be in the occupancy of the judgment-debtor. The Code apparently contemplates that it is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in those rooms. The basis therefore of the argument in these grounds of revision is unsound. As regards the point that the mother is living separately from the son, a mere separation in residence does not amount to any partition in Hindu law, and there is nothing shown that there has been any partition of the son from the joint Hindu family from which the mother had a right of maintenance. No other ground of revision was argued. I consider that the finding of the Sessions Court was correct. The sentences are not excessive. The application in revision is dismissed. The accused who are on bail must surrender to their bail and must complete the rest of their sentences.

K S. *Application dismissed.*

A. I. R. 1935 Allahabad 492

KENDALL, AG. C. J AND BAJPAI, J.

Muhammad Ismail Khan—Plaintiff—Appellant.

v.

Jawahir Lal and *others*—Defendants—Respondents.

Letters Patent Appeal No. 41 of 1933, Decided on 30th November 1934, against judgment of Collister, J., D/- 8th September 1933.

Lease - Construction—Use of word dawans per se does not imply perpetuity — Lessee given right to build or let it out on rent for anybody else—Lessee to have all rights enjoyed by lessor—Held lease was perpetual one.

The use of the word dawam in a lease per se might not imply perpetuity, but where the lessee was given the right to build a house or to let it out on rent to anyone else and it was further said that the lessee shall have the same right as the lessor enjoyed up till then and acting upon the lease costly buildings were erected:

***Held*: the lease was a perpetual one.**

[P 493 C 1]

P. L. Banerji and *S. K. Mukerji*—for Appellant.

A. P. Pandey—for Respondents.

Judgment.—This is a plaintiff's appeal under S. 10. Letters Patent, his suit having been dismissed by all the Courts so far. The question that we have to decide is whether the defendant, who claims under a lease, obtained a lease in perpetuity, or a tenure that was to subsist for the lifetime of the original lessee Jai Chand. The facts of the case have been given at length in the judgments of the Courts below and of the learned Single Judge of this Court. It has been consistently held so far that the words employed in the lease, coupled with the surrounding circumstances and the subsequent conduct of the parties, lead to only one, inference, namely, that the lease was perpetual. It is not necessary for us to go in detail into the expressions used in the document, because it is clear that the use of the word dawam per se might not imply per-

petuity. but in the present case the lessee was given the right to build a house or to let it out on rent to anyone else. It was further said that the lessee shall have the same right as the lessor enjoyed up till then. It is clear that the lessor had proprietary rights, and she could undoubtedly have granted permanent rights to others. There is no reason why Jai Chand, the lessee, should not be deemed to have the same rights, and that would only be consistent with the idea of the lease being a perpetual lease. It also appears that after the death of Jai Chand, the original lessee, in 1914, the lessor and her successors have been accepting rent from the sons and representatives of Jai Chand. Further, acting upon the right given to the lessee to build upon the land, costly buildings have come into existence. We are therefore of the opinion that the decision of the learned Single Judge is correct. We therefore dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 493

SULAIMAN, C. J. AND BENNET, J.

Gayasi Ram and *others* — Plaintiffs—Appellants.

v.

Shahabuddin and *others*—Defendants—Respondents

Appeal No. 46 of 1933, Decided on 22nd January 1935, from order of Thom, J., D/- 11th September 1933.

Transfer of Property Act (1882), S. 10—Clause that vendee should not alienate property to any one other than vendor or his heirs is contrary to S 10 and is void.

A clause in a sale-deed that the vendee should not transfer the property by mortgage, gift or sell to any one excepting vendor or his heirs is contrary to S. 10 and is void : 1921 *All* 97 ; 1929 *All* 492, *Rel on*; 1927 *All* 170 (*FB*) and 1932 *P C* 148, *Dist.* [P 495 C 1]

A. P Bagchi—for Appellants.

N. P. Asthana—for Respondents.

Bennet, J.—This is a Letters Patent appeal by the plaintiffs who have lost their suits in both the lower Courts and before the learned Single Judge of this Court. On 3rd July 1912, Bhuja Ram, father of the plaintiff, Gayasi, sold a house to Nanhu, the father of Ramsarup, defendant 3, for the sum of Rs. 150. In that sale-deed there was a clause providing that the vendee would not transfer the house by mortgage, gift or self to anyone excepting the vendor or his heirs; that if the house were sold by auction-sale the sale would be invalid; and that if the house were transferred in contravention of the said terms then the vendor or his heir would have a right to get back the house by paying Rs. 175. On 13th April 1928, Ramsarup, son of the vendee sold the house to defendant 2, Raja Ram, for Rs. 1,000. On 3rd April 1929, Raja Ram, sold the house to defendant 1, Shahabuddin, for Rs. 800. On 12th April 1929, the plaintiffs have brought the present suit against all the defendants claiming possession of the house on payment of Rs. 175 to defendant 1. The Courts below dismissed the suit on the ground that the condition was contrary to S. 10. T. P. Act as amounting to an absolute restraint on alienation. That view has been upheld by the learned Single Judge of this Court. Learned counsel in Letters Patent appeal relies on certain rulings which he claims will show that in similar cases it has been held that such conditions are not contrary to S. 10, T. P. Act. The first ruling on which he relied is a Full Bench ruling in 1927 All 170 (1). Learned counsel points out that the contract in that case quoted in the foot-note at the bottom of p. 530 (of 49 All 527), amounts in effect to the same result as the contract in the present case. The contract in that case is as follows:

"I, Saiyid Muhammad Razi, cannot transfer the said share by sale or mortgage. If I, Saiyid Muhammad Razi, wish to transfer the remaining one pie (English) share or if I, Sheikh Nasiruddin, wish to transfer the whole or part of my share in mauza Gurdih aforesaid, we can transfer it among ourselves, that is, one executant can transfer it to the other. In case of transfer to another person, the other executant will acquire it by pre-emption on payment of consideration at the rate of Rs. 8-5-4 for each pie (English) in case of sale and on payment of Rs. 4-2-8 for each pie (English) in case of other transfers."

I would note firstly that the contract in the ruling differs because it does not state that alienation shall not take place. It sets out that a transfer may be made between the parties and further provides that if a transfer is made to another person then the opposite party will acquire the property by pre-emption. The pre-emption differs from the usual contract for pre-emption because the rate at which the purchase is to be made is fixed by the agreement. But in dealing with this case the Full Bench did not lay any stress on this particular condition that the

1. Aulad Ali v. Ali Athar, 1927 All 170=100 I C 683=49 All 527 (FB).

price was fixed. On the contrary the Full Bench treated the case as one of a contract creating a right of pre-emption. On p. 530 the acting Chief Justice stated, after quoting the contract and stating that it gave the right to pre-emption:

"That is a perfectly harmless and natural mutual arrangement, very common in India, quite intelligible, the object being that so long as the parties to the transaction preferred to keep out third persons from the body of co-sharers, they should have a right of veto."

On p. 528 it is stated that each of the parties was the owner of an eight anna share in a certain village and one party transferred all his eight-anna share with the exception of a one pie share to the other. Again at the bottom of p. 532 the learned acting Chief Justice objected to the application of the equitable rule of "analogy to the statute" to pre-emption contracts, that is. he treated the present contract as one of pre-emption. The second point on which the Full Bench ruling is distinguishable is tha. in no part of that ruling has any reference been made to S. 10, T. P. Act. The case was not put forward that the contract in that ruling would amount to an absolute restraint on alienation. As the case was not argued on that ground I consider that it cannot be held that the ruling is an authority for the proposition that S.. 10 does not apply to a contract of that nature. It should further be noted that in the ruling the case was one between co-sharers in a village. In the present case the property in suit is not zamindari property, but a house and the parties are in no sense co-sharers, nor can there be any question of pre-emption by a contract. The next ruling on which learned counsel relies is a ruling of their Lordships of the Privy Council reported in 1932 P C 158 (2). That ruling sets out that on 19th September 1870, there was a compromise which stated:

"It has been settled that both wives should, in accordance with this agreement, in their capacity as wives, from this time be declared permanent owners of a moiety each of the entire mahal Shadipur . . . . . The said females shall not have power to transfer this property to a stranger."

In accordance with this contract their Lordships observed on p. 712 of 1932 A L J:

"In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family . . . . Their Lordships see no reason therefore to hold that the provision in the compromise agreement that Sughra Bibi should not have power to transfer the properties in suit to a stranger was otherwise than binding upon her"

Their Lordships come to the conclusion that S. 10, T. P. Act, did not make any change in the law prior to its enactment in 1882 and that the arrangement before their Lordships was an arrangement which would not be contrary to the provisions of S. 10. But I consider that the present case is very different from the family arrangement which was before the Privy Council. In the present case there is an absolute restraint on alienation to anyone other than the vendor or his heirs. In the case before their Lordships of the Privy Council their Lordships held that it was open to Sughra Bibi to make an alienation to anyone she desired within the family circle. Further the case before their Lordships was one in which provision was made for the wives of the person executing the agreement. In the present case the sale-deed which gave rise to this case is a sale-deed between strangers and cannot be considered parallel to a family arrangement.

On the other hand I consider that there are three rulings in which the principle has been laid down in favour of the defendants-respondents. The first of these rulings is 1921 All 97 (3). In that ruling there was a sale with a condition that the vendee or his heirs should sell to the vendor or his heirs for the same price and to no one else. It was held that this would amount to an absolute restraint on alienation and that this clause was not enforceable. In 1929 All 381 (4). there was a condition against the transfer of an allowance by way of maintenance which was a charge on immovable property and the condition forbade making the transfer during minority or after minority. It was held that this was an absolute restraint on alienation and was void as contrary to the principle of S. 10, T. P. Act. In 1929 All 492 (5), there was a case of a settlement between a husband and his two wives by way of the execution of a document styled a Tamliknama in which it was held that the property

2. Mahomed Raza v. Abbas Bandi, 1932 P C 158 =137 I C 321=59 I A 236=7 Luck 257=1932 A L J 709 (PC).

3. Lal Singh v. Khub Chand, 1921 All 97 = 64 I C 408.

4. Asghari Begam v. Maula Bakhsh, 1929 All 381 =116 I C 90.

5. Gomti Singh v. Anari Kuar, 1929 All 492=118 I C 152.

should be held by the husband of the two wives and that neither he nor his wives could transfer separately and the transfer could be made only when all combined. It was held that this was an absolute restraint on alienation so far as the one-third share of the husband was concerned and that this condition was not valid as it violated S. 10, T. P. Act, so far as that one-third share was concerned. Following those three rulings I hold that the condition in restraint of alienation in the present case is contrary to S. 10, T. P. Act, and therefore void.

Accordingly I hold that the suit of the plaintiffs fails and I dismiss this Letters Patent appeal with costs.

Sulaiman, C. J.—I concur. As laid down by their Lordships of the Privy Council in 1932 P C 158 (2), the prohibition contained in S. 10 is operative against an absolute restraint on alienation only and not against partial restraints. But in order to see whether there is absolute restraints or not one has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in S. 10. For instance, if the condition is that the property shall not be transferred without the consent of the other party, it may be argued that there is a remote possibility when the promisee agrees that a transfer can take place. But obviously such a condition is for all practical purposes a complete prohibition against a transfer, unless the promisee gives his consent. On the other hand where there is no prohibition against the transfer itself, but a right of pre-emption is conferred on the promisee to take the property from a stranger vendee, S. 10 would be inapplicable.

The only difficulty which I have felt in this case is on account of a similarity between the conditions which were to be found in the document considered by the Full Bench in 1927 All 170 (1), and the present one. The mere fact that in that document there was no sentence laying down that the property shall not be transferred except to the executant, whereas there is a sentence in the present argument, is not, to my mind, of very great importance. My conclusion would not have been different even if in the present deed that sentence has not found a place. In both the documents there was a provision that in case of transfer to another person, the other executant would acquire the property on payment of a consideration at a fixed rate and not on payment of the price paid by the purchaser. But I agree with my learned brother that the Full Bench case cannot be treated as an authority for the proposition that S. 10 does not apply to such cases because the point was never argued by counsel before the learned Judges and there is nothing in the judgment to indicate that their attention was drawn to the contention. We cannot therefore presume from the mere fact in the similarity of the language of the two documents that this point was necessarily decided by the Full Bench. Looking at all the conditions entered in the document prohibiting transfer by mortgage, gift or sale to anyone except the promisee and his heirs and entitling the latter to recover it for Rs. 175 only, no matter for how much more it may be sold, and even prohibiting an auction-sale for more than Rs. 175 and all this for all generations to come there is no doubt that for all practical purposes there is an absolute restraint on alienation and the conditions are void.

K.S. *Appeal dismissed,*

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* A. I. R. 1935 Allahabad 495

NIAMATULLAH AND BENNET, JJ.

In re. *Messrs Gaya Prasad Chhotey Lal.*

Miscellaneous Case No. 285 of 1934, Decided on 30th November 1934, by Commissioner of Income-tax, Central and United Provinces, D/- 30th April 1934.

*** Income-tax Act (1922), S. 4 (3) (vii)—Agreement by assessee to finance litigation—Money advanced from time to time to be returned on successful termination of appeal with profits in lump sum—Successful termination of appeal—Lump sum paid to assessee in addition to amount actually advanced—Transaction held was business and that income was not merely casual one but return on money invested and as such was liable to income-tax.**

The assessee agreed to advance to another such sums as were needed for the prosecution of his appeal and stipulated for its return together with profit on the sums advanced. The profits were not calculated at a given rate of interest, but in a lump sum and on the successful termination of the appeal, the assessee was paid a lump sum in addition to amount advanced, though not the full amount stipulated.

Held: that the business which yielded profit to the lender commenced from the date of the agreement and continued till the assessee rea-

lized the sum. There was continuity and regularity in the sense that he advanced sums from time to time as occasions arose The transaction therefore amounted to business within the meaning of the Income-tax Act. This income was not of a purely casual nature. On the contrary it represented a return on the money invested by the assessee and as such was assessable to income-tax: 1932 *P C* 138, *Expl.*

[P 497 C 1,2]

Harnandan Prasad for *Gopi Nath Kanzru*—for Applicant.

K. Verma—for the Crown.

Order.—This is a reference by the Commissioner, Income-tax. under S. 66 (2). The assessee is a Hindu undivided family, which owns a certain house property which is its principal source of income. In previous years income-tax used to be assessed on the income of that property. In the year ending 31st March 1932, the family was assessed on an income which included a sum of Rs. 15,000 received in a trasaction to be presently referred to. The question which arose before the assessing authorities was whether this sum of Rs. 15,000 can be considered to be income, profit, or gain of business within the meaning of the Income-tax Act. The Income-tax Commissioner held that it was income accruing from business and therefore taxable. He however made a reference under S. 66 (2) on the application of the assessee, and the questions which we are called upon to answer are as follows:

"1. Did the sum of Rs. 14,560 assessed by the Income-tax Officer represent income, profits or gains? 2. If so, did that sum represent a receipt arising from business within the meaning of Cl. (vii) of sub-S. (3) of S. 4, Income-tax Act, 1922, and consequently excluded from the exemption conferred by that clause?

It appears that one Kanhaiya Lal Jaju was a party to an appeal pending in the High Court. The assessee entered into an agreement with Kanhaiya Lal, under which the assessee undertook to supply funds needed for the prosecution of the appeal by Kanhaiya Lal who agreed to repay the sums to be advanced to him by the assessee together with an additional sum of Rs. 21,000 in case the appeal was decided in favour of Kanhaiya Lal. It seems to be implied that if Kanhaiya Lal was unsuccessful, he was not liable to repay any part of the advances made by the assessee, nor would he be liable to pay anything by way of compensation. The agreement was reduced to writing. The assessee, represented by one Chhote Lal, executed an instrument stipulating to supply all funds needed by Kanhaiya Lal for the prosecution of his appeal and to take formal receipts from the latter. The agreement proceeded to lay down that, in case the appeal was successful, Kanhaiya Lal would pay back all the sums advanced by the assessee together with the sum of Rs. 21,000 and that in case Kanhaiya Lal failed to fulfil his undertaking, it would be open to the assessee to institute a suit for recovery of the sums due under the agreement with interest at the rate of 9 per cent per annum. The agreement further provided that in case any compromise was arrived at between Kanhaiya Lal and his adversary the assessee would be entitled to repayment of the sums advanced by him and also to the sum of Rs. 21,000 referred to above.

The assessee financed the litigation, and Kanhaiya Lal won his appeal. Apparently Kanhaiya Lal was not willing to pay the sum of Rs. 21,000 in addition to the sums actually advanced. Eventually a compromise was arrived at between the assessee and Kanhaiya Lal. under which the latter paid Rupees 15,000 in full satisfaction of the assessee's claim under the agreement referred to above. The Income-tax Department deducted a sum of Rs. 440 on account of interest paid by the assessee, and assessed Rs. 14,560 to income-tax. This is the sum which is referred to in question No. 1.

The learned advocate for the assessee has argued that the receipt of Rs. 15,000 by Kanhaiya Lal in the circumstances already stated cannot be considered to be income, profit or gain from business within the meaning of S. 4 (3) (vii). Income-tax Act. He also contended that it is income of a casual nature and should be deemed to have been exempted by the aforesaid section. Reliance is placed on 1932 P C 138 (1), in which their Lordthips of the Privy Council made certain observations to the effect that the word "business" connotes continuity and regularity of trasactions. In that case Messrs. Shaw, Wallace & Co., agents of a certain petroleum company, were paid a large sum of money as compensation for the termination of their agency. The Income-tax Authorities treated it as income, profit or gain, and assessed it to tax. The Calcutta High Court held that it could not be considered to be income, gain or profit so as to attract the application of

1. Commissioner of Income-tax, Bengal v. Shaw Wallace & Co. 1932 P C 138=136 I C 742=59 I A 206=59 Cal 1343 (PC).

the Income-tax Act. Their Lordships of the Privy Council took the same view and observed:

"The object of the Indian Act is to tax 'income,' a term which it does not define. It is expanded, no doubt into 'income, profits and gains, but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite source The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as 'capital'. But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

Their Lordships also referred to the phrase "business carried on by him" in S. 10. In the end they held the payment to Messrs. Shaw, Wallace & Co. as no more than a solatium. We are clearly of opinion that the observations of their Lordships of the Privy Council quoted above, which are strongly relied on by the assessee, should be taken in conjunction with the facts of that case and we are unable to hold that their Lordships intended to lay down that, unless the source of income is one which yields income periodically and not only once the income derived from it cannot be assessed to tax. Circumstances are easily conceivable in which there can be no doubt that the receipt of a sum of money is the income, profit or gain from business, and yet it accrued only once. In the case before us there can be little doubt that the assessee embarked upon a transaction of loan in which unusual conditions were stipulated. He agreed to advance such sums as were needed by Kanhaiya Lal for the prosecution of his appeal and stipulated for its return together with profit on the sums advanced. The profits were not calculated at a given rate of interest. but in a lump sum. It may be, as the learned advocate for the assessee argues, that there was an element of speculation in the transaction. At the same time, it cannot be gainsaid that the transaction was one of loan from which the lender expected to derive considerable pecuniary profit. The business which yielded profit to the lender commenced from the date of the agreement and continued till the assessee realized the sum of Rs. 15,000 from Kanhaiya Lal. There was continuity and regularity in the sense that he advanced sums from time to time, as occasions arose for Kanhaiya Lal to borrow, took steps to enforce the agreement against Kanhaiya Lal and succeeded so far as to recover Rs. 15,000 out of the Rs. 21,000 agreed to be paid, over and above the sums actually advanced. We are clearly of of opinion that the transaction amounted to business within the meaning of the Income-tax Act. We are unable to hold that this income was of a purely casual nature. On the contrary. we think that it represents a return on the money invested by the assessee. To hold otherwise would imply that the income, profit or gain, accruing from a single transaction or investment which is not akin to the assessee's trade or avocation is not income, gain or profit from business which in our opinion, is contrary to the plain meaning of the words employed in the Act. That a single transaction or investment may be business cannot admit of doubt. Any receipts exceeding the capital must be treated as profit. It is true that, if Kanhaiya Lal had lost the case, the assessee would probably have lost all that he had advanced to him. That however is beside the point. The fact remains that he received Rs. 15,000 as a return on the sums which Kanhaiya Lal had borrowed.

For the reasons given above we answer both the questions in the affirmative. The assessee shall pay the costs of this reference. We assess the fee of the advocate for the department at Rs. 150 for which a certificate shall be filed within the time allowed by the rules.

K.S. *Reference answered.*

A. I. R. 1935 Allahabad 497

NIAMATULLAH, J.

Ganga Sahai —Defendant—Appellant.

v.

Mt. Janki and *another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1261 cf 1934, Decided on 29th January 1935, from decision of Sub-Judge, Bulandshahr, D/- 26th July 1934.

Mortgage — Usufructuary mortgage — If property is converted into cash, encumbrance is transferred from original property mortgaged to one substituted.

The usufructuary mortgagee has an incumbrance on the mortgaged property, and if such mortgaged property is converted into cash, the encumbrance is transferred from the property

originally mortgaged to the one substituted therefor. The usufructuary mortgagee is certainly entitled to possession of the substituted security in the same manner as he had a right to the possession of the property originally mortgaged. [P 498 C 2]

G. S. Pathak—for Appellant.

Judgment.—This appeal has arisen from a suit brought by the plaintiff-respondent for recovery of a certain sum of money which came into the appellant's possession in the following circumstances:

The plaintiff was a simple mortgagee under a deed of 1909 and a usufructuary mortgagee under a subsequent deed of 1913. The property mortgaged under the two was the same. The defendant-appellant was a mortgagee in respect of part of that property under a deed of 1918. The defendant's mortgage was also simple. The defendant obtained a decree for sale on foot of his mortgage and had the property mortgaged to him sold and purchased, at any rate part thereof himself. The prior mortgagee enforced his mortgage of 1909 and had the mortgaged property sold. As a matter of fact some property is said to have been exempted, but the question is not material for the purpose of this appeal. The mortgage of 1909 was satisfied in full, and a surplus was left in Court. In the meantime, the appellant whose mortgage of 1918 was not satisfied in full obtained a decree under O. 34, R. 6, Civil P. C. In execution of his simple money decree thus obtained he attached the surplus in Court and recovered it. The plaintiff then brought the suit which has given rise to this appeal. claiming the entire sum from the defendant on the allegation that as usufructuary mortgagee under the deed of 1913 he is entitled to it. The first Court dismissed the suit on grounds which are palpably erroneous. The lower appellate Court decreed the plaintiffs' suit, but it seems to me that its conclusions though correct are not based on the right principle.

It is perfectly clear that the plaintiff had a prior charge under his deed of simple mortgage of 1909 on the entire property covered thereby. The surplus left after satisfaction of the mortgage of 1909 was the only security left to the usufructuary mortgagee, the plaintiff under the deed of 1913. The plaintiff was entitled to a charge on the substituted security in the shape of the surplus sale proceeds left after the satisfaction of the deed of 1909. The defendant who was the third mortgagee. could not claim any portion of that surplus before satisfaction of the mortgage of 1913, which was prior to his own. The learned advocate for the appellant contended that a usufructuary mortgagee is not entitled to a decree for sale, and therefore the plaintiff is not entitled to recover the sale proceeds of the property to which his mortgage related. It cannot be denied that the usufructuary mortgagee has an incumbrance on the mortgaged property, and if such mortgaged property is converted into cash, for example, here it is acquired under the Land Acquisition Act, the encumbrance is transferred from the property originally mortgaged to the one substituted, therefor. The usufructuary mortgagee is certainly entitled to possession of the substituted security in the same manner as he had a right to the possession of the property originally mortgaged. This being so it was the plaintiff who is entitled to the surplus sale proceeds. The defendant withdrew it and the funds in his hand were subject to the encumbrance in favour of the plaintiff. The plaintiff is therefore entitled to recover the same from the defendant. No question in regard to the usufructuary mortgagee's right to have the mortgaged property sold arises in a case like this. He has as much right to possession of the money into which the mortgaged property has been converted as he had in regard to the property originally mortgaged.

The learned advocate for the appellant raised a subsidiary point. He points out that there is nothing to show that the mortgage money due to the plaintiff under the deed of 1913 is equal to or in excess of the amount drawn by the defendant. He is however not in a position to say that after the satisfaction of the usufructuary mortgage of 1913, some surplus will be left in the hands of the defendant. No such question was raised in either of the Courts below, obviously because the amount due to the plaintiff under the deed of 1913 exceeds the sum in dispute.

The appeal fails and is dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 499

SULAIMAN, C. J. AND BENNET, J.

Ram Dihal Dubey—Plaintiff— Appellant.

v.

Gajraj Updahya and *others* —Defendants—Respondents.

Letters Patent Appeal No. 37 of 1933, Decided on 3rd January 1935, against decree of Kendall, J., Allahabad, D/- 14th August 1933.

(a) Fraud—Fraud committed on defendant by non-service of notice or misrepresentation as to nature of proceeding— Such fraud vitiates entire proceeding — Agra Tenancy Act (1901), S. 81.

Where a fraud is committed either on a defendant in that notice of the proceedings is not served on him at all, or there is some misrepresentation which makes him believe that the nature of the proceeding is different from what it really is, the defendant has really had no opportunity to appear before the Court and put his case before it. A fraud of this kind has always been held to vitiate the entire proceedings and invalidate the ex parte order, which might have been passed against the absent defendant. [P 500 C 1]

(b) Agra Tenancy Act (1901), Ss 81 and 99 — Ejectment proceedings in Revenue Court under S. 81 challenged on ground of fraud — Proper remedy is by regular suit under S. 99 and not for declaration in civil Court.

Where certain ejectment proceedings in a Revenue Court under S. 81 are challenged on the ground of fraud by the tenant the proper remedy for him is not to file a suit for a declaration in the civil Court that the proceedings are invalid, but to file a regular suit under S. 99 and in such a suit the Revenue Court is competent to go into the question of the alleged fraud and ignore the previous ejectment order, if fraud were established. The Revenue Court would further be in a position to give effect to its own decree by putting the plaintiff into possession as against the landholder : 1929 *All* 232. *Dist.* [P 500 C 2]

Harnandan Prasad—for Appellant.

M. L. Agarwala—for Respondents.

Sulaiman, C. J.—This is a plaintiff's appeal arising out of a suit for a declaration that an order of ejectment against him and in favour of the defendants passed by the Revenue Court was ineffectual and invalid inasmuch as it had been obtained by fraud. No consequential relief could be asked for, as the holding, from which the plaintiff had been ejected, was an agricultural holding. The Court of first instance dismissed the suit on the ground that the claim was barred on account of the Revenue Court's decision. On appeal the lower appellate Court allowed the appeal and remanded the case for disposal on the merits. Among other things, the plaintiff had alleged that in the service of the notice issued under S. 81 by the Revenue Court, fraud had been committed, and the process-server was in collusion with the opposite party, and misrepresented to the plaintiff the nature of the proceeding. There were also other allegations that the plaintiff had sent rents by money orders, which had been returned and that this fact was suppressed by the defendants in the Revenue Court. The lower appellate Court came to the conclusion that the allegations that the process-server was in collusion with the defendants and that he had committed fraud on the plaintiff by misrepresenting that the notice was in connection with a redemption proceeding were matters relating to the service of notice and were exclusively cognizable by the Revenue Court, but that the allegation that the plaintiff had sent rents to the defendants twice by money orders, and that they did not accept them, did not in any way, refer to the service or the non-service of the notice and was a matter, which could constitute fraud. On appeal to this Court, a learned Judge, who disposed of the appeal, rightly pointed out that the question whether the amount of arrears of rent was due and whether the defendants had refused to accept the rent sent to them were questions to be decided by the Revenue Court, and if they were not decided in that Court, they cannot be reagitated in the civil Court. But the learned Judge came to the conclusion that the question whether a notice had been properly served on the respondent under S. 81, Tenancy Act, or whether a fraud had been practised on him by the serving officer was also one for the decision of the Revenue Court. Inasmuch as the plaintiff's application for review in the Revenue Court has failed, the learned Judge held that the finding of the Revenue Court that there had been no fraud committed was binding on the civil Court, and it could not now be questioned by the plaintiff.

It is quite obvious that the question whether the defendants had falsely claimed certain arrears of rent, which were not due and whether they had suppressed the fact that rents had been tendered to them would be matters which could not constitute a basis for re-opening the order on the ground of fraud. These are matters which were not extraneous to the proceeding and should have been raised before the Revenue Court and decided by it. But where a fraud is com-

mitted on a defendant in that notice of the proceeding is not served on him at all, or there is some misrepresentation which makes him believe that the nature of the proceeding is different from what it really is, the defendant has really had no opportunity to appear before the Court and put his case before it. A fraud of this kind has always been held to vitiate the entire proceeding and invalidate the ex parte order, which might have been passed against the absent defendant.

It is highly doubtful whether questions of fraud which can avoid the entire proceeding could be gone into either under S. 151, Civil P. C., or under O. 47, R. 1, for an ex parte decree obtained fraudulently becomes voidable subsequently when the fraud comes to the knowledge of the defendant. But in any case it is clear that the orders passed by the Revenue Courts in the revenue proceeding could not operate as res judicata in civil Court. Proceedings under S. 81, Tenancy Act, do not really result in a decree, and that is another reason why the order could not operate as res judicata.

But the real difficulty in the way of the plaintiff is that the suit itself is not cognizable by the civil Court at all. Under S. 4, Civil P. C., the Code is not to limit or otherwise affect any special or local law that is in force. S. 230, Agra Tenancy Act, ousts the jurisdiction of the civil Court and confers exclusive jurisdiction on Revenue Courts for suits and applications of the nature specified in the fourth schedule. It follows that if the plaintiff could have brought a suit in the Revenue Court claiming substantially the relief that is now claimed, then the jurisdiction of the civil Court is completely barred under this section.

Assuming that the ejectment proceedings were fraudlent and are void and ineffectual as against the plaintiff, the effect is that the plaintiff would still continue to be a tenant of his holding and would be a tenant, who has been wrongfully dispossessed by the landholder. When the proceedings were fraudulent, it cannot be said that the ejectment of the defendants was in accordance with the provisions of the Tenancy Act. It must be held that the illegal ejectment brought about by fraud was otherwise in accordance with the provisions of the Act, Under S. 121, Tenancy Act, a tenant during the continuance of a tenancy can sue for a decclaration as to his right as a tenant, and under S. 99, Tenancy Act, where a tenant has been ejected from his holding otherwise than in accordance with the provisions of the Act by his landholder or any person claiming through him, he may sue the person so ejecting him for possession of the holding. It therefore seems to us that the plaintiff had a remedy by way of a regular suit for recovery of possession under S. 99, Tenancy Act, and in such a suit the Revenue Court would have been competent to go into the question of the alleged fraud and ignore the previous ejectment order if fraud were established. The Revenue Court would, further, be in a position to give effect to its own decree by putting the plaintiff into possession as against the landholder.

The learned advocate for the plaintiff-appellant relies strongly on the decision of a single Judge of this Court in 1929 All 232 (1), in which it was held that the civil Court is the proper Court to determine the question of fraud by which a decree is obtained in the Revenue Court and the finding of the Revenue Court in a review proceeding that no fraud had been committed would not be binding on the civil Court at all. But in that case, the Revenue Court had decided that the plaintiff was a tenant of certain lands. The plaintiff then brought a suit in the civil Court for a declaration that he was really a grove-holder of the land and the Revenue Court decree had been obtained by fraud and he should be given possession. Under the old Tenancy Act the disputes between a grove-holder and a proprietor of the land could be settled by the civil Court. Accordingly the suit for a declaration that the plaintiff was a grove-holder and he had been wrongfully dispossessed and should be put in possession was cognizable by the civil Court. It was in these circumstances that the previous order of the Revenue Court which had been obtained by fraud was held not to be binding on the plaintiff. That case is clearly distinguishable from the case before us. Here under the Tenancy Act we have no jurisdiction to grant possession to the plaintiff of an agricultural holding. Our mere declaration would be ineffective. There is ample provision in the Act itself which entitles a Revenue Court to go into this question. We are therefore of opinion that the pre-

1. Mt. Jahandar Begum v. Chinta, 1929 All 232 =116 I C 855.

sent suit is not cognizable by the civil Court at all. We accordingly dismiss the appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 501

NIAMATULLAH, J.

Jafar Beg and *another*—Appellants.

v.

Ujagar Lal—Respondent.

Second Appeal No. 1164 of 1934, Decided on 28th January 1935, from decision of Sub Judge, Etawah, D/- 30th May 1934.

(a) Evidence Act (1872), S. 48—Value and sufficiency of expert evidence cannot be questioned in Second Appeal—Civil P. C., (1908), S 100.

The opinions of experts are relevant, but not conclusive as to the matters to which they relate; their value and sufficiency cannot legitimately form the subject of consideration and scrutiny in second appeal: 1924 *All* 116 *Ref.*

[P 501 C 2]

(b) Custom—Finding on question of custom is finding of fact - Civil P. C. (1908), S. 100.

A finding on the question of custom is a finding of fact in so far as it records what happened and in so far as it gives weight to the opinion evidence.

[P 501 C 2]

A. Dharam Das—for Appellants.

Judgment.—This is a second appeal from the decree passed by the learned Subordinate Judge, Etawah, in a mortgage suit for sale. A preliminary decree was passed in favour of the plaintiff-respondent. Subsequently he applied for a final decree when the appellants objected alleging that the mortgage money had been satisfied partly by payment in cash, for which a receipt was passed and partly by execution of an unregistered bond or promissory note in favour of the mortgagee decree-holder. The decision of the case rested on proof of the appellant's allegations, which were denied by the mortgagee. The appellants examined a few witnesses and a handwriting expert in support of their case. The mortgagee also produced a handwriting expert, besides some other evidence. After discussing the evidence at some length, the lower appellate Court recorded the following finding on that part of the case:

"All things considered I am of opinion that the receipt produced by the appellant does not appear to have been given them by the respondent."

This is clearly a finding of fact and cannot be questioned in second appeal. The learned advocate for the appellants however contends that in so far as the relative weight of the opinions of the hand-writing experts was one of the questions in the lower Court, the finding is a mixed one of law and fact. Reliance is placed on 1924 All 116 (1), at pp. 814 and 815 (of 1923 A L J) in which a learned Judge of this Court had to consider the weight of expert medical witnesses in a case of judicial divorce under the Mahomedan law. It was observed:

"It is a finding based on examination and balancing of the opinions and views of experts or of the impressions produced on their minds by what they may have seen, heard, or observed, and as in the case of some specific evidence about custom, the sufficiency of the facts observed or of the inferences or opinions formed can always be examined to ascertain and determine their intrnsic value. The opinions of experts are relevant, but not conclusive as to the matters to which they relate, and where they materially differ, as in this instance, their value and sufficiency, may legitimately form the subject of consideration and scrutiny despite the acceptance of anyone of them by one Court or another."

This observation is valuable as indicating the considerations which should weigh in judging the evidence of experts; but with all respect I am unable to agree that:

"value and sufficiency may legitimately form the subject of consideration and scrutiny."

in a second appeal. The learned Judge refers, probably by way of analogy to the case of custom and assumes that it involves mixed question of law and fact. It has since been held by this Court that a finding on the question of custom is a finding of fact in so far as it records what happened and in so far as it gives weight to the opinion evidence. Moreover, the case before me is not one in which the finding is based solely on the conflicting evidence of experts. There is oral evidence, and an attempt was made by parties to corroborate or to contradict it. I am clearly of opinion that the finding in question is one of fact and cannot be considered in second appeal, which is dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

1. Altafan v. Ibrahim, 1924 All 116=75 I C 502 =1923 A L J 811.

A. I. R. 1935 Allahabad 502

NIAMATULLAH, J.

Abdul Hamid — Judgment-debtor — Applicant.

v.

Firm Shyam Lal Chiman Lal — Decree-holder—Opposite Party.

Civil Revn. No. 483 of 1934, Decided on 25th January 1935, against order of Small Cause Court Judge, Agra, D/- 18th August 1934.

(a) Provincial Small Cause Courts Act (1887), S. 17 — Objection to execution application — No order on merits passed on such objection but objection struck off for default of judgment-debtor — Judgment-debtor can raise same objection by another application—Proviso to S. 17 does not apply nor was order one under S. 47, Civil P. C.

The judgment-debtor objected to an execution application on the ground that the applicant was not competent to apply for execution of the decree; on the date fixed the judgment-debtor was absent but the Court did not dispose of his objection on the merits and did not decide whether the applicant was competent to apply for execution of the decree or not, but passed an order striking off the objection for default:

Held: that his objection had not been dismissed on the merits, and it was open to him to take the same objection by another application instead of applying for the order of dismissal being set aside.

Held also: that the order could not be treated as one under S. 47 and did not amount to a decree.

Held further: that the order in question could in no sense be considered to be an ex parte decree so as to attract the application on the proviso to S. 17, Small Cause Courts Act.

[P 502 C 2; P 503 C 1]

(b) Civil P. C. (1908), S. 47 - Unless some question of nature specified in S. 47 is determined, order is not one under S. 47.

Unless some question of the nature specified in S. 47, Civil P. C., is determined, an order passed in execution proceedings between the parties to the decree cannot be considered to be one under S. 47, Civil P. C. [P 503 C 1]

M. Mahmudullah—for Applicant.

Kamta Prasad Verma — for Opposite Party.

Order.—This is an application for revision of an order passed by the learned Judge of the Small Cause Court at Agra. It seems to me that the applicant and the lower Court have acted under a misapprehension as regards the law applicable to the circumstances of the case. The applicant was the judgment-debtor in certain execution proceedings in the lower Court taken at the instance of one Nawal Kishore. The original decree-holder had died and Nawal Kishore applied for execution of the decree. The judgment-debtor objected on the ground that Nawal Kishore was not competent to apply for execution of the decree. The case was fixed for 7th April 1934, when the applicant was absent. The Court did not dispose of his objection on the merits and did not decide whether Nawal Kishore was competent to apply for execution of the decree or not, but passed an order "striking off the objection for default." A few days later, the judgment-debtor made an application purporting to be one under Ss. 141 and 151, Civil P. C., and praying that his objection dismissed for default be restored. He made certain allegations as regards the circumstances in which he was not present on 7th April 1934, when his objection was dismissed. The learned Judge did not decide the questions raised by the application and dismissed it on the preliminary ground that no security was furnished, as required by the proviso to S. 17, Small Cause Courts Act. The present application is for revision of the last mentioned order.

The learned counsel for the applicant contends that the proviso to section 17, Small Cause Courts Act, applies only to cases in which a defendant, against whom an ex parte decree has been passed, applies for an order to set aside the ex parte decree, and that it does not apply to cases in which ex parte orders have been passed in miscellaneous proceedings. The lower Court seems to have been of opinion that as the order, dated 7th April 1934, was one under S. 47, Civil P. C., and therefore a decree, the proviso to S. 17, Small Cause Courts Act, is applicable, and no application for an order to set aside the decree (that is, the order under S. 147), is maintainable without security being furnished.

The applicant appears to have laboured under the misapprehension that, unless the order dismissing his objection for default be set aside, he is not entitled to press his objection. This was a mistaken view. His objection had not been dismissed on the merits, and it was open to him to take the same objection by another application instead of applying for the order of dismissal being set aside. His objection had not been decided on the merits, and there was nothing in the order of 7th April 1934, to prevent him from pressing the same objection again. There being no adjudication no question of res judicata can arise. It should be noted that the provisions

of O. 9, Civil P. C., are not applicable to execution proceedings.

The lower Court was wrong in treating its order of 7th April 1934, as an order under S. 47. By that order no question arising between the parties to the suit in which the decree had been passed and relating to the execution discharge or satisfaction of the decree was determined. It could not therefore be an order under S. 47, Civil P. C., and cannot amount to a decree. Unless some question of the nature specified in S. 47, Civil P. C., is determined, an order passed in execution proceedings between the parties to the decree cannot be considered to be one under S. 47, Civil P. C. Assuming that the position of the applicant was that of a defendant, the order in question can, in no sense, be considered to be an ex parte decree so as to attract the application of the proviso to S. 17, Small Cause Courts Act. It is unfortunate that a simple case like this should have become so controvertial as to necessitate a revision. A little consideration of the legal aspect of the matter by the applicant and by the lower Court would have materially shortened the proceedings. The application is allowed, the order of the lower Court is set aside, and the case is sent back to that Court for disposal according to law. Parties shall bear their own costs in this Court.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 503 (1)

Special Bench

THOM, BENNET AND IQBAL AHMAD, JJ.

An Advocate High Court, Allahabad, In the matter of.

Civil Misc. Case No. 451 of 1934, Decided on 29th October 1934.

Practice — High Court attaches great weight to findings of fact of Bar Council.

To the findings of fact of a committee of the Bar Tribunal the High Court usually attaches great weight. [P 503 C 1]

Order.—Several charges in which Mr. R. advocate, was charged with professional misconduct were remitted by the High Court to the Bar Council for investigation. The Bar Council held an enquiry and have now reported that in their opinion upon the evidence led before them the charges have been unsubstantiated. This is a finding of fact and to findings of fact of a committee of the Bar Tribunal the High Court usually attaches great weight. One of us is not satisfied that the findings of fact of the Bar Council in the present case are absolutely correct, but we are in agreement that there being no objections to the findings those findings should be accepted by this Court.

In the result we accept the findings of the Bar Council. Let the papers be filed.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 503 (2)

BAJPAI, J.

Ewaz Singh—Plaintiff—Appellant.

v.

Rani Dan Kuar — Defendant—Respondent.

Second Appeal No. 1159 of 1932, Decided on 21st December 1934, from decision of Dist. Judge, Mainpuri, D/- 19th May 1932.

(a) Agra Tenancy Act (1926), S. 271—There is no irrebuttable presumption in favour of person recorded as co-sharer.

There is no irrebuttable presumption under S. 271 that a person whose name is recorded as a cosharer has proprietary rights. [P 504 C 1]

(b) Agra Tenancy Act (1926), S. 271—Question of proprietary title raised before Revenue Court—Issue should be remitted to civil Court—Finding of civil Court is binding on Revenue Court.

Section 271 is quite clear and when a question of proprietary title is raised before a Revenue Court, the proper procedure is to remit an issue to the Civil Court and the finding of the Civil Court will be binding on the revenue Court but not on the Appellate Court. [P 504 C 1]

Shiva Prasad Sinha—for Appellant.

N. P. Asthana and *B. N. Sahai*—for Respondent.

Judgment.—This is an appeal by the plaintiff whose suit has been dismissed by the lower appellate Court. The facts are that he brought a suit for profits against Thakurain Dan Kuer for the years 1332, 1333 and 1334 fasli on the allegation that he the plaintiff and Thakur Drigpal Singh, the husband of Tharkurain Dan Kuer, were joint usufructuary mortgagees of certain property, but Drigpal Singh, realised the entire profits during his lifetime and his widow realised the rest of the profits after the death of Drigpal Singh during the years in suit.

It was pleaded by the defendant, Thakurain Dan Kuer, that the plaintiff, Ewaz Singh, was not entitled to any portion of the mortgagee rights although his name was included as a mortgagee. The suit was brought in the Revenue Court but upon this plea being raised by the defendant the Re-

venue Court remitted an issue to the civil Court under the provisions of S. 271, Agra Tenancy Act, Local Act 3 of 1926. The civil Court decided in favour of the right of the plaintiff and the Revenue Court accepting that finding proceeded to determine the plaintiff's share of the profits and decreed the suit for a sum of Rs. 517, with interest and proportionate costs. The defendant went in appeal to the learned District Judge and under the provisions of S. 271, Sub-S. 4, Cl. (a) the issue decided by the learned Subordinate Judge and accepted by the Revenue Court became appealable before the District Judge and the lower appellate Court proceeded to discuss the evidence on the point. It came to the conclusion. that:

"The entire consideration of the mortgage was advanced by Drigpal Singh and not even a Small portion of it was paid by Ewaz Singh, the respondents."

It therefore held that the plaintiff had no proprietary interest in the mortgagee rights and dismissed the plaintiff's suit. In second appeal it is contended before me that as the plaintiff's name was recorded as a co-sharer, there was an irrebutable presumption in favour of the plaintiff so far as the Revenue Court was concerned, and reliance was placed on certain cases which proceeded upon a consideration of S. 201, Cl. 3, of the former Tenancy Act. There is no force in this contention because under the altered state of law, as is to be found in the provisions of S. 271, Agra Tenancy Act, there is no irrebuttable presumption in favour of the plaintiff and the rulings relied on by learned counsel for the appellant are no longer good law. S. 271 is quite clear and when a question of proprietary title is raised before a Revenue Court, the proper procedure is to remit an issue to the civil Court and the finding of the civil Court will be binding on the Revenue Court but not on the appellate Court. The finding of the lower appellate Court is a finding of fact and cannot be questioned in second appeal. I dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 504

BENNET, J.

Haider and *another*—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 853 of 1934, Decided on 18th December 1934, from order of Sess. J. Bijnor, D/- 5th September 1934.

Penal Code (1860), Ss. 304, and 34—Two accused having common intention to beat deceased's party—Death caused by a blow—Both are responsible under Ss. 304, and 34.

The two accused had the common intention of beating the party of which the deceased was a member. The deceased died as a consequences of a blow struck in the beating. [P 505 C 2]

Held: that both the accused were responsible under Ss. 304 and 34, I P C: 1933 *All* 528; *Relon*; 1918 *All* 420, *Ref*; 40 *All* 103=1918 *All* 209=43 *I C* 438 *Held* **Overruled**. [P 505 C 2]

Govt. Pleader - for the Crown.

Judgment.—This is a jail appeal by two persons, Haidar and Muzaffar who were charged under S. 304, Penal Code, with causing the death of one Hidayat Ullah and who were convicted by the learned Sessions Judge under S. 352, Penal Code, and sentenced to two years' rigorous imprisonment each and a fine of Rs. 150 each. The prosecution case sets out that the houses of the accused adjoin the house of the deceased. Hidayat Ullah, and that a quarrel arose between the parties in regard to certain constructions. On 28th May 1934 at sunset there was a dispute which arose by abuse being exchanged by one Mt. Lali and was followed by abuse between Niaz Ullah and the two accused and the accused beat Niaz Ullah with lathis and also hit Mt. Lali. Hidayat Ullah at this stage interfered by going upon his roof where the dispute was taking place and he was struck by the accused with lathis and fell down unconscious. After this Alladia was beaten by the accused and Mt. Umdi received a blow and the accused were then struck by Niaz Ullah as they were departing. A report was made on the night of 28th and 29th May, after midnight without delay as the thana was 9 miles away and the injured persons, including the unconscious Hidayat Ullah, were taken to the thana. The prosecution case is put forward in the report. Hidayat Ullah died in hospital on the evening of 29th May. Various witnesses were put forward for the prosecution whom the learned Judge finds to have been more or less connected with the family of the deceased. One witness who was independent was not named in the report.

The accused admitted that there had been a quarrel on the occasion and said that the quarrel had taken place on the roof of the deceased and that Niaz Ullah, Hidayat Ullah and Alladia attacked them with lathis and they defended themselves. They said that the injury on the head of Hidayat Ullah was caused by a lathi blow of Niaz Ullah which struck Hidayat Ullah by mistake. The Court has held that the story of the accused is not established and that the story of the prosecution is correct. I see no reason to differ from that conclusion and on that finding the Sessions Court should have convicted the accused. The Court also found that the medical evidence showed that they were six simple injuries on each of the accused and that the injuries must have been received in a lathi fight between the parties but that the accused were aggressors. I see no reason to differ from this finding of the Sessions Court. On this finding I consider that the conviction should been under S. 304, Penal Code. The learned Sessions Judge Mr. F. Rustomji held that on the strength of a number of Punjab rulings he was bound to convict under S. 325, Penal Code, and not under S. 304, Penal Code. His proposiition is:

"where a man receives only one blow on the head and dies and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two can be convicted under S. 304, Indian Penal Code, but both of them can be convicted of an offence under S. 325, Indian Penal Code"

The medical evidence here shows that Hidayat Ullah died from a fractured skull caused by a lathi blow on the head and that there was one external wound on the head and no other injuries were mentioned in the post mortem examination or in the evidence. The other persons on the side of the deceased also had injuries. There was therefore a common intention on the part of the accused to beat the opposite party with lathis. The view of the Court was at one time put forward in a certain ruling of this Court 1918 All 209 (1). That ruling was overruled by a ruling of a Bench of this Court in 1918 All 420 (2). The view that S. 304 applies to a case of this kind is also held in a ruling reported in 1933 All 528 (3). In that case there were four accused persons, one of whom had a gun and he shot and killed the deceased.. The three remaining accused persons had lathis. The person who fired the shot was convicted under S. 302, Penal Code, and the other three persons were convicted under Ss. 302-34, Penal Code, on the finding that all must have known that the gun might be used in furtherance of a common intention of all accused. In the present case the two accused had the common intention of beating the party of which the deceased was a member. The deceased died as a consequence of a blow struck in that beating. Both the accused are therefore responsible under Ss. 304 and '34, Penal Code. On this view of the case, the sentence which has been imposed ot two years' rigorous imprisonment and a fine of Rs. 150 each is not excessive. Accordingly I dismiss this appeal.

K.S. *Appeal dismissed.*

1. Chandan Singh v. Emperor, 1918 All 209=43 I C 438=19 Cr L J 150=40 All 108.
2. Emperor v Gulab. 1918 All 420=47 I C 805=19 Cr L J 953=40 All 686.
3. Irshad Ullah Khan v. Emperor, 1933 All 528 =146 I C 264=34 Cr L J 1234=55 All 607.

A. I. R 1935 Allahabad 505

Full Bench

SULAIMAN, C. J., KENDALL AND BAJPAI, JJ.

Lallu Singh—Defendant—Appellant.

v.

(*Lala*) *Chander Sen*—Plaintiff—Respondent.

Second Appeal No. 10 of 1932, Decided on 20th February 1935, from decision of Dist. Judge, Bulandhahr, D/- 16th November 1931.

Agra Tenancy Act (1926), S. 225—Court is bound to give 12 per cent interest only up to date of suit—Interest pendente lite and future is governed by Civil P. C. (1908), S. 34.

Under the provisions of S. 225, a cosharer is entitled to claim interest at the rate of 1 per cent mensem. The Court is therefore bound to award him interest at a 12 per cent annum up to the date of the suit. As regards the interest pendente lite and future, the case is governed by S. 34, Civil P. C. which is applicable to suits in the revenue Court as well and under that section, in addition to any interest adjudged on the principal sum for any period prior to the institution of the suit, the Court may order insterest at such rate as it deems reasonable to be paid on the principal sum adjudged rom the date of the suit to the date of the decree, as well as further interest from the date of the decree till the date of realisation. It is therefore incumbent on the Court to fix rates for pendente lite and further interest if it decides to award such interest; but it is not obligatory on the Court to award interest at the rate of 12 per cent per annum, just as it is not obligatory on a Court to award pendent lite

and future interest at the contractual rate in case of simple money debts: 1932 *All* 178 *Expl.*

[P 506 C 2]

Shiva Prasad Sinha—for Appellant.

A. M. Khwaja—for Respondent.

Sulaiman, C. J.—This is a defendant's appeal arising out of a suit for profits under S. 226, Agra Tenancy Act. The facts are fully set forth in the order dated 22nd November 1933, which is reported in 1934 All 155 (1). Before remanding certain issues it was decided by the Full Bench that the plaintiff as assignee of the profits for 1334 F was entitled to maintain the suit against the lambardar and also that such a suit lay in the Revenue Court. It was further held that the defendant can claim adjustiment on account of any decree held by him in respect of any payment of Government revenue made during the year 1334 F, but not earlier. It was also laid down that when an ostensible purchaser who is not a bona fide purchaser and has simply lent his name to a debtor to be used as a cloak for the property, brings a suit to enforce the debtor's claim, it is open to a creditor of the debtor to prove the nature of the transfer, and that the suit can be regarded as a suit instituted by the debtor herself through her benamidar. The further question whether if the transfer was not a sham and bogus transaction, but had really passed property though it was effected in order to defeat or delay creditors and was therefore fraudulent in that sense, the defendant can still be allowed to defeat the plaintiff's claim on the ground that the transfer is not binding upon him, was not decided. And as the facts had not been clearly found, issues were sent down to the lower appellate Court for fresh findings.

The lower appellate Court has now found that Rs. 527-15-0 was the amount of the Government revenue paid by the lambardar on account of the plaintiff's share in the year 1334 F; and therefore the defendant is undoubtedly entitled to claim a deduction of this amount from the principal sum of Rs. 696, which was the share of the profits of the assignor of the plaintiff in that year. The learned advocate for the plaintiff urges before us that that he is entitled to support the decree of the lower appellate Court on the ground that the amount should not be reduced inasmuch as the plaintiff should be given interest at the rate of 1 per cent per mensem pendente lite, and not only 6 per cent per annum which was allowed by the trial Court. No doubt the plaintiff was entitled to support the decree on such a ground if valid. But the trial Court had fixed only 6 per cent per annum as the rate of pendente lite and future interest and no objection was taken in the lower appellate Court to this rate, although the lower appellate Court actually reduced the amount decreed to the plaintiff. No cross-objections were filed in this High Court in respect of the lower rate of interest.

The learned advocate for the plaintiff relies on the case of 1932 All 178 (2), for the proposition that the plaintiff is entitled to get simple interest at the rate of 1 per cent per annum on his share of the net profits from the date when they became divisible till actual realisation. No doubt in that case, having regard to the circumstances there present, such a rate of interest was allowed instead of allowing to the plaintiff the principal sum with interest at 12 per cent per annum up to the date of the suit and pendente lite and future interest at 6 per cent per annum on the consolidated amount. But it was nowhere laid down in that case that the plaintiff cosharer is entitled as of right to recover interest at 12 per cent per annum on the principal amount of profits from the date when they accrued till the date of realization. Under the provisions of section 225 a cosharer is entitled to claim interest at the rate of 1 per cent per mensem. The Court is therefore bound to award him interest at 12 per cent per annum up to the date of the suit. As regards the interest pendente lite and future, the case is governed by S. 34, Civil P. C., which is applicable to suits in the Revenue Court as well, and under that section, in addition to any interest adjudged on the principal sum for any period prior to the institution of the suit, the Court may order interest at such rate as it seems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, as well as further interest from the date of the decree till the date of realization. It is therefore incumbent on the Court to fix rates for pendente lite and future interest if it decides to award such interests; but it is not obligatory on the Court to award interest at the rate of 12 per cent per annum, just as

1. Lallu Singh v. Chander Sen, 1934 All 155=147 I C 937=56 All 624 (F B).

2 Mohammad Abdul Jalil Khan v. Mohammad Abdus Salam Khan, 1932 All 178=137 I C 166.

it is not obligatory on a Court to award pendentelite and future interest at the contractual rate in case of simple money debts. In 1932 All 178 (2), the particular method of calculating interest was chosen because there were altogether 34 appeals between the parties which were conveniently to be disposed of on some common principle. It was not intended to be laid down there that in every case a plaintiff is entitled as of right to claim interest at the rate of 1 per cent per mensem even after the institution of the suit. In the circumstances of the present case we do not think that we should award to the plaintiff interest at 12 per cent per annum pendente lite.

The next point whether the defendant can take advantage of the principle underlying S. 53, T. P. Act, against the plaintiff assignee of the profits by showing that the transfer was with intent to defeat and delay her creditors does not arise, because of the clear finding of fact by the lower appellate Court that in the present case there is absolutely nothing to show that the present plaintiff had colluded with his assignor to defraud the appellant by getting the profits sold to him fictitiously, or even that he had any knowledge that his assignor wanted to defraud any of her creditors by making the transfer to him. We do not think that the lower appellate Court has placed the burden of proof wrongly on the defendant-appellant. He is not invoking the provisions of S. 53, T. P. Act, in terms, but is seeking the aid of the principles of justice, equity and good conscience which cannot be applied unless the facts are fully established by him.

We would accordingly allow this appeal in part, and modify the decree of the lower appellate Court in this way, that we order that a sum of Rupees 527-15-0 be first deducted from the principal sum of profits of Rs. 696, leaving a balance of Rs. 168-1-0, and that the plaintiff should have interest at 12 per cent per annum on this balance from 1st August 1927, till 17th September 1927, and thereafter at 6 per cent per annum on the consolidated amount till the date of realization or till the date of the deposit in the Court below, if made in this case. Parties will receive and pay costs in proportion to success and failure in all Courts.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 507

NIAMATULLAH, J.

Hurmat Singh—Objector—Appellant.

v.

Ganga Narain and *others*—Decree-holders—Respondents.

Ex. Second Appeal No. 1292 of 1934, Decided on 30th January 1935, from order of Dist. Judge, Cawnpore, D/- 23rd July 1934.

*** Hindu Law—Debts—Suit on mortgage of joint family property executed by father—Mortgage found to be invalid to certain extent and simple money decree for such amount passed against father—Creditor can attach and sell mortgaged property in execution of simple money decree—O. 34, R 14 is no bar—Civil P. C. (1908), O. 34, R. 14.**

Where a suit is brought on a mortgage on joint family property executed by the fa her and the mortgage is found to be not for legal necessity to a certain extent and the mortgage is declared invalid but a simple money decree for such amount is passed against the father, the decree-holder can in execution of the decree so obtained attach and sell the property covered by the mortgage and O. 34, R. 14 is no bar to his so doing. If the mortgage property is sold in execution of a simple money decree, the auction-purchaser will take it subject to the charge, so far as it has been held to be valid. The two debts are now separate and distinct: 1928 *All* 596 *Expl*; 1924 *P C* 50, *Ref.* [P 508 C 2]

G. S. Pathak—for Appellant.

Judgment.—This is an execution of decree appeal from the order of the learned Additional District Judge, Cawnpore, disallowing the appellant's objection to attachment of certain property belonging to a joint family consisting of the appellant and his father. The respondents obtained a mortgage from the appellant's father for a certain sum of money, charged on the joint family property. Subsequently he instituted a suit for enforcement of that mortgage, impleading the father. The son was made a party on his own application and put the mortgagee to proof of legal necessity for the mortgage money. Part of the sum advanced under the deed was found to have been taken for necessary purposes. For such part a decree for sale of the mortgaged property was passed. As regards the remaining part of the consideration of the mortgage, the Court held that the mortgage was invalid. A simple money decree was however passed for that amount against the father personally. The decree-holder applied for execution of such simple money decree by attachment and sale of the property which had been hypothecated under the mortgage. The

son objected on the ground that the mortgage having been declared to be invalid so far as the amount sought to be recovered by attachment was concerned, their family property could not be sold for satisfaction thereof. The trial Court allowed the objection. On appeal by the decree-holder the lower appellate Court took a contrary view and disallowed the objection. The present appeal is from the last mentioned order.

The learned advocate for the appellant contends, to set aside the mortgage but to allow the same debt to be recovered by sale of the same property is an anomaly. There is no doubt that the anomaly exists; but it is equally undeniable that it arises from well recognised principles of Hindu law. In the absence of legal necessity or other justifying cause, the father cannot alienate or charge family property, and the sons can have the alienation set aside. The sons are however bound to pay the debts of the father, unless tainted with immorality, and the holder of a simple money decree against the father can attach the entire joint family property in execution of that decree. The appellant in this case successfully impeached the mortgage so far as it was for the amount now in dispute. The charge created by the father in respect of this amount has already been declared to be invalid. The simple money decree against the father in respect of it is binding on the father and can be executed by attachment of the joint family property belonging to him and the sons. It was argued before me that the Full Bench case of 1928 All 596 (1) is an authority for the proposition that the debt, which was originally secured, is not such a debt of the father as would justify attachment and sale of the father's property. That case is, to my mind, no authority for any such proposition. In that case, a mortgage decree for sale had been obtained against the father in a suit to which sons were no party. No simple money decree had been obtained against the father. Subsequently, in execution proceedings, the question arose whether the sons were bound to pay the debt, assuming there was no legal necessity for the same, incidentally the question arose whether the word "debt" occurring in the second proposition enunciated by their Lordships of the Privy Council in 1924 P C 50 (2), included secured debt or was limited to unsecured debt. There was some difference of opinion on that question, which was however immaterial for the disposal of the case before the learned Judges composing the Full Bench. There is nothing in that case which can support the proposition contended for in the present case.

It is next contended that the decree-holder cannot proceed against the property hypothecated under the mortgage deed, and reliance is placed on O. 34, R. 14, Civil P. C., which provides that:

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage and he may institute such suit, notwithstanding anything contained in O. 2 R 2."

It is clear to me that the debt, for which a simple money decree has been passed, is not in satisfaction of a claim arising under the mortgage, because the mortgage has been declared to be invalid so far as that amount is concerned. The claim arises not from the mortgage, but from the father's liability to pay to his creditor what had been borrowed by him. The section clearly contemplates a case in which it is open to the creditor to obtain the same relief by enforcement of the mortgage and he deliberately refrains from doing so. In such a case, the law makes it imperative that he should seek his remedy by enforcement of the mortgage. The rule obviously can have no application where the mortgage is not enforceable. I hold that O. 34, R. 14, is no bar to the decree-holder obtaining satisfaction of his decree by attachment and sale of the property covered by the mortgage deed. If the mortgaged property is sold in execution of a simple money decree, the auction-purchaser will take it subject to the charge, so far as it has been held to be valid. The two debts are now separate and distinct.

The result is that the appeal fails and is dismissed under O. 41, R. 11, Civil P. C.

Leave to appeal under the Letters Patent is asked for but is refused.

K.S. *Appeal dismissed.*

1. Jagdish Prasad v. Hoshyar Singh, 1928 All 596=115 I C 775=51 All 137 (F B).

2. Brij Narain v. Mangla Prasad, 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

A. I R. 1935 Allahabad 509

SULAIMAN, C. J. AND BENNET, J

Lal Girwar Lal — Plaintiff — Appellant.

v.

Dau Dayal — Defendant — Respondent.

Second Appeal No. 1057 of 1931, Decided on 6th February 1935, from decision of Addl. Sub-Judge, Agra, D/- 23rd April 1931.

Negotiable Instruments Act (1881), S. 118—Promissory note or bond—Suit for consideration lent—Defendant not clearly admitting execution—Plaintiff failing to prove consideration—Held he is not entitled to decree and cannot take advantage of weakness in defendant's evidence.

Plaintiff sued for recovery of Rs 700, with interest and co-ts, stated to have been borrowed by the defendant from the plaintiff and to be payable on demand. The plaint asserted that after taking the loan, the defendant made over two writings to the plaintiff for his satisfaction which are hereto annexed. The plaintiff filed a document purporting to be a promissory note attested by witnesses and a receipt of the same date. The defendant denied that he had executed any promissory note in favour of the plaintiff and pleaded that the document filed by the plaintiff had been obtained from him by practising fraud, and also denied the passing of any consideration. The plaintiff led evidence in the first instance and defendant produced rebutting evidence. The Court disbelived the plaintiff's evidence and also considered that the defendant's witnesses were not worthy of belief, and as the plaintiff failed to prove that the money had been lent to the defendant, the Court dismissed the suit.

Held: that where the Court has after a consideration of the entire evidence recorded a clear finding one way or the other, then the finding is based not on a mere presumption but on the evidence, and has to be accepted. The decree was proper and the plaintiff therefore could not be allowed to take advantage of the weakness in the defendant's evidence that the want of consideration had not been satisfactorily establish ed, when his suit was professedly not based on the bond. [P 501 C 2]

G. Agarwala and *B. Malik*—for Appellant.

S B. L. Gaur—for Respondent.

Sulaiman, C. J.—This is a plaintiff's appeal arising out of a suit for recovery of Rs. 700 with interest and costs, stated to have been borrowed by the defendant from the plaintiff and to be payable on demand. The plaint asserted that:

"after taking the loan, the defendant made over two writings to the plaintiff for his satisfaction which are hereto annexed."

The plaintiff filed a document purporting to be a promissory note attested by witnesses and a receipt of the same date. The defendant denied that he had executed any promissory note in favour of the plaintiff and pleaded that the document filed by the plaintiff had been obtained from him by practising fraud, and also denied the passing of any consideration. The plaintiff led evidence in the first instance and the defendant produced rebutting evidence. The lower appellate Court has disbelieved the plaintiff's evidence and has also considered that the defendant's witnesses are not worthy of belief. As the plaintiff failed to prove that the money had been lent to the defendant, the lower appellate Court has dismissed the suit.

The appeal was referred to a Division Bench because of an apparent conflict of opinion on the question whether where the plaintiff has led evidence in the first instance to prove the consideration for a promissory note and has failed to establish the passing of consideration, he can fall back on the initial presumption in his favour. On this point the latest ruling of this Court in 1935 All 154 (1), is in favour of the plaintiff. In that case the execution of the promissory note having been admitted by the defendant and the passing of the consideration denied plaintiff could still avail himself of the presumption under S. 118 (a), even though the evidence produced by both the parties had not been believed by the Courts. This view is in accord with the previous rulings of this Court in 11 I C 761 (2), 1914 All 232 (3) and 1932 All 164 (4). The learned counsel for the respondents however relies on 1915 All 228 (5), in which there are certain remarks which may be construed to amount to an expression of the view that where the plaintiff has chosen to open the case and lead evidence as to the passing of consideration and the Courts have disbelieved that evidence, the presumption arising in favour of a negotiable instrument with regard to the passing of consideration would not hold good. It is not clear whether the learned Single Judge meant to express that opinion clearly: if so, we would not be prepared to agree with that view. Possibly in that case the Courts were satisfied on the entire evidence that some con-

1. L. Ram Nath v. Lala Ram Chandra Mal, 1935 All 154.
2. Muhammad Tahir v. Raghubir Dayal, (1911) 11 I C 761.
3. Jamna Das v. Uma Shanker, 1914 All 232=25 I C 158=36 All 303.
4. Jagmohan Misir v. Mendhai Dube, 1932 All 164=135 I C 241=54 All 375.
5. Kishen Ballabh v. Ghure Mal, 1915 All 223==28 I C 390.

sideration had passed. In 1923 All 214 (6). it was laid down that in a case where consideration is denied and the plaintiff goes into the witness-box. and the result of his cross-examination is such that he fails to establish the point which he set out to make namely, that he gave the consideration, and the Court is satisfied that he did not give the consideration, the defendant can avail himself of that. We are not satisfied that it was meant to be laid down in that case that where the plaintiff merely fails to prove that consideration passed and the defendant also fails to prove that he did not give consideration, there is no presumption in favour of the plaintiff. Very probably in that case the Court had come to the conclusion that some consideration had passed because the learned Judge observed:

"and the Court is thus satisfied that he did not give the consideration which he alleges."

The Court is certainly entitled to record a categorical finding on the question of the passing of consideration of the entire evidence produced by both the parties. The case of 1924 All 256 (7), may be distinguishable because there the plaintiff had gone back on the recital in the negotiable instrument and had admitted that at least part of the consideratiion had not been paid in cash. The learned Judges especially emphasised this fact and remarked:

"As the case now stands the plaintiff himself has gone back on the recital in the promissory note to the effect that Rs. 8000 were paid over in cash."

As in the present case there is no such going back, we are not called upon to consider the bearing of this ruling on this case, although it may be pointed out that S. 118, Negotiable Instruments Act, does not speak of any cash consideration. The case of 1930 All 568 (8), has no application because there the presumption under S. 118, Negotiable Instruments Act, was applied, but it was held that that presumption had been rebutted by the evidence in the case.

It seems to us that under O. 18, R. 3. Civil P. C. Where there are several issues, the burden of proving some of which lies on the plaintiff, he can "at his option" either produce his evidence on those issues in the first instance or reserve it by way of answer to the evidence produced by the other party. The exercise of the first of these options does not in any way involve an admission on the part of the plaintiff that he is undertaking the burden of proving that issue, although that burden lies on the defendant. Section 118, Negotiable Instruments Act, is imperative and the Court is bound to draw the initial presumption that every negotiable instrument was made for consideration, when its execution is admitted. Similarly S. 102, Evidence Act, throws the burden of proving want of consideration on the defendant, for if no evidence was produced by either side and the execution of the document being admitted, the plaintiff's claim would be decreed. But where the Court has after a consideration of the entire evidence recorded a clear finding one way or the other, then the finding is based not on a mere presumption, but on the evidence, and has to be accepted.

In the present case the main difficulty in the way of the plaintiff is that he was conscious of the fact that the ostensible promissory note which had been attested by witnesses either before or after the execution was a bond and not a promissory note, or that it had been tampered with. Again, the receipt was under stamped and could not be accepted without being impounded. In the face of these difficulties the plaintiff chose to bring a suit for the recovery of the amount advanced as a loan and admitted that the documents were handed over to him "after the taking of the loan." Furthermore it is not at all clear that the defendant had clearly admitted the execution of the promissory note or the bond in question in the strict sense of the word. He had admitted his signature on the document, but had qualified his admission by saying that the signature had been obtained by means of fraud. We therefore do not think that in this particular case the plaintiff should now be given a decree for the amount when the Court below has recorded a clear finding that he has failed to prove that money was lent in the defendant. He cannot be allowed to take advantage of the weakness in the defendant's evidence that the want of consideration had not been satisfactorily established, when his suit is professedly not based on the bond.

The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

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6. Md. Shafi Ali Khan v. Mahomo Moazzam Ali Khan, 1923 All 214=67 I C 634.
7. Shambhu Dayal v. Lallu Mal, 1924 All 256=80 I C 717.
8. Singar Kunwar v. Basdeo Prasad, 1930 All 568=124 I C 717.

A. I. R. 1935 Allahabad 511

GANGA NATH, J.

Niader Singh—Plaintiff—Appellant.

v.

Ram Chander and *others*—Defendants—Respondents.

Second Appeal No. 158 of 1932, Decided on 24th January 1935, from decision of Sub-Judge, Merrut, D/- 12th November 1931.

Transfer of Property Act (1882), Ss. 66 and 68— Mortgage — Covenant against lease— Existence of such covenant cannot entitle mortgagee to claim rights other than those necessary for maintenance of his security— Mortgagor in possession is entitled to lease properly permanently irrespective of its effect on mortgage provided it is not injurious to property so as to render security insufficient.

A covenant against a lease in a mortgage deed cannot put the mortgagee in a better position as regards his rights which are laid down in Ss. 66 and 68 of the Act. The existence of a covenant in the mortgage deed cannot entitle the mortgagee to claim rights other than those which are necessary (according to the nature of the mortgage) for the maintenance or enforcement of his security for re-payment of the mortgage debt, the sole object of the contract. Hence a mortgagor in possession is entitled to lease out the mortgaged property permanently irrespective of its effect on the mortgagee provided it is not destructive or permanently injurious of the property so as to render the mortgagee's security insufficient and the purchaser of the property in execution of the mortgage decree is not entitled to turn the lessee out: 1928 *Pat* 238, 4 *All* 518; *Rel on.* [P 512 C 1]

Panna Lal—for Appellant.

S. N. Gupta—for Respondents.

Judgment.—This is a plaintiffs' appeal and arises out of a suit brought by them against the defendants-respondents for a declaration that the lease executed by Harbans Singh, defendant 3, in favour of Ram Chandar and Ram Das, defendants 1 and 2 and Bakhtawar, brother of defendants 1 and 2, on 5th September 1917, in respect of the plots in mouza Kharkhanda described in the plaint was ineffectual and not binding on the plaintiffs. Harbans Singh, defendant 3, had executed a mortgage of the property in village Kharkhanda and other property in other villages in favour of Kanhaiya Lal on 5th September 1902, Harbans Singh executed subsequently another mortgage in favour of the plaintiffs on 26th February 1913. After the two mortgages Harbans Singh executed a permanent lease of 7 bighas and 18 biswas of land in village Kharkhanda in favour of Ram Chander and Ram Das, defendants 1 and 2. The heirs of Kanhaiya Lal, who is dead brought a suit and obtained a decree on the basis of their mortgage. The mortgaged property in village Kharkhanda was put up for auction and sold, and purchased by the plaintiffs for Rupees 20,000. For the balance of the mortgage money the other mortgaged property which was in other villages was sold and after satisfying the balance, a surplus of about Rs. 1,309 was left. After the decree of the heirs of Kanhaiya Lal, the plaintiffs also obtained a decree on the basis of their mortgage on account of which they realised Rs. 1,049 out of the surplus money. The plaintiffs have now brought this suit for a declaration that the lease referred to above was ineffective, void and not binding on them. The defendants contended that the lease was valid, that its terms were fair and reasonable, that there was no ground for setting it aside, that the plaintiffs were only the auction-purchasers and had no subsisting rights of the mortgagees and that the lease was binding on them.

The trial Court framed an issue as regards the reasonableness of the rent and recorded a finding that the rent was not low but was reasonable. The plaintiffs' own evidence shows that the rent prevalent in the village was Rs. 7 or Rs. 8 per bigha and even less. The rent of the lease in suit worked out at Rs. 9-8-0 per bigha. No collusion or fraud as regards the lease was proved. The trial Court dismissed the suit. The decree of the trial Court was confirmed in appeal by the learned Subordinate Judge of Meerut. The only question in this appeal is how far the lease is valid and binding on the plaintiffs. The mortgage was simple and the mortgagor remained in possession of the mortgaged property. In the case of non-possessory mortgage a mortgagor remains the owner of the property with every right to manage his property in the manner he thinks proper and suitable. There was some doubt as regards the mortgagor's power to grant leases after having made non-possessory mortgages but this doubt has been removed now by S. 65 (a), T. P. Act. S. 65 (a), T. P. Act, lays down that:

"Subject to the provisions of sub-S. (2), a mortgagor while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee."

Sub-Clause (a) lays down that:

"Every such lease shall be such as would be made in the ordinary course of management of

the property concerned, and in accordance with any local law, custom or usage."

Clause (b) lays down that:

"Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance."

Clause (3) lays down that:

"The provisions of Sub-S. (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed,"

If there is no covenant in the mortgage deed contrary to the mortgagor's power of giving a lease, the lease would be binding on the mortgagee; but if there is a covenant in the mortgage deed against the grant of a lease, the lease will not be binding on the mortgagee. Whether there be any covenant or not a mortgagor in possession of the mortgaged property cannot commit any act which is destructive or permanently injurious thereto if the security is insufficient or will be rendered insufficient by such act as has been laid down in S. 66, T. P. Act. The mortgagee cannot complain unless his security is or is likely to be diminished to the extent stated in the explanation in S. 66, T. P. Act. If the mortgagor commits any such act as diminishes the security, the remedy of the mortgagee is under S. 68, T. P. Act. He can ask the mortgagor to give additional security or can sue him for his mortgage money but so long as the mortgagee's security is not rendered insufficient, as already stated, the mortgagee has no right to complain against any act done by the mortgagor. A covenant against a lease in a mortgage deed cannot put the mortgagee in a better position as regards his rights which are laid down in Ss. 66 and 68, T. P. Act. The existence of a covenant in the mortgage deed cannot entitle the mortgagee to claim rights other than those which are necessary (according to the nature of the mortgage) for the maintenance or enforcement of his security for re-payment of the mortgage debt, the sole object of the contract. This proposition is not without authority. In 4 All 518 (1), at p. 524, Mahmud, J., said:

"I am quite prepared to hold that any alienation by the mortgagor, which infringes upon or is capable of doing injury to the rights of the prior mortgagee is not binding upon him, and he may sue to set it aside. But this in my judgment follows more from the rule of law than from any express covenant in the mortgage-deed. The rights of a mortgagee holding a mortgage with covenant or without covenant against alienation cannot be injured by any act of the mortgagor subsequent to the mortgage, and the mere existence of such covenant cannot entitle the mortgagee to claim rights other than those which are necessary (according to the nature of the mortgage) for the maintenance or enforcement of his security for re-payment of the mortgage debt, the sole object of the contract. I am therefore of opinion, that transfers made in breach of covenants against alienation covenants so often introduced in mortgage-deeds and so often infringed by mortgagors in this country are valid except in so far as they encroach upon the rights of the prior mortgagee, and that, with this reservation such covenants do not bind the property so as to prevent the acquisition of a valid title by the aliene."

Section 66 instead of rendering all alienations made in derogation of the rights of the mortgagee invalid prescribes the limits within which the mortgagor's transfer would be upheld. If the acts of the mortgagor render the security insufficient but not so insufficient as to diminish the ready but dimly foreshadowed by S. 66, T. P. Act, the mortgagee may protect himself under the provisions of S. 68, T. P. Act. As regards the rights of the mortgagee against the alienations made by the mortgagor all that the mortgagee can claim is that no right derogatory to his grant shall be recognised. In 6 Cal 317 (2) in which the mortgagee-purchaser was held disentitled to oust a zar-i-peshgidar whose lease was made in controvention of the covenant and not to grant zar-i-peshgi to any one or to execute any deed in any way by which any difficulty might arise in the realization of the money covered by the deed, the mortgagee was held entitled only to bring a suit against the zar-i-peshgidar to have his right declared to sell the property to satisfy his mortgage debt, so as to give the zar-i-peshgidar an opportunity of redeeming, which indeed, would have been his course if the zar-i-peshgidar had been the puisne mortgagee.

If any alienation or lease renders the security insufficient, the mortgage has every right to ignore it and to get the mortgaged property sold free from the alienation or the lease. As already stated the mortgaged property was sold under the mortgage decree and it fetched more than the mortgage money that was due. It is therefore evident that the lease in dispute which was given only for a few bighas in a village did not, in any way, diminish or affect the security of the mortgagees. As already stated it has also been proved that the lease was in no way collusive or fraudulent or preju-

1. Ali Hasan v. Dhirja, (1882) 4 All 518=1882 A W N 118.

2. Radha Pershad Misser v. Monohur Das, (1881) 6 Cal 317=7 C L R 293.

dical to the estate. It was given during the ordinary course of management of the property by the manager who was in possession of the property and had every right to manage his property in such a manner as he thought fit. Under these circumstances the mortgagee could not challenge the lease.

When a mortgagee himself had no right to challenge the validity of the lease much less could an auction-purchaser in his decree do so. That an auction-purchaser of the mortgaged property cannot turn out the lessee is supported by several authorities. In 16 I C 102 (3) after the passing of the decree for sale of mortgage property certain leases were granted by the judgment-debtor in the ordinary course of management of his estate and not fraudulently, and subsequently the estate was, with the permission of the Court, purchased for a sum far in excess of the decretal money which was fully discharged. It was held that such purchaser acquired the right of the mortgagee to the extent of the mortgage and such right in the mortgaged property as was left with the mortgagor on the date of purchase and was consequently entitled to question the alienations made prior to his purchase. The same point was considered in 1928 Pat 238 (4). There it was held that a mortgagor in possession was entitled to lease out the mortgaged property permanently irrespective of its effect on the mortgagee provided it is not destructive or permanently injurious to the property so as to render the mortgagee's security insufficient. The purchaser of the property in execution of the mortgage decree is not entitled to turn the lessee out. This case applies on all fours to the present case.

The learned counsel for the appellants has relied on 1921 Pat 183 (5) but this case is distinguishable inasmuch as the alienation was made in collusion with tenants and to injure the mortgagee. There the mortgagor in possession entered into an agreement with his tenants after the date of mortgage that they should thenceforward pay him nagdi rents, and up till the time of the agreement they had paid produce rents and the rate settled on conpromise was considerably lower than the fair rent, and this low rate was entered into in collusion with tenants after taking heavy nazranas because the mortgagor saw no means of saving his property. The lease is valid and the plaintiffs have no right to challenge its validity. It is therefore ordered that the appeal be dismissed with costs. Permission to file a Letters Patent appeal is granted.

K.S. *Appeal dismissed.*

3. Adanki Teli v. Moti Chand, (1912) 16 I C 102.
4. Nathu Singh v. Lachu Singh, 1928 Pat 238=107 I C 156.
5. Mathura Rai v. Mangil Das, 1921 Pat 183=56 I C 805.

A. I. R. 1935 Allahabad 513

NIAMATULLAH, J.

A. P. Bagchi—Judgment-debtor—Appellant.

v.

Mrs. F. Morgan — Decree-holder — Respondent.

Second Appeal No. 1545 of 1934, Decided on 14th February 1935, from decision of Small Cause Court, Judge, Allahabad, D/ 22nd February 1934.

Civil P. C. (1908), O. 21, R. 2—For application of R. 2, some allegation of understanding as to adjustment between-judgment-debtor and decree holder is necessary —Judgment-debtor cannot decide for himself and act on supposition that decree has been wholly or partly adjusted.

Order 21, R. 2 applies only to cases in which payment has been made to the decree-holder, or where adjustment of the decree has otherwise taken place to the satisfaction of the decree-holder. It cannot apply to a case in which the adjustment was not accepted by the decree-holder. It is not open to the judgment-debtor to decide for himself and act on the supposition that the decree has been wholly or partly adjusted, though the decree-holder is unwilling to accept that position. Mutual understanding is of the essence of the rule. It may be that the decree-holder and the judgment-debtor at first agreed to a certain adjustment of the decree, but subsequently when the judgment-debtor moved the Court, the decree-holder denied the alleged adjustment. In such a case if the judgment-debtor proves by evidence that the adjustment had taken place and the decree-holder is falsely denying it, the position would be different from a case in which the decree-holder and judgment-debtor never arrived at any understanding. Hence where it is not suggested by the judgment-debtor that there was any understanding between the parties that sums spent by him on repairs would be set off against the decretal amount, O. 21, R. 2 does not apply. [P 514 C 2]

A. P. Pandey—for Appellant.

Mahbub Alam—for Respondent.

Judgment.—This is an execution decree appeal arising out of certain objections taken by the appellant to the amount of decretal money payable by him. It appears that the appellant was defendant in a suit for ejectment from a house admittedly belonging to the respondent, who also claimed a cer-

tain sum as rent or compensation for use and occupation of the house. The suit was decreed together with a certain sum awarded to the plaintiff for rent and another sum for use and occupation of the house. The Court made some distinction between these two items. It is however not necessary to dilate upon it in these proceedings. The appellant applied to the Court stating the amount decreed to the plaintiff and the amount which he himself claimed under two heads: (1) payment of taxes to the Municipal Board and (2) expenses incurred for sundry repairs to the house. He claimed to be entitled to deduct the sums spent by him on both these accounts from the decretal amount for which the decree-holder was entitled to take out execution.

The Court of first instance allowed a set off in respect of the Municipal taxes but did not allow any deduction in respect of sums spent on repairs. On appeal by the appellant, the lower appellate Court did not enter into the question whether the appellant was entitled to a deduction in respect of costs of repairs. It dismissed the appeal on the ground that O. 21, R. 2, Civil P. C., under which the application was made, did not apply. The appellant's case, as laid in his application in the Court of first instance, was that he was entitled to costs of certain repairs made by him, and that to that extent the decree in favour of the plaintiff should be deemed to have been satisfied. Accordingly he prayed that adjustment be recorded under O. 21, R. 2, so as to entitle the decree-holder to take out execution only in respect of the balance. As a matter of fact, the appellant deposited the balance, and no question of any further execution should, according to him arise. In my opinion this view is based on a complete misunderstanding of O. 21, R. 2, and the principle underlying it. That rule runs as follows:

"Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

"The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause . . . . . why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

The rule applies only to cases in which payment has been made to the decree-holder, or where adjustment of the decree has otherwise taken place to the satisfaction of the decree-holder. It cannot apply to a case in which the adjustment was not accepted by the decree-holder. It is not open to the judgment-debtor to decide for himself and act on the supposition that the decree has been wholly or partly adjusted, though the decree-holder is unwilling to accept that position. Mutual understanding is of the essence of the rule. It may be that the decree-holder and the judgment-debtor at first agreed to a certain adjustment of the decree, but subsequently, when the judgment-debtor moved the Court, the decree-holder denied the alleged adjustment. In such a case, if the judgment-debtor proves by evidence that the adjustments had taken place and the decree-holder is falsely denying it, the position would be different from a case in which the decree-holder and the judgment-debtor never arrived at any understanding. It is not suggested by the appellant that there was any understanding between the parties that sums spent by him on repairs would be set off against the decretal amount. This being so, O. 21, R. 2, Civil P. C., does not apply. The order appealed from is correct. The appeal is dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 514

KENDALL, J.

Jhakri Kewat—Applicant.

v.

Ram Naresh Sahi—Opposite Party.

Civil Revn. No. 490 of 1934, Decided on 11th January 1935, against order of Dist. Judge, Gorakhpur, D/- 10th March 1934.

Government of India Act (1915) (5 and 6 Geo. V, C. 61), S. 107—High Court will exercise powers only in most exceptional cases—It cannot ignore provisions of Agra Tenancy Act—Application barred under Tenancy Act cannot be treated under Civil P. C. S. 115 —Agra Tenancy Act Ss. 253, and 264.

Although the High Court may have powers of a judicial as well as of an administrative nature under S. 107 of the Government of India Act, it will only exercise those powers in the most exceptional cases. The High Court is not competent to ignore the provisions of Ss. 253 and 264 of the Agra Tenancy Act, and to deal with every

application presented to it in a matter relating to the Revenue Courts as if it were one under S. 115 of the Civil P. C. It is the duty of High Court under S. 107 of the Government of India Act to enforce and not to ignore the provisions of the Agra Tenancy Act and if the High Court were to interfere with such matter under S. 107, it would indeed be introducing a precedent full of inconvenience and uncertainty in the decision of future cases: 1933 *Cal* 132, 1919 *All* 46, *Queen V. Bolton* (1841) 1 *Q B* 66, *Ref.* [P 516 C 1 ,2]

Chandra Bhan Agarwala—for Applicant.

Muhammad Ismail and *D. Sanyal*—for Opposite Party.

Order.—This case has been argued before me by Mr. C. B. Agarwala as one under S. 107, Government of India Act. The circumstances may be set forth briefly here. A suit for arrears of rent was brought by a ziladar against the present applicant, and was decreed on 20th September 1930. There was no appeal, and the decree-holder, after unsuccessfully attempting to realise the amount of his decree for arrears of rent, finally made an application for the ejectment of the tenant under S. 79, Agra Tenancy Act of 1926, and after some time had been allowed to the judgment-debtor, an order of ejectment was passed under S. 18 of the Act on 15th August 1933. An appeal was made against this order, but on the office of the appellate Court reporting that the court-fee was deficient, it was dismissed after time had been given to the appellant to make up the deficiency. It was dismissed on 2nd October 1933. The applicant then made an application for review in the appellate Court, which was dismissed on 10th March 1934, in the order against which the present application is made. It was dismissed because the court-fees required for an application under O. 47, Civil P. C., had not been paid. It is admitted that no application in revision to the High Court will lie. S. 115, Civil P. C., is expressly excluded by S. 254, Agra Tenancy Act, read with Sch. 2, and the special section relating to revision by the High Court. S. 153 will not cover the present case. Mr. Agarwala therefore has sought to rely on S. 107, Government of India Act, and a preliminary objection has been made on behalf of the opposite party that this provision of law will not apply.

Section 107, Government of India Act. gives the High Courts powers of superintendence over all Courts subordinate to their jurisdiction, and in particular it specifies powers of an administrative nature. But it has been pointed out by Mr. Agarwala that it has been held in more than one case by more than one High Court that the powers which the High Courts enjoy under the provisions of S. 107, Government of India Act, and which they enjoyed under S. 15, Indian Councils Act of 1861, were not limited to administrative powers, but also included powers of a judicial or quasi-judicial nature. I have been referred to the case of 9 All 104 (1), in which a Full Bench of this High Court had to consider the limitations of the powers enjoyed by the High Court under S. 15, Indian Councils Act. The maojrity of that Bench were of the opinion that the High Court was not competent to interfere with and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court had proceeded on an error of law or an error of fact. Two of the learned Judges were of opinion that the Court had powers of a judicial or quasi-judicial character (conferred by S. 15, Indian Councils Act), apart from them conferred by S. 622, Civil P. C., but that the last mentioned provisions might properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final. Mr. Agarwala argues therefore that this Court is competent to use S. 107 of the present Government of India Act, in cases where S. 115, Civil P. C., would cover the issue if it were not for the provisions of the Agra Tenancy Act of 1926, and he has pointed to a recent decision of a Bench of the Calcutta High Court in the case of 1933 Cal 132 (2), in which the Court interfered with orders that had been passed under the Bengal Emergency Powers Ordinance notwistanding the wide language of S. 39 of that Ordinance. It is suggested therefore that the High Court should interfere in the present case notwithstanding the provisions of S. 253, Agra Tenancy Act.

Leaving aside for the time being the question of whether the present matter is one which could be covered by the revisional powers of the High Court

1. Muhammad Sulaiman Khan v. Fatima, (1886) 9 All 104=1886 A W N 309 (F B).
2. Manmatha Nath v. Emperor, 1933 Cal 132 = 142 I C 280=1933 Cr C 193=34 Cr L J 299= 60 Cal 618.

provided for in S. 115, Civil P. C., I think it is necessary to point out that although the High Court may have powers of a judicial as well as of an administrative nature under section 107. Government of India Act, it will only exercise those powers in the most exceptional cases. If Mr. Agarwala's argument were pressed to its logical conclusion, it would follow that the High Court would be competent to ignore the provisions of Ss. 253 and 264. Agra Tenancy Act, and to deal with every application presented to it in a matter relating to the Revenue Courts as if it were one under S. 115, Civil P. C. That the High Court does not do so as a practice is a matter of common knowledge, but that it has no jurisdiction to do so is, I think, clear even from the remarks made by the Bench of the Calcutta High Court in the case which I have quoted:

"The power of superintendence is a power of a well known and well recognised character,"

The learned Judge remarked:

and should be exercised upon those judicial principles which give it its character. The matter cannot be better put than in the words of Lord Demman, C, J., in 1 Q B 66 (3) at p. 76.

"It is of a much more importance to hold the rule of a law straight, than from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases."

In another passage they remark:

"The limits put upon appeal by the Indian Legislature are a part of the judicial system which it is just as necessary for this Court to enforce under S. 107 as any other feature of that system."

In other words it is the duty of this Court under S. 107, Government of India Act, to enforce and not to ignore the provisions of the Agra Tenancy Act. I have been referred to a case in which a learned Judge of this Court made use of the provisions of S. 107, Government of India Act, to interfere judicially with the orders passed by a Munsif: 1919 All 46 (4). But that was an order in which he felt that the High Court was bound to interfere. Similarly the Calcutta High Court had to deal with a very serious case under the criminal law in which they felt that a man had been convicted without any evidence, and they felt bound to interfere. These were exceptional cases, but it cannot be said that the present case is an exceptional case. It is the kind of matter that is very common in the Revenue Courts, and if the High Court were to interfere with such matters under S. 107, it would indeed be "introducing a precedent full of inconvenience and uncertainty in the decision of future cases." The preliminary objection therefore prevails and the application is dismissed with costs.

K.S. *Application dismissed.*

3. Queen v. Bolton, (1841) 1 Q B 66=4 P & D 679 =5 Jur 1154.

4. In the matter of Kadhary, 1919 All 46=52 I C 279=20 Cr L J 615=42 All 26.

A. I. R. 1935 Allahabad 516

BAJPAI, J.

Ramdeo—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 987 of 1933, Decided on 23rd January 1935.

Penal Code (1860), S. 353—Constable informed about gambling going on in public place—Preventing his proceeding in that direction by use of criminal force is offence under S. 353—Public Gambling Act (1867). S. 13.

Where a constable has received information that gambling is going on in a public thoroughfare he would under the law be entitled to apprehend the gamblers without warrant, and if he is prevented from proceeding in that direction by use of criminal force by the accused, he is deterred from discharging his duty viz., to arrest the gamblers and hence accused are guilty under S. 353, I. P. C.: 1915 *All* 208; 1915 *All* 442, *Dist.* [P 517 C 2]

L. N. Gupta and *S. P. Kumar*—for Applicant,

Asst. Govt. Advocate—for the Crown.

Order.—The applicant Ramdeo was convicted by a Tahsildar Magistrate of an offence under S. 353, Penal Code, and sentenced to a fine of Rs. 200. His appeal was dismissed by the District Magistrate and in revision the learned Sessions Judge refused to submit the case to the High Court with a recommendation for the setting aside of the conviction and the sentence. He has therefore come up to this Court in revision and his main contention is that Wakalat Husain, the Constable against whom criminal force is said to have been used was not a public servant discharging his duty at that particular time.

The facts are that the police authorities at Mirzapur were informed that gambling was going on near the house of Ramdeo underneath an Imli tree which was a public thoroughfare and three constables, Bindeshri Rai, Amir Bahadur Singh and Ram Narain Singh, were sent to effect the arrest of the gamblers. On 5th November 1933, the said three constables were going towards the house of Ramdeo when they met Wakalat Husain, the complainant

in the present case, and asked him to accompany them and assist in arresting the gamblers. When the party was about 50 or 60 paces from the place where the gambling was going on Ramdeo rushed forward and grappled with Wakalat Husain shouting all the time to his companions to run away. Courts below have believed this portion of the prosecution story and have convicted Ramdeo as stated above.

The contention is that while it is true that Wakalat Husain was a constable and as such a public servant yet when he accompanied the constables to arrest the gamblers he was not in the execution of his duty and that he was not discharging any duty as a public servant. He was just like any other private citizen whom the raiding party may have taken in confidence and from whom the raiding party might have sought assistance. Reliance is placed on the case of 1915 All 208 (1), where Piggot, J., held that an Excise Inspector who had no warrant authorising a search and was assaulted by a person whose wall was attempted to be scaled in order to effect an entry in the house was not a public servant acting in the discharge of his duty and the accused who had assaulted the Inspector was not guilty under S. 330, Penal Code. My attention was also drawn to the case of 1915 All 442 (2), where the same learned Judge held that where the Sub-Inspector of a Police Station sent an intimation to the Sub-Inspector of another Police Station that he intended to search a house within the jurisdiction of the latter officer and secured the presence of a constable to help him in carrying on the search but the constable had no authority from his Sub-Inspector either verbal or in writing, the provisions of sections 165 and 166, Criminal P. C., were not complied with, and a person resisting the search was not guilty of an offence under S. 353, Penal Code. In both of these cases the officer in question was a public servant, but inasmuch as he was not armed with a warrant of authority to do the thing which he intended to do it was rightly held that the accused did not prevent or deter a public servant from discharging his duty. As a matter of fact the officer concerned was exceeding his duty. In the present case Wakalat Husain was informed by certain constables that gambling was going on in a public place. Wakalat Husain had every reason to believe that the information was correct. Wakalat Husain was therefore proceeding in the direction which had been pointed out to him. Under S. 13, Public Gambling Act, a Police officer may apprehend without warrant any person gambling on a public street, place or thoroughfare, etc. etc. Wakalat Husain was a Police officer, he had received information that gambling was going on in a public thoroughfare and he would under the law be entitled to apprehend the gamblers without warrant. He was prevented by Ramdeo from proceeding in that direction by use of criminal force and Ramdeo thus deterred Wakalat Husain from discharging his duty which was to arrest the gamblers.

I am therefore of the opinion that there is no force in the argument advanced by learned counsel for the applicant. It is then said that the sentence of Rs. 200 as fine is very severe. The adequacy of sentence is always a matter of some trouble to the Revisional Court which is not in a position to Judge of the local conditions or of the peculiar circumstances attending a particular case. In the present case the Courts below were satisfied that the sentence was not severe and they took into consideration the fact that the police authorities were on several previous occasions baulked in their attempt to apprehend Ramdeo's gang. It is not possible for me to say that the sentence is so severe that I should interfere in my revisional jurisdiction. I dismiss this application.

K.S. *Application dismissed.*

1. Mukhtar Ahmad v. Emperor, 1915 All 208=29 I C 335=16 Cr L J 495=37 All 353.
2. Madho S nar v. Emperor, 1915 All 442=30 I C 141=16 Cr L J 589.

A. I. R. 1935 Allahabad 517

GANGA NATH, J.

Sukhai—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. Apln. No. 814 of 1934, Decided on 20th December 1934, from

Criminal P. C., (1898), S. 122—Magistrate should not reject sureties on police report.

When sureties are offered, it is the duty of the Court to accept them unless it is satisfied that they are not proper persons. It should not reject them on police reports. Magistrate should therefore before refusing to accept surety, himself hold an enquiry: 1922 *All* 541, 1914 *All* 489. [P 518 C 2]

(b) Criminal P. C., (1898) S. 526—Rejection of sureties illegal—Transfer was ordered.

Where a Magistrate has ignored S. 122 while rejecting the sureties offered it is a circumstance

which may entitled the accused to have his case transferred. [P 518 C 2]

Gajadhar Prasad Bhargava—for Applicant.

Order.—This is an application by Sukhai for transfer of the proceedings pending against him under S. 110, Criminal P. C., in the Court of Mr. Kuldip Narain Singh, Sub-divisional Magistrate, Soraon. The ground given by the applicant is that the learned Magistrate has rejected the various sureties for appearance offered by the applicant. The applicant was required to furnish two sureties in Rs. 300 each for his presence. Baikunt Nandan and Udit Narain sureties came forward with money and applied to the Court to stand surety for the applicant. The learned Magistrate instead of accepting them demanded an enhanced security from the applicant under S. 117 (3), Criminal P. C., for a sum of Rs. 1,000. The applicant thereafter offered two sureties as demanded by the learned Magistrate under S. 117 (3). but he rejected them also on receiving a police and tahsil report although the sureties were fit persons and had undertaken to keep the applicant with them. The learned Magistrate not only demanded an enhanced security for Rs. 1,000 under S. 117 (3), but reported to the jail superintendent that the applicant was a dangerous person and the applicant was therefore kept in fetters for several days. The learned Magistrate states in his explanation that on the application of the prosecution he did inform the superintendent of jail that the applicant was a dangerous person; thereafter on the 12th October, when the applicant came and gave an assurance to the learned Magistrate that he would not misbehave in Court or in the Court compound the learned Magistrate communicated the applicant's assurance to the jail superintendent with the remark that the Court did not consider it necessary that the accused should be given fetters and consequently the applicant's fetters were removed. These two inconsistent reports of the learned Magistrate show that he had made the first report without satisfying himself.

As regards rejecting sureties it is a fact as appears from the explanation of the learned Magistrate that no less than 8 sureties were produced by the applicant who were all rejected on the reports received from the tehsil and police station by the Magistrate. In 1914 All 489 (1), it was held that the Magistrate had a wide discretion under S.. 122 to accept or reject a surety. This discretion can however be exercised after a satisfactory enquiry in accordance with law. Where a Magistrate acting on a police report only refused to accept certain persons as sureties, it was held that there having been no enquiry the order was bad. In 1922 All 541 (2), it was held that when sureties are offered it is the duty of the Court to accept them unless it is satisfied that they are not proper persons. It should not reject them on police report. Since then there has been amendment in S. 122, Criminal P. C. Proviso to Cl. 1, lays down that before refusing to accept or rejecting any surety a Magistrate shall either himself hold an enquiry on oath into the evidence of the surety or cause such enquiry to be held and a report to be made thereon by a Magistrate Subordinate to him. Cl. 2 lays down that a Magistrate shall, before holding enquiry, give reasonable notice to the surety or to the person by whom the surety is offered and shall, in making the enquiry, record the substance of the evidence adduced before him. Cl. 3 lays down that if the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-S. 1, and the report of such Magistrate (if any) is that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing. The learned Magistrate has entirely ignored the provisions of S. 122, Criminal P. C.

It appears from the explanation of the learned Magistrate that he let off the applicant to find out sureties, but the sureties produced by him were rejected by the learned Magistrate. All these circumstances are such as might reasonably cause an apprehension in the mind of an accused person. It is therefore ordered that the case be transferred from the Court of Mr. Kuldip Narain Singh, S. D. M. Soraon and sent back to the learned District Magistrate for trial by any other competent Magistrate under him.

K.S. *Order accordingly.*

1. Bhawani Singh v. Emperor, 1914 All 489=26 I C 646=16 Cr L J 54.
2. Gopi Khatik v. Emperor, 1922 All 541=68 I C 35=23 Cr L J 499.

A. I. R. 1935 Allahabad 519

BENNET, J.

Firm Sant Lal-Mahadeo Prasad—Plaintiff—Applicant.

v.

Kedar Nath — Defendant—Opposite Party.

Civil Revn. No. 300 of 1934, Decided on 5th December 1934, against order of Special Munsif, Allahabad, D/- 28th March 1934.

(a) Civil P. C. (1908), O. 20, R. 5—Order on objections to award should comply with O. 20, R. 5— Arbitration.

An order on the objections to an arbitration award should comply with the provisions of O. 20, R. 5, and the Court should state its finding on decision with the reasons therefor upon each separate issue. [P 519 C 2]

(b) Government of India Act (1915), S. 107—Munsif not carrying out directions given by High Court—High Court has jurisdiction to set aside his order.

Under provisions of S 107, Government of India Act, the High Court has power and jurisdiction to see that the orders of the High Court are carried out. Where the Munsif has not carried out the directions given by the High Court and has purported to act in a different manner, it has jurisdiction to set the order in question aside. [P 519 C 2]

Chandra Bhan Agarwal — for Applicant.

S. B. L. Gaur—for Opposite Party.

Order.—This is an application in civil revision by a plaintiff against an order dated 28th March 1934, by a Special Munsif of Allahabad, Syed Izhar Hasan. A preliminary objection has been taken that as the order in question is one "setting aside the decree of the arbitrator," by which presumably the Munsif meant setting aside the award of the arbitrator and directing parties to produced evidence, therefore there was no case decided but only a case pending and no revision lay under S. 115, Civil P. C. It has been held to this effect in 1932 All 452 (1). If the present applicant like the applicant in that case had come for the first time before this Court, I would consider that the ruling would govern the civil rivision and I would have ruled that no civil revision lay. But the facts are different. In Civil Revision No. 169 of 1933, the defendant made an application to this Court to revise the judgment of this Munsif who made a decree in this suit in terms of the award. A learned Single Judge of this Court in that revisional order stated that the Munsif should have allowed the parties a chance to challenge the decision of the arbitrator and should have allowed the usual period of ten days to file objections. This Court therefore ordered:

"I set aside the judgment and decree complained of and remand the case to the Munsif in order that he may give ten days' time to the parties, from the date of the information given to the parties of the receipt of the record in his Court to file objections. After the objections if any have been decided, the Munsif should proceed in accordance with law."

Now, it is stated that the Munsif allowed the parties 10 days to file objections and then the Munsif passed the order which is now under revision. That order states as follows:

"Heard the learned counsel for parties. The general practice of this Court has been that a case is referred for decision to a referee. The referee generally heard orally or took down the evidence of parties and gives his decision on such evidence. It has not been considered necessary to submit record of evidence to my Court.

But in view of the obiter dictum of the Hon'ble High Court, I hold that the proceedings in this particular case were bad."

"I set aside the decree of the arbitrator. Parties to produced evidence before me on 30th April 1934.

It is clear that what was intended by the learned Judge of this Court was that the Munsif should consider the objections in accordance with R. 15, Sch. 2, Civil P. C. Under that rule the Court can set aside an arbitration award only on one of the grounds mentioned in that rule. The Court has not attempted to act in accordance with the provisions of that rule. I consider that an order on the objections to an arbitration award should comply with the provisions of O. 20, R. 5, and that the Court should state its finding or decision with the reasons therefor upon each separate issue. Instead of complying with these provisions the Court has merely referred to the order of this Court as an obiter dictum and stated that on that account the arbitration proceedings are bad. I consider that this Munsif has not complied with the direction of this Court which was that the Munsif should decide the objections and proceed in accordance with law. The Munsif has not decided the objections and he has not proceeded in accordance with law. Now, learned counsel argued that because the present order would not amount to a case decided therefore no revision would lie to this Court. I consider that under the provisions of S. 107, Government of India Act, this Court has power and jurisdiction to see that the orders of this Court

1. Risal Singh v. Faqira Singh, 1932 All. 452= 136 I C 568= 53 All 1006.

are carried out. This Court has given certain directions to this Munsif as to how he shall proceed. The Munsif has not carried out those directions and has purported to act in a different manner. That being so, I consider that this Court has jurisdiction to set the order in question aside, and I set it aside, and I direct the Munsif to carry out the order already given on 4th October 1933, in Civil Revision No. 169 of 1933, that is, the Munsif should hear the parties and consider the objections and should set aside the award only if he finds that there are grounds for setting it aside, under R. 15 of Sch. 2. Accordingly I allow this application in revision with costs and I set aside the order of 28th March 1934, and direct the Munsif to proceed in accordance with this order.

K.S. *Application allowed.*
Order set aside.

A. I. R. 1935 Allahabad 520

BENNET, J.

Ramchandra—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 870 of 1934, Decided on 5th December 1934, from order of Sess. Judge, Bareilly, D/- 14th August 1934

(a) Criminal P. C. (1898), S. 103 (1)—Person having two convictions for serious crime is not respectable inhabitant.

A man who has been twice convicted of serious crimes is not a respectable inhabitant and is altogether unsuitable as a search witness. [P 520 C 2]

(b) U. P. Excise Act (4 of 1910), S. 60 (b)—Sub Inspector may make search without obtaining warrant only in urgent cases.

In an urgent case a sub-Inspector may make a search for an offence against the Excise Act without obtaining a warrant from Excise Officer. Where there is no urgency and the Excise Officer is in same place, search without warrant is not proper. [P 521 C 1]

(c) U. P Excise Act (4 of 1910), S. 60 (b)—Sub-Inspector putting person having two convictions as search witness — Adverse comments against sub Inspector and brother of such witness in prior case—Held case was not genuine one.

Where a sub-Inspector put a man who had two prior convictions as a search witness and there was already some adverse comments against the sub-Inspector and brother of the witness :

Held: that the conclusion was that the case was not a genuine here. [P 521 C 1,2]

S. B. Johari—for Applicant.

Asst Govt. Advocate—for the Crown.

Order.—This is an application in revision by one Ramchandra who has been convicted by a Magistrate under S. 60 (b) and (f), U. P. Excise Act, sentenced to six months and three months' concurrent rigorous imprisonment under these sections and fine. The conviction and sentences were upheld by the Sessions Court. The evidence for the prosecution consisted of Sub-Inspector, Abdul Hai Khan of Bareilly Kotwali, P. W. 2, Lakhpat Rai, son of Raghuber Dayal Kayastha, P. W. 3, Banne Khan, occupation given as service. These three persons state that on 25th March 1934, the house of the accused was searched and materials for the manufacture of illicit liquor were recovered and liquor was actually being manufactured and the accused was present. The accused stated that he was not present, but he was working at a certain printing press and was called by the police. He states that he locked up his house inside and left the outside door open. He states that none of the articles connected with the manufacture of liquor belonged to him, but that he had enmity with Roshan Lal, the brother of Lakhpat Rai, P. W. 2, and that Lakhpat Rai must have planted these articles in his house in his absence. Some argument was made by the Government Pleader in the Sessions Court that Lakhpat Rai was not the brother of Roshan Lal. I am unable to understand how this argument could be made because in the first line of his cross-examination Lakhpat Rai admits that he has a brother Roshan Lal. It is held by the Sessions Court that Lakhpat Rai has twice been convicted, once for forgery and once for robbery under S. 392, Penal Code. It is clear that a man who has been twice convicted of serious crimes of this nature is altogether unsuitable as a search witness. A Sub-Inspector makes a search under the provisions of S. 165 (4), Criminal P. C., which applies the provisions of S. 103, so far as may be. S. 103, sub-S. (1) lays down that the Sub-Inspector shall call two or more respectable inhabitants of the locality to accompany him as search witnesses. Obviously Lakhpat Rai cannot be described as a respectable inhabitant of the locality. It is true that the search list shows that there was another search witness whose name is Kifayat Ullah. That person has not been called as a witness for the prosecution.

The prosecution has chosen to rely on the evidence of this man Lakhpat Rai. In my opinion Lakhpat Rai is altogether unworthy of credit. I am

unable to understand why the Sub-Inspector brought a man like Lakhpat Rai with him to the search. The Sub-Inspector says that he had already two search witnesses with him and on the way he met Lakhpat Rai. Knowing Lakhpat Rai as a man who had been twice previously convicted, he should not have asked Lakhpat Rai to accompany him. He has chosen to take him with him on the search and he has chosen to put him forward as one of the two search witnesses for the prosecution. The Sub-Inspector is apparently, a man of considerable experience as he is the Sub-Inspector of the Kotwali in Bareilly. I am unable to understand why he has acted in the manner in which he has done if this case is a genuine case. That being so his action suggests to my mind the conclusion that the case is not a genuine case. It is true that all the suggestions for the defence may not have been established. I consider however that enough has been shown in this case to discredit the evidence for the prosecution. Another point about the Sub Inspector is that he states he did not obtain a search warrant before making his search. It is true that in an urgent case a Sub-Inspector may make a search for an offence against the Excise Act without obtaining a warrant from the Exercise Officer. It is not shown in the present case that there was any great urgency. If liquor was being manufactured at the house of the accused as the Sub-Inspector claims to have ascertained from a spy, then the Sub-Inspector being in Kotwali in Bareilly could have in a very short time obtained the warrant from the Excise Officer who was also presumably at head-quarters on 25th March 1934.

The defence have also pointed out that this Sub-Inspector, Abdul Hai and a witness Roshan Lal have been the subjects of adverse comment by a Bench of this Court in Criminal Appeal No. 285 of 1934 (1), where a conviction under S. 302, Penal Code, and sentence of death was set aside on 26th July 1924. It is certainly remarkable that these two cases should come before this Court in one ol which this Sub-Inspector is the subject of adverse comment along with a witness Roshan Lal and in the present case the Sub-Inspector is the subject of adverse comment along with Lakhpat Rai, who is the brother of Roshan Lal, and who has been twice previously convicted. The association of this Sub-Inspector with witnesses of this class is certainly a matter which should form the subject of an inquiry and accordingly I follow the example of the Bench and direct that a copy of this judgment should be sent to the Inspector-General of Police for such action, if any, as he desires to take.

Under these circumstances, I allow this application in revision and I set aside the conviction and sentences on the accused Ramchandra and I direct that he be set at liberty and that the fine, if realized, should be refunded.

K S. *Application allowed.*

1. Emperor v. Ram Lal, Criminal Appeal No. 285 of 1934.

A. I. R. 1935 Allahabad 521

ALLSOP, J.

Kedar Nath—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1042 of 1934, Decided on 6th March 1935, from order of Asst. Sess. Judge, Allahabad, D/- 8th December 1934.

(a) Penal Code (1860), S. 471 — Receipts filed in Court in rent suit and placed before plaintiff for admission or denial—Held they were used even though plaintiff denied them.

Accused filed certain receipts in a rent suit against him and placed them before the plaintiff for admission or denial and the plaintiff denied them.

Held: if the plaintiff had been deceived and had admitted them the appellant would have achieved his object. The term 'use' in S 471 is of wide meaning and the accused did use the receipts. [P 522 C 1]

(b) Evidence Act (1872), S. 15—Evidence of similar but unconnected facts is not admissible to prove guilt—They can be used only to prove intention or previous conduct.

The evidence of similar but unconnected facts is not admissible to prove a fact in issue. Where an accused was charged with an offence of forging certain receipts, the evidence of two witnesses that accused produced forged receipts by way of defence in another suit and never established their genuineness is not admissible to show that these receipts are also forged. They can be used only to prove the intention or conduct of accused. [P 522 C 2; P 523 C 1]

K. D. Malaviya—for Accused.

Govt. Pleader—for the Crown.

Judgment.—This is an appeal by Kedar Nath who has been sentenced to rigorous imprisonment for a period of 4½ years under S. 471, read with S. 467, Penal Code, that is, for the offence of using as genuine documents which he knew or had reason to believe to be forged documents. It ap-

pears that one Ram Das filed two suits for arrears of rent against the appellant in the Court of the Tahsildar of Soram in the Allahabad District, viz., suit Nos. 556 and 557 of 1933. The appellant produced five receipts to prove payment of the amounts alleged to be due from him. Two of these receipts were admitted by Ram Das and the other three Exs. A, B and D were denied. Thereafter the appellant did not put in an appearance as defendant to the suits and he made no attempt to prove the three receipts which had been denied. On 17th May 1934, both suits were decreed after making allowance for the sums paid and acknowledged under the two receipts which had been admitted. The appellant was then prosecuted in respect of the three disputed receipts. He was tried before a jury and as I have already said, he has been convicted.

One of the arguments addressed to me is that it cannot be said that the appellant used the receipts within the meaning of S. 471, Penal Code, because he merely filed them in Court and made no attempt to prove that they were genuine. Reliance is placed on 35 Cal 820 (1). The facts in that case may not have been exactly similar. In this case the appellant certainly used these three receipts because they were placed before the plaintiff for admission or denial and the plaintiff denied them. If the plaintiff had been deceived and had admitted them the appellant would have achieved his object. The term "use" is of wide meaning and I do not think that it can possibly be said that the appellant did not use the receipts.

The other argument is that the finding of the jury is vitiated by the admission of evidence which was not properly admissible and by the misdirection of the learned Judge upon that point. There were five witnesses produced, the first two being the Tahsildar and an Honorary Assistant Collector to whom the cases in the Revenue Court were ultimately transferred. Their evidence was merely formal. The third witness was Ram Das, the plaintiff in the two suits. He did say that the receipts were forgeries. The other two witnesses were Brij Lal and Har Bux. Their evidence was that in two suits filed by them in the years 1932 or 1933, the appellant produced forged receipts by way of defence and never attempted to establish them when they were denied. The contention is that the evidence of these two witnesses was inadmissible. There can be no doubt to my mind that it was inadmissible. The learned Judge has relied upon S. 15, Evidence Act. It is a well-known rule of law that the evidence of similar, but unconnected facts is not admissible to prove a fact in issue. If a man is charged with a theft, the fact that he committed a previous, but unconnected theft is obviously no reason for thinking that he is guilty. One has only to consider a specific instance to discover how unreasonable it would be to allow such evidence to be produced. If a theft is committed for instance in the town of Allahabad it would obviously be absurd to arrest any previous convict and to say that he must be guilty because he had committed thefts on previous occasions. S. 15, Evidence Act, allows the production of evidence to prove knowledge or intention when the question of such knowledge or intention is in issue. If certain facts are proved which would constitute an offence if the necessary knowledge or intention were present and, if that knowledge or intention is denied, it is no doubt admissible to prove by the previous conduct of the accused person that he must have had the guilty knowledge or intention which was a requisite ingredient of the offence. The learned Judge in the present case has however undoubtedly used the evidence of these two witnesses not to establish that the appellant had a guilty knowledge or intention when he put in the receipts, namely the knowledge that the receipts were forged and the intention of using them dishonestly, but also for the purpose of deciding that the receipts were in fact forged. This is clear from his direction to the jury in his charge. He says:

"Direct evidence of forgery cannot be expected. The mere denial of Ram Das would not be sufficient to hold the documents forgeries. I have permitted the evidence of instances of the use of questionable document by the present accused in the suits of Brij Lal Singh to come on the record as to my mind that evidence was admissible under S. 15, Evidence Act."

It is clear that the learned Judge was telling the jury that the evidence of Ram Das was not sufficient to establish that the disputed receipts were in fact forgeries. If the evidence of the other two witnesses, Brij Lal and Har Bux, is excluded, there is no evidence except that of Ram Das to prove that the receipts were not genuine. It

1. Ambika Prasad Singh v. Emperor, (1908) 35 Cal 820.

is quite clear that the evidence of these two witnesses is not admissible to prove the fact of the forgery. In view of the words used by the learned Judge in his charge I cannot, but believe that the jury were influenced in finding that the receipts were forged by evidence which was legally inadmissible to prove this fact. That being so, there was undoubtedly a failure of justice in this case because the appellant was found to be guilty on evidence which could not be used against him.

I should, perhaps, make it clear that in my opinion the evidence of the two witnesses would be admissible to show that the appellant deliberately used the receipts knowing them to be forged provided it is satisfactorily established from other evidence that they were in fact forged. The result is that the appellant has not been properly tried and the only course is to direct that he should be tried again before another jury. I therefore set aside the conviction and sentences and direct that the appellant shall be retried for the offence with which he is charged before another jury. If the appellant is on bail he shall remain on bail pending the orders of the Court below.

K.S. *Retrial ordered.*

A. I. R. 1935 Allahabad 523

NIAMATULLAH AND BENNET, JJ.

Parbhu Lal Pearey Lal—Applicant.

v.

Commissioner of Income-tax—Opposite Party.

Misc. Case No. 384 of 1933, Decided on 23rd November 1934, from reference of Commissioner of Income-tax, D/- 21st March 1933.

Income tax Act (1922), Ss. 3 and 2 (6)(a)—Hindu joint family cannot form partnership with another firm — Contract Act (1872), S. 239.

A partnership cannot be formed by an association of a joint Hindu family with another firm: 1933 *All* 77, *Ref.* [P 524 C 2]

S. K. Dar and *Din Dayal*—for Applicant.

K. Verma—for Opposite Party.

Niamatullah, J.—This is a reference by the Commissioner of Income-tax on a direction of this Court on an application made by an assessee. The facts are somewhat complicated. There is a joint family in Muttra which has various firms and one of these firms is styled Parbhu Lal Pearey Lal. This firm Parbhu Lal Pearey Lal has been in existence with effect from the year 1932-33. Previous to that there was no separation in the joint family and the joint family was somewhat loosely described as Parbhu Lal Pearey Lal. An assessment was made for the year 1931-32 on the income of year and in making that assessment the income-tax officer of Muttra found in the books of the joint family a certain Khata called Onkar Mal Babu Lal, Sir account which stood as follows:

Credit	Rs. 78,910-2-9
Debit	Rs. 47.299-14-0
Profit	Rs. 31,610-4-9
Total	Rs. 78,910-2-9.

Enquiries were made from Bombay and it was found that the Bombay firm of Onkar Mal Bau Lal had heavy losses during the year under assessment and the Muttra joint family Parbhu Lal Pearey Lal had also losses. No income-tax therefore was assessed on either the joint family in Muttra or the firm Onkar Mal-Babu Lal in Bombay, but the income-tax authorities have assessed income-tax on what they allege to be a firm constituted by the partners, one partner being the joint family Parbhu Lal Pearey Lal in Muttra and the other partner being the firm Onkar Mal-Babu Lal in Bombay. The transactions of this alleged partnership show a profit and therefore that profit has been assessed to income-tax. Objection was taken by Parbhu Lal Pearey Lal and those objections were overruled and Parbhu Lal Pearey Lal also submitted an application to the Income-tax Commissioner to make a reference to this Court. The Income-tax Commissioner held that no question of law arose as in his opinion there was a partnership. This Bench held that the decision as to whether there was a partnership was a decision on a question of law and that as a question of law had arisen under S. 66 (2) the Income-tax Commissioner was bound to make a reference to this Court. Accordingly this Court selected seven of the questions in the application of Parbhu Lal Pearey Lal and required the Commissioner to make a statement on the case. That statement has now been supplied. The first of these questions is:

"Whether the association of the firm Messrs. Parbhu Lal Pearey Lal of Muttra and of the firm Messrs. Onkar Mal Babu Lal of Bombay in certain joint transactions in 1929-30 could and did form in law a new partnership or a new firm within the meaning of S. 239, Contract Act, or of any other law."

Learned counsel for Commissioner has taken objection to the wordings of this question and he alleges that the

attention of the Income-tax Commissioner was not drawn to the importance of the word "firm" and that in fact Parbhu Lal Pearey Lal of Muttra during the year in question were not a firm, but were a joint Hindu family. This in fact has been stated by the Commissioner. Learned counsel desired further that inquiry should have been made in regard to Onkar Mal-Babu Lal of Bombay. But we consider that it is too late now to raise any point as to whether Onkar Mal-Babu Lal are a firm or joint Hindu family as all along they have been described by the Commissioner and the authorities under him as a firm. Therefore the question is whether a partnership can be formed by an association of a joint Hindu family in Muttra with a firm in Bombay. This question of the interpretation of the word "partnership" has been already before this Court. We may mention that in S. 3, Income-tax Act, income-tax may be charged:

"on all income, profits and gains of the previous year of every individual Hindu undivided family, company, firm and other association of individuals.

The only word in this section under which the alleged partnership could be brought is the word "firm." In S. 2 (6) (a) it is stated that "firm", "partner" and "partnership" have the same meanings respectively as in the Contract Act, 1872. In S. 239, Contract Act, it is stated:

"Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them. Persons who have entered into a 'partnership' with one another are called collectively a firm.'"

No doubt in the General Clauses Act which was in force at the time of the Contract Act, there was a definition which is similar to the definition in General Clauses Act, 10 of 1897, for the word "person." This definition in S. 3 (39) states that "person" shall include any company or association or body of individuals, whether incorporated or not. If therefore that definition were to be applied to the Contract Act, S. 239, then the argument for the Commissioner would be correct. It is however provided in S. 3, General Clauses Act, that these definitions should not be applied if there is anything repugnant in the subject or context. In Chap. 11 on partnership in the Contract Act there are various provisions in regard to the death of partners and matters of that nature which will clearly not apply to a firm. This matter has already been considered by a Bench of this Court in a ruling reported in 1933 All 77 (1). The reference in that case was:

"Whether having regard to the deed of partnership, dated 16th April 1928, and to other relevant evidence on the record, the finding that the registered firm Jai Dayal Madan Gopal, Benares, is in its corporate capacity a partner in nine other firms bearing the same name was a legal and proper finding."

Both learned Judges held that one firm cannot legally be a partner in another firm. Learned counsel for the Commissioner argued that this ruling was in regard to registered firms. A firm is registered under S. 26 (a), Income-tax Act, and any firm constituted under an instrument of partnership specifying the individual shares of the partnership may apply for registration. It will be observed that this provision prevents a Hindu family from applying for registration as a firm.

But we are of opinion that the ruling in question does not draw a distinction between a registered firm and any firm. On p. 1000 the learned Chief Justice stated:

"But if the question were asked whether one firm can legally be a partner in another firm then I would unhesitatingly proceed to answer it. There is authority for the view that one firm cannot legally be a partner in another firm."

This passage shows that no importance was attached by their Lordships to the point that the firms in that particular case had been registered under the Income-tax Act. We consider that we should follow this ruling in the present case and we therefore hold that no partnership could be legally constituted between the Bombay firm and the Hindu joint family in Muttra. Under these circumstances the answer to the first question must be in the negative. This governs all the other remaining six questions in the case and in our opinion the income-tax authorities have no power to impose a fine under S. 25 of the Act, on the ground that the alleged partnership did not report its discontinuance. With these observations we direct that our opinion shall be forwarded to the Income-tax Commissioner. We allow costs to the applicant at Rs. 200, for which a certificate has been filed. This covers the present hearing and also the former hearing. We also assess for the use of the department the fees of learned counsel for Commissioner at Rs. 150.

K.S. *Order accordingly.*

1. Jai Dayal Madan Gopal, In the matter of, 1933 All 77=143 I C 390=54 All 846.

A. I. R. 1935 Allahabad 525

KENDALL, J.

Secy. of State — Defendant — Applicant.

v.

Firm Narain Das Shyam Lal—Plaintiff—Opposite Party.

Civil Revn. No. 598 of 1934, Decided on 25th February 1935, against order of Small Cause Court Judge, Aligarh, D/- 24th July 1934.

Railways Act (1890), S. 76 — Plaintiff is not absolved from proving that Railway administration is liable for loss or deterioration—If plaintiff proves misconduct or negligence on part of Railway administration, he need not further prove that such misconduct has caused loss.

Section 76 was made by the legislature, no doubt, for the protection of plaintiffs who had suffered loss but who were not in a position to prove in what manner the property had been damaged or destroyed after it had been consigned to the railway, because in the ordinary course of events they are not in a position to know how the loss has been caused. But the Act has not any where provided that a plaintiff is absolved from the duty of proving that a railway administration is liable for causing the loss or deterioration of the goods Under S. 76 if it is clear that the damage should have been caused by the misconduct of the railway servants, it is not necessary for the plaintiff to prove how their misconduct had caused the loss. Where the goods which were consigned in a damaged condition and remained in the train for over ten days had deteriorated for this reason and not through any misconduct and negligence on the part of the railway administration:

Held: that the railway company was not liable in damages. [P 525 C 2]

Muhammad Ismail—for Applicant.

Order.—This is an application on behalf of the Secretary of State for India in Council, through the Agent of the Eastern Bengal Railway and the East Indian Railway for the revision of an order of the Judge of the Small Cause Court, Aligarh, in which the suit of the oppisite party for Rs. 32 damages was decreed. The circumstances are stated in the judgment of the trial Court. It appears that the plaintiff had consigned a number of bags of rice for despatch to Aligarh and that when the rice arrived at the station of destination, damage was found to have been caused to the extent of six maunds, and the plaintiff therefore sued for compensation to the amount of Rs. 30, the value of the rice.

In decreeing the suit the Judge noticed the evidence brought by the Railway to prove that the wagon was water-tight, and he also noticed that in the Risk Form A, which represented the contract between the parties, a note had been made when the goods were despatched that the bags in which the rice was consigned were in a damaged condition; some were resewed, others showed signs of probing and damp storage, so that they were liable to deteriorate in transit. Risk Form A is a form that is used when goods are already damaged and it is one of those forms which are known as owner's risk forms, but the Judge in giving the plaintiff a decree has relied entirely on S. 76, Railways Act, in which it is laid down that in a suit against a railway administration for compensation for.....deterioration of.....goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused. This provision was made by the Legislature no doubt for the protection of plaintiffs who had suffered loss, but who were not in a position to prove in what manner the property had been damaged or destroyed after it had been consigned to the railway, because in the ordinary course of events they are not in a position to know how the loss has been caused. But the Act has not anywhere provided that a plaintiff is absolved from the duty of proving that a railway administration is liable for causing the loss or deterioration of the goods, and from the terms of the contract it appears that the plaintiff knew of the fact that the goods tendered to the railway were either in bad condition or defectively packed and understood to hold the railway:

"harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway administration's servants."

In the present case the plaintiff did not prove that the loss or damage to the rice had arisen from misconduct on the part of the railway administration's servants, and the Judge apparently believed that he was relieved of the necessity of proving this by S. 76 of the Act. This however only shows that if it is clear that the damage has been caused by the misconduct of the railway servants, it is not necessary for the plaintiff to prove how their misconduct had caused the loss. In this case, from the evidence that was before the Court, it seems to be highly probable that the goods which were consigned in a damaged condition and remained in the train for over ten days

had deteriorated for this reason and not through any misconduct and negligence on the part of the railway administration. At any rate, it is quite clear that the learned Judge misdirected himself as to the law in a matter of this sort, and that his decision is a result of this misdirection. No one has appeared on behalf of the opposite party in this Court. I therefore allow the application, set aside the decree and order of the trial Court, and direct the plaintiff's suit be dismissed with costs in both Courts.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 526

GANGA NATH, J.

Bageshar Misir and *others* — Defendants—Appellants.

v.

Mahabir Shukul and *another*—Plaintiff and Defendant—Respondents,

Second Appeal No. 1295 of 1932, Decided on 18th February 1935, from decision of Second Addl. Sub-Judge, Jaunpur, D/- 6th July **1932.**

Agra Tenancy Act (1926), S. 227 — Plaintiff having joint possession— No allegation of dispossession—Suit for share of profits against defendant on allegation that defendant has realised profits from tenants — Suit is not cognizable by civil Court.

The plaintiff had stated in the plaint that he obtained joint possession and he did not state anywhere that he had been dispossessed. All that he said was that the defendants had realised his share of profits from the tenants. He filed a suit in civil Court for joint possession and mesne profits.

Held: that the only relief which the plaintiff claimed and to which he was entitled was a decree for his share of profits which according to him had been realised by defendants from the tenants and for which he could claim and obtain relief in the revenue Court under S. 227, Ten. Act, and not in the civil Court.

Held: further that the mere fact that the plaintiff chose to add a relief which is unnecessary to the reliefs which can be granted by the revenue Court will not take the case out of the jurisdiction of the revenue Court: 1930 *All* 193; 1929 *All* 810, *Rel on.* [P 527 C 1]

Lakshmi Saran—for Appellants.

Gopalji Mehrotra—for Respondents.

Judgment.—This is a defendants' appeal and arises out of a suit brought against them by the plaintiff-respondent for joint possession and mesne profits. The plaintiff's case was that the defendants had realized rent from the tenants which were due and payable to the plaintiff. The defendants denied doing so. Defendants 1 and 4, contested the suit and admitted the plaintiff's title to the property in question, but pleaded that they (defendants) had no concern with the property and, as such, they were not liable to pay mesne profits to the plaintiff. Defendant 5 also admitted that the parties had been in possession, but he contested the amount of mesne profits. The trial Court gave a decree to the plaintiff in respect of 3/4th of the two pies and old share. In appeal the learned Additional Subordinate Judge decreed the suit for joint possession as well as mesne profits. Against this decision an appeal has been filed by defendants 1 to 4. The chief point for consideration is whether the suit was cognizable by the Civil Court or not. The case of the plaintiff is given in paras. 6 and 7 of his plaint para. 6 is:

"The defendants have entered into wrongful possession of the property in dispute, are being benefited thereby thereby and are realising rent from sub-tenants."

Paragraph 7 is:

"The plaintiff brought some suits for arrears of rent against the sub-tenants in revenue Court, wherein the defendants made the sub-tenants set up defence that they had paid the rent to the defendants. From this it is quite evident that the defendants have made collections from the plaintiff's tenants."

In para. 4 the plaintiff stated:

"The plaintiff's claim for possession of the property in question was decreed on 18th May 1922, and, through Court amin; the plaintiff obtained possession of the property in respect of which the decree was passed, on 2nd June 1923.'

It would appear from the allegations in para. 4 that the plaintiff did actually obtain joint possession with the defendants. There is nothing in the allegations made by the plaintiff in paras. 6 and 7 which may show that the plaintiff has been dispossessed by the defendants. The plaintiff's allegations amount to simply saying that the defendants have been realising rent from the tenants which should have been paid to the plaintiff. The plaintiff has scrupulously avoided stating in the plaint that he has been dispossessed from any part of the property. It may be mentioned here that the property is zamindari and none of the parties has been in physical possession over any specific portion of the zamindari property or the sir or khudkasht appertaining to it. All the parties are jointly in possession. In relief (a) the plaintiff has stated that:

"a decree for possession of the property in dispute specified at the foot of the plaint may be passed in favour of the plaintiff against the defendants."

Relief (b) states that:

Rs. 120 on account of damages and mesne profits for three years next before the date of

institution of the suit, may be awarded to the plaintiff against the defendants."

The suit is therefore for the recovery of rents which were due to the plaintiff and have been realized according to the plaintiff by the defendants. The plaintiff has added a relief for possession for which he has disclosed no cause of action and in respect of which he has not even stated that he has ever been dispossessed. S. 230, Agra Tenancy Act (3 of 1926), lays down that:

"Subject to the provisions of S. 271, all suits and applications of the nature specified in Sch. 4 shall be heard and determined by the revenue Courts and no Courts other than a revenue Court shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application, or of any suit or application, based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application."

Under S. 227:

"A co-sharer may sue another co-sharer for a settlement of accounts, and for his share of the profits of a mahal or of any part thereof."

The plaintiff could have got a relief which he seeks in this suit under S. 227, Tenancy Act, in the Revenue Court. The mere fact that a plaintiff chooses to add a relief which is unnecessary to the reliefs which can be granted by the Revenue Court will not take the case out of the jurisdiction of the Revenue Court. In 1930 All 193 (1), where a relief for an injunction had been joined to the other reliefs it was held that the mere fact that a perpetual injunction has been asked for will not take the case out of the jurisdiction of the Revenue Court. In the present case as already stated the plaintiff has stated in the plaint that he obtained joint possession and he does not state anywhere that he has been dispossessed. All that he says is that the defendants have realized his share of profits from the tenants. Therefore the only relief which the plaintiff claims and to which he is entitled is a decree for his share of profits which according to him has been realized by the defendants from the tenants and for which, as already stated, he can claim and obtain relief in the Revenue Court under S. 227, Tenancy Act. This view is not without an authority. In 1929 All 810 (2), where a cosharer in an undivided mahal was in actual possession of the property in the sense that he was making collections for the whole co-parcenary body, it was held that it was not open to another cosharer to institute a suit against him in the Civil Court for joint possession of the property or for mesne profits. The proper remedy of the plaintiff in such a case was to file a suit for profits or for settlement of accounts in the Revenue Court. The suit is therefore not cognizable by the Civil Court. It is therefore ordered that the appeal be allowed, the decree of the lower Court be set aside and the plaint be returned to the plaintiff for presentation to the proper Court. As this point of jurisdiction was not raised by the defendants the parties shall bear their own costs of this appeal.

The learned counsel for the respondent relied on 1921 All 112 (3). Whatever may have been the doubts which were dealt with in the case cited by the learned counsel they have been removed and set at rest by the Full Bench decision in 1930 All 193 (1). As the valuation of this suit was below Rs. 200, no appeal lay to the Civil Court and consequently S. 268, Tenancy Act, does not apply. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal allowed.*

1. Ananti v. Chhannu, 1930 All 193=124 I C 540=52 All 501 (F B).
2. Bashir Husain v. Mohammad Ali, 1929 All 810=120 I C 558.
3. Said Unnissa v. Fida Husain, 1921 All 112=61 I C 385.

A. I. R. 1935 Allahabad 527

NIAMATULLAH, J.

Bhairon Singh and *another* — Defendants—Appellants.

v.

P. Ganga Narain and *another*—Plaintiffs—Respondents.

Second Appeal No. 1411 of 1934, Decided on 11th February 1935, from decision of Addl. Dist. Judge, Cawnpore, D/- 1st August 1934.

Evidence Act (1872), S. 69 — Witness present at time of execution—Mentioning attestor's name and identifying their signature and mentioning that executant signed in his presence — Held S. 69 was satisfied and mortgage was proved.

In a suit on a mortgage, the execution of the mortgage-deed was denied by the defendant-appellants. The mortgagor, the mortgagee and all the attesting witnesses had died before the institution of the suit. The only evidence which the mortgagee produced to prove due execution of the mortgage-deed was that of the son of the mortgagee, who stated that "I was present at the time of the execution of the mortgage-deed. *R. S.* and *R. A.* attested the deed. The scribe was *A*, petition writer. Ram Singh (executant) signed in my presence and that of the attesting witnesses;" the witness also identified the signa-

tures of the attesting witnesses ; but he did not say that they had signed in his presence :

Held : that all the requirements of S. 69 were made out and that the mortgage was proved. [P 528 C 2]

J. C. Mukerji—for Appellants.

Judgment.—This is a defendant's appeal arising from a suit for sale of mortgaged property. The execution of the mortgage deed was denied by the defendant-appellants. The mortgagor, the mortgagee and all the attesting witnesses had died before the institution of the suit. The only evidence which the mortgagee produced to prove due execution of the mortgage deed was that of the son of the mortgagee, who stated that:

"I was present at the time of the execution of the mortaage-deed. Ram Sundar and Ram Adhin Bajpai attested the deed. The scribe was Abdul Karim, petition writer. Ram Singh (executant) signed in my presence and that of the attesting witnesses."

The witness also identified the signatures of the attesting witnesses: but he did not say that they had signed in his presence. It is argued that the evidence falls short of the requirements of S. 69, Evidence Act. The contention is that if no attesting witness can be found, it must be proved that the "attestation" of one of the attesting witnesses, at least, is in his handwriting and that the signature of the person executing the document is in the hand-writing of the person, and that it is not enough for the party relying on the document to prove that the signature of one at least of the attesting witnesses is in his own handwriting. The learned advocate ingeniously argues that the word "attestation" in S. 69 implies that the witness should be an attesting witness in the sense in which that expression is understood in law, that to say, it should be proved that the person purporting to be an attesting witness had seen the executant sign or received acknowledgment from him. Assuming this view of S. 69 is correct, I do not think the evidence quoted above falls short of the requirements of that section as the witness identified the signatures of the attesting witnesses. In this view, all the requirements of S. 69 are made out. Both the lower Courts have accepted the evidence as sufficient proof of the mortgage deed in suit.

No other question is raised in this second appeal, which is dismissed under O. 41, R. 11, Civil P. C.

Appeal dismissed.

K.S.

A. I. R. 1935 Allahabad 528

GANGA NATH, J.

Jadu Dube—Plaintiff—Appellant.

v.

Dasrath Rai and *another*—Defendants—Respondents.

Second Appeal No. 1186 of 1932, Decided on 22nd February 1935, from decision of Dist. Judge, Ghazipur, D/- 30th July 1932

Agra Tenancy Act (1926), Ss. 132, 138 and 139 — Mere failure to take steps under Ss. 138 and 139 in time does not bar suit for arrears.

There is nothing in the provisions of Ss. 138 and 139 which may bar a suit for recovery of arrears of rent, even if either of the parties fail to take necessary steps under Ss. 138 and 139 for the division of the produce, where the rent is taken by division or for estimate or appraisement of the standing crops : 1932 *All* 149, *Rel on*. [P 528 C 2]

K. Verma and *V. D. Bhargava* — for Appellant.

A. P. Pandey—for Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendant-respondent to recover arrears of rent which was payable admittedly by division of produce. The trial Court decreed the suit, but the learned District Judge, Ghazipur, dismissed the suit with a finding that the plaintiff had not taken necessary steps for the division of the produce at the time of the produce. Against this decision this appeal has been preferred. The only question for determination is whether the suit lies or not. There is no provision in the Agra Tenancy Act, which forbids the filing of a suit if the necessary steps for the division of produce, such as are prescribed under Ss. 138 and 139, Tenancy Act, are not taken in time. On the other hand, S. 132, Tenancy Act, which applies to the recovery of arrears of rent lays down:

"An arrear of rent shall be recoverable by suit, or by distraint or by notice through the tehsildar in accordance with the provisions of this Act or in any one or more such ways."

Sections 138 and 139 provide for the procedure to be adopted in case either party applies for the division of the produce in kind, or for estimate or appraisement of the standing crops where rent is taken by estimate or appraisement. As already stated there is nothing in the provisions of Ss. 138 and 139 which may bar a suit for recovery of arrears of rent even if either of the parties fail to take necessary steps under Ss. 138 and 139 for the division of the produce where the rent

is taken by division or for estimate or appraisement of the standing crops. This view is not without an authority. In 1932 All 149 (1), it was held that whether rent was payable by division of the produce and the rent was in arrears, a suit for the money equivalent of such rent lay under S. 132, Tenancy Act of 1926, and that Ss. 138 and 139 simply laid down the procedure for the deputation of an officer and there was nothing in them which could cut down the right of suit granted by S. 132.

The learned District Judge did not enter into the question as to how much rent was due by the defendant-respondent. It is therefore ordered that the appeal be allowed with costs. The case be remanded to the lower Court to admit it under its original number and to dispose of it in accordance with law on the evidence on the record. The court-fee will be refunded as usual. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal allowed.*

1. Indarjit Partap Bahadur Sahi v. Sewak Rai, 1932 All 149=134 I C 457=54 All 89.

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* A. I. R. 1935 Allahabad 529

(Full Bench)

SULAIMAN, C. J., BENNET AND HARRIES, JJ.

Mohammad Taki Khan — Plaintiff—Appellant.

v.

Jang Singh — Defendant—Respondent.

Second Appeal No 834 of 1933, Decided on 12th March 1935, from decision of Dist. Judge, Farrukhabad, D/- 12th January 1933.

*** (a) Evidence Act (1872), Ss. 91 and 92—Term that certain amount is to be paid by transferee - Oral evidence to prove separate contemporaneous agreement that amount menitoned will not be paid is not admissible.**

Where under a written document there is some amount still outstanding which under its terms has to be paid by the transferee, then it is not open to the transferee to produce oral evidence to show that there was a separate contemporaneous oral arrangement under which it was agreed that this sum would not be payable, for such a course would be allowing him to contradict the terms of the document and would be contrary to the provisions of S. 92: *Case law discussed.* [P 534 C 1]

(b) Evidence Act (1872), Ss. 91 and 92—Mortgagor can prove by oral evidence that money sought to have been borrowed has not actually been borrowed—Mortgage.

So far as the amount of the mortgage money as stated in the mortgage deed is concerned, it is always open to the mortgagor to say that he had not received the full consideration, because the admission that so much had been paid by the mortgagee to the mortgagor is a mere acknowledgment of the receipt of the amount paid in the past and is therefore a recital as to a fact and there is nothing in S. 92, which would debar a mortgagor from saying that although he admitted having received the full amount, he had not in fact received it. On the other hand, if a dispute arose as to whether the exact amount mentioned in the mortgage deed to be paid in future was the amount agreed to be advanced or was more or less, then both parties would be estopped from going behind the recital, because there would be an implied promise on the part of the mortgagee to advance the whole of that amount. [P 534 C 2]

(c) Fraud—Plaintiff fraudulently entering into contract in order to cheat third person—Fraud succeeded — Plaintiff is estopped from alleging his own fraud and setting it up as against defendant

Where a plaintiff comes to Court and wants to go back upon the terms of a contract entered into by him on the ground that such terms had been fraudulently entered by him in order to cheat a third person and such fraud has actually succeeded, there can be no doubt that the plaintiff would be estopped from alleging his own fraud and setting it up as against the defendant. [P 534 C 1, 2]

(d) Practice—Plaintiff cannot place evidence in Court in alternative.

Per *Bennet, J.*—A plaintiff cannot appear in a witness box in a Court of law and state in the alternative; when it is a question of evidence a statement must be precise. [P 536 C 2]

*** (e) Evidence Act (1872), Ss. 91 and 92—Amount of sale consideration in sale deed is term—No evidence of oral agreement to vary, contradict or add or subtract from sale consideration is admissible — Sale— Consideration.**

The amount of sale consideration is a term of deed of sale; when the terms of a deed of sale have been proved according to S. 91 of the Act, no evidence of any oral agreement or statement shall be admitted as between the parties to the deed of sale or their representatives for the purpose of contradicting, varying, adding to, or subtracting from the amount of sale consideration. [P 537 C 1]

*** (f) Evidence Act (1872), Ss. 91 and 92—Acknowledgment of receipt of whole or part of sale consideration is not term -Oral evidence to show amount acknowledged was not received is admissible.**

The acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale and oral evidence may be given to show that the amount acknowledged or any part of it was not received. [P 537 C 1]

(g) Evidence Act (1872), Ss. 91 and 92—One party tendering oral evidence to prove that the amount acknowledged was not received—This does not give right to other party to prove that sale consideration is lsss than what is stated in deed.

Per *Bennet* and *Harries, JJ.*—When one party tenders oral evidence to prove that the

amount acknowledged or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the amount of sale consideration was less than what is entered in the deed of sale. [P 537 C 1, 2]

F. Owen O' Neile, K. N. Katju and *Shah Jamil Alam*—for Appellant.

K. Verma and *Babu Ram Avasthi*—for Respondent.

Sulaiman, C. J.—Three questions have been referred to this Full Bench for answer by the Division Bench before which the plaintiff's appeal arising out of a suit for sale on the basis of a mortgage-deed came up for hearing. On 17th August 1926, a sale deed was executed by the plaintiff and his uncle along with their wives in favour of the two vendees including the present defendant. The sale deed purported to be for Rs. 11,400, out of which a part was paid in cash and another part was set off against a previous debt and the balance of Rs. 5,000 was stated to have remained in the hands of the vendees who were liable to pay the amount to the vendors. On the same date a mortgage deed was executed by one of the vendees in favour of the plaintiff and his uncle for this sum of Rs. 5,000, under which the mortgagor agreed to pay this amount to the two vendors and hypothecated his immovable property as security for the amount. There was, of course, an admission that this sum was due under the contemporaneous sale deed and would be paid later. The present plaintiff admits to have received some payments and brought the suit to recover Rs. 3,300, the balance out of Rs. 5,000 which according to him had remained unpaid. The defendant set up the defence that the principal consideration of the sale deed was not Rs. 11,400 but only Rs. 8,400 and that the extra sum of Rs. 3,000 had been entered therein fictitiously in order to defeat and delay possible pre-emptors. A question arose whether it was open to the defendant to adduce evidence to show that a part of the sale consideration was really fictitions. Such evidence was allowed by the Courts below and they have come to the concurrent finding that this amount was in fact fictitious. The first question referred to the Full Bench is:

"Whether evidence tending to show that the consideration for the said sale was a lesser sum than that stated in the sale-deed of the 17th August 1926 was admissible."

The answer to this question depends on an interpretation of Ss. 91 and 92, Evidence Act. Under the latter section when the terms of any contract have been proved, no evidence of any oral agreement is to be admitted as between the parties to any such instrument or their representatives. "for the purpose of contradicting, varying, adding to, or substracting from, those terms." Under proviso 1, however any fact which would invalidated any such document can be proved and by way of illustration it is mentioned that want or failure of consideration can be proved. Obviously such want or failure of consideration as can be proved must be one which would invalidate the document.

There are several cases in support of the plaintiff-appellant's case, which may be first mentioned briefly. In the case of 1915 Mad 868 (1), it was laid down that the amount of the price agreed to be paid is an essential term of a contract of sale and that no evidence of an oral agreement at variance with the provisions of the deed is admissible. Accordingly the vendor in that case was not allowed to show that the true sale consideration instead of the ostensible amount of Rs. 35,000 was really Rs. 36,000, the extra sum of Rs. 1,000 having been agreed to be written off after delivery of possession. See also the cases of 1923 Cal 570 (2) and 1930 Mad 659 (3).

In the case of 1923 All 429 (4). Walsh, J., declined to allow evidence to be considered which was intended to show that the true consideration of Rs. 3,000 mentioned in the sale deed was in fact Rs. 2,500 only, and he thought that an attempt to prove that a sale really took place for one sum when the deed says that it took place for another sum was not within the proviso of S. 92 and could not be allowed to be made. The learned advocate for the defendant had to concede that this case is a direct authority in favour of the plaintiff-appellant. He however relies first on certain earlier cases in support of his contention that evidence is admissible.

In the case of 22 All 149 (5), their Lordships of the Privy Council disallowed oral evidence for the purpose of ascertaining the intention of the

1. Adityam Iyer v. Rama Krishna Iyer, 1915 Mad 868=21 I C 458=38 Mad 514.
2. Annada Charan v. Hargovinda, 1923 Cal 570 =75 I C 557.
3. Krishnayya v. Mohammad Galeb Sahib, 1930 Mad 659=124 I C 508.
4. Lala Singh v. Basdeo Singh, 1923 All 429=71 I C 768.
5. Bal Kishen Das v. W. F. Legge, (1900) 22 All 149=27 I A 58=7 Sar 601 (P C).

parties to the deeds in question, but laid down that the question whether the document was an out and out sale or whether it was a mortgage by conditional sale could be decided on a consideration of the documents themselves with only such extrinsic evidence of such surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. By the very definition of mortgage by conditional sale as now contained in the Transfer of Property Act, a transaction which is ostensibly one of sale would be a mortgage by conditional sale, if there is an agreement to reconvey the property.

In the case of 22 All 370 (6), their Lordships of the Privy Council affirmed the judgment of this Court and approved of the proposition that where there had been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid. Their Lordships took care to point out that S. 92 did not indicate that no statement of fact in a written instrument was to be contradicted by oral evidence. Accordingly when there was a mere acknowledgment of a receipt of consideration it was laid down that there was no infringement of that section to accept proof that by a collateral arrangement between the parties, the consideration money had in fact remained with the purchaser in his hands for the purposes and under the conditions agreed between them. These cases therefore do not support the contention urged on behalf of the defendant.

But great reliance is placed by the learned counsel on the case of 33 All 340 (7), decided by their Lordships of the Privy Council. In that case Hanifunnissa had executed a document which purported to be a sale deed for a sum of Rs. 60,000 in favour of her daughter and had acknowledged the receipt of the entire consideration in the deed. She brought a suit on the allegations that the document was a fictitious document and that really no interest in the property had passed to the transferee. In the alternative she claimed that it was a sale deed, the consideration for it had not been paid to her and she should be given a decree for the full amount. The defendant on the other hand denied that the transaction was a fictitious transaction, but at the same time did not admit that it was a sale transaction and pleaded that it was a transaction of gift under which she was not liable to pay any amount at all. The trial Court did not come to the finding that the transaction was wholly fictitious and holding it to be a deed of gift, dismissed the plaintiff's claim for recovery of the sale price as well. On appeal before the High Court only one point appears to have been pressed on her behalf, for the judgment of the High Court opened with the remark:

"The only point involved in this appeal is whether or not extrinsic evidence is admissible for the purpose of showing that a document which purports to be and is on the face of it a deed of sale is in reality a deed of gift."

The learned Judges came to the conclusion that the defendant was debarred from showing a different nature of the transaction and that S. 92, Evidence Act, was in her way, and accordingly decreed the plaintiff's claim for recovery of Rs. 60,000 on the footing that it was a sale transaction, though not a fictitious transaction. When the matter went up in appeal before their Lordships of the Privy Council, their Lordships thought that the decree appealed from could not be sustained and were of the opinion that the proper course was to remand the case to the High Court to be dealt with on the evidence. The case was accordingly remanded. Another Division Bench of this Court then disposed of the appeal and dismissed the suit holding that the transaction was one of gift, pure and simple.

The learned advocate for the defendant relies on this case strongly and urges before us that this is a conclusive authority that evidence should be allowed to show that the sale consideration was not what was recited in the deed. It should however be borne in mind that in that case although the plaintiff's case that the document was fictitious had apparently been abandoned in the High Court and was certainly not made the basis of the decision by the High Court, there was an admission by the plaintiff that the whole of the consideration had been paid to her and that nothing was due and owing to her from the defendant. The deed on the face if it therefore showed that there was no longer any pecuniary liability on

6. Sah Lal Chand v. Indarjit, (1900) 22 All 370=2 I A 93=7 Sar 702 (P C).
7. Hanif-unnissa v. Faiz-unnissa, (1911) 33 All 340=11 I C 398=38 I A 85 (P C).

the transferee at all. The defendant took up the same position that there was no further pecuniary liability on her, but explained this circumstance by showing that although there was a recital that money had in fact been paid, the true fact was that it was understood between the parties that no money should ever be paid and was therefore not paid. The decision of their Lordships of the Privy Council is accordingly no authority for the proposition that where a part of the sale consideration is on the face of the document still outstanding and is agreed between the parties to be payable in future, it is open to the vendee to show that that sum was a fictitious amount.

This Privy Council case was followed by a Division Bench of this Court in the case of 1914 All 298 (8). In that case the ostensible sale consideration stated in the deed was Rupees 40,000 but the vendor had admitted receipt of Rs. 37,600 and had acknowledged payment in the deed; the balance of Rs. 2,400 was to be paid in cash at the time of the registration. The vendor however brought the suit for recovery of Rs. 24,874 out of the sum of Rs. 37,600 on the allegation that although it had been admitted in the deed that the sum had been paid, it had in fact not been paid. The defendant turned round and although denying liability to pay this amount pleaded that this sum had been fictitiously entered in the deed and that it was wrongly stated to have been paid, the true fact was that it was never intended between the parties that it should be paid and that accordingly it had not been paid. The Bench purporting to follow the decision of their Lordships of the Privy Council held that such evidence was admissible. One of the reasons suggested was that where a plaintiff is allowed to go back upon the recital in the the deed, the defendant is also entitled to produce oral evidence in support of her own allegations. It is not possible to admit oral evidence on any such equitable ground. The question whether evidence is admissible or not is a legal question which is to be decided on the proper interpretation of the relevant sections of the Indian Evidence Act.

Under S. 91 when the terms of a contract have been reduced to the form of a document, no evidence can be given in proof of terms of such contract except where secondary evidence of its contents is admissible. It follows that if the contract between the parties has been reduced to the form of a document, they cannot be allowed to set up any other contract at variance with the terms of the document.

Section 92. Evidence Act, provides that where a contract has been entered into between two parties and certain terms have been reduced to the form of a document, then neither party, with certain exceptions, can be allowed to go back upon the written document and either contradict, vary, add to or substract its terms. Both parties must be tied down to the agreement which they chose to reduce into writing. The exceptions are contained in the various provisions. The section therefore prevents a party from varying the terms of the document in a way which would be contrary to its plain language, but where other evidence is sought to be produced in order to invalidate the document itself, then, of course, there is no prohibition because obviously the invalidation of a document is not a variation of its terms, but its very negation.

Where the dispute is as to whether the transferee had agreed to pay Rs. 5,000 or Rs. 3,000 in future the agreement is certainly a part of the terms of the document and contains a promise of the transferee and therefore an obligation and liability on him to pay the stated amount. On the other hand, where the dispute is as to whether a sum of Rs. 5,000 stated to have already been paid and received was in fact Rs. 5,000 and not a smaller sum of Rs. 3,000, the question is one of fact and relates to the exact amount which was paid and received. Substantially this is no part of the terms of the contract, for there is now further obligation on the transferee to pay the stated amount. In reality the question what was the actual amount paid in the past, i. e., the recital of the amount said to have been received, is not very material if both parties admit that that amount is no longer due. A recital as to the past payment is a recital of a fact and therefore is no estoppel against the person who made the admission. There is only a presumption against him arising out of his admission, but that presumption is by no means conclusive or irrebutable. On the other hand, where there is a promise to pay

8. Chuni Bibi v. Basanti Bibi, 1914 All 298=24 I C 661=36 All 537.

a certain amount in future, it is by no means a statement of a fact which may be shown to be incorrect. but is the undertaking of a liability under a written document which cannot be allowed to be departed from. By trying to show that the recital is wrong, the party is merely trying to show that it made a wrong admission; while by attempting to show that the amount promised to be paid was different he is attempting to alter one of the conditions in the deed which still remains to be fulfilled. It seems to me that there is under this section no prohibition against the party to a document restraining him from trying to show that a statement of fact contained in the document was in reality not true, but there is a prohibition against him from attempting to show that one of the essential terms of the document which creates an existing liability on him was wrong, and therefore not binding upon him. If the admission has been obtained by means of fraud, force or misrepresentation or is in any other way invalid, it is open to the party aggrieved to have the document set aside, in which case it would fall to the ground on account of its invalidity, but a party cannot accept a part of the document and its terms and repudiate the other parts. Where a defendant says that the transaction in question was not a sale but a mortgage or that it was not a sale but a gift, he is attempting to show that the true nature and character of the transaction was different from what it ostensibly was. He need not necessarily be varying its terms provided such terms can be gathered from the documents in existence and, as laid down by their Lordships, from the surrounding circumstances showing the relation to existing facts. But where a party admits that a transaction was of the nature and character as appears from the document, but wishes to show that the consideration still payable was less or more than what was entered therein, he is accepting the transaction in part and trying to alter another part of it. Such a course is certainly not open to the party.

Speaking personally for myself, I think the case of 33 All 340 (7) decided by their Lordships of the Privy Council could not be distinguished in 1914 All 298 (8). It is suggested that the distinction was that in that case the plaintiff had at first alleged that the transaction was wholly a fictitious one, though at a later stage that position was actually abandoned. It would, to my mind, have made no difference even if she had brought a suit on the simple allegation that the sum of Rs. 60,000 was due to her on the sale deed, for the defendant would still have been allowed to prove that what she had admitted to have received and therefore admitted was not due from the defendant was in fact not due because it had never been agreed to be paid. Their Lordships no doubt sent the case back for decision on the merits. But I would take it that their Lordships meant that the case should be decided on the evidence which the High Court had declined to examine, thinking that S. 92 was a bar, that is to say evidence relating to the question as to whether the transaction was a gift transaction that is such that there was no consideration outstanding. When the case came back to the High Court, the only point that was considered was whether the transaction was a gift or a sale and the finding being in favour of the defendant, the suit was dismissed. Had the further question as to whether the transaction was a fictitious one also arisen, the enquiry would not have been confined to these natures of the transaction only. It was on taking this view of the Privy Council decision that the Division Bench in the case of 1914 All 298 (8), allowed evidence to be given to show that part of the consideration which had been admitted by the plaintiff in that suit to have been received and therefore no longer due was in fact no longer due though on the ground that it had been understood that nothing would be payable at all. In view of the decision of their Lordships of the Privy Council, I am unable to hold that this view was in any way erroneous.

At the same time I am clearly of the opinion that the case of 33 All 340 (7) did not decide the wider question that it is open to the defendant to show that the consideration mentioned in the sale deed was fictitious even though there was under the deed an existing liability on the defendant to pay such an amount. The distinction to my mind is this: Where the written document purports to show that property was transferred by one party to the other and that there was no longer any further liability on the latter to pay any amount to the former and goes on to add that this is so because the additional amount which

the latter was liable to pay had already been paid previously, then the defendant is entitled to say that there was a contract of transfer of the property and that property passed from one to the other and further to agree that there was no longer any liability on him to pay any additional amount, but may say that the reason why there is no longer any liability on him is not that the amount stated to have been paid previously was in fact paid, but that it had never been agreed upon that it would be paid at all and was therefore not paid. The dispute between the parties whether the amount which was admitted by one party to have been paid and was therefore not due or whether it was agreed by both the parties not to be payable and was therefore not payable, does not raise any question of the existing rights and liabilities between the parties under the document, but merely recites a past event. I therefore do not consider that there is any attempt to vary the terms affecting the rights and liabilities of the parties, if it is tried to be shown that the recital of the past event was slightly inaccurate,' although the effect of the document was the same as appears from it.

In the present case however the sum of Rs. 5,000, was expressly stated to be still due from and payable by the vendees. Indeed, they executed a separate mortgage deed in order to secure this amount. To allow one of the vendees now to go back upon this covenant would be to allow them to repudiate their liability to pay Rupees 5,000 which under the document, they were bound to pay. I do not consider that such a covenant is a mere recital of a fact which can be shown to be wrong; it would really be varying the terms of the document if evidence to show the contrary were permitted.

I have therefore no hesitation in holding that where under a written document there is some amount still outstanding which under its terms has to be paid by the transferee, then it is not open to the transferee to produce oral evidence to show that there was a separate contemporaneous oral arrangement under which it was agreed that this sum would not be payable, for such a course would be allowing him to contradict the terms of the document and would be contrary to the provisions of S. 92, Evidence Act. The second question referred to the Full Bench is:

"Whether evidence tending to show that the mortgage of the 17th August 1926 was for a lesser sum than that stated in the mortgage deed of that date was admissible."

So far as the amount of the mortgage money as stated in the mortgage deed is concerned, it is always open to the mortgagor to say that he had not received the full consideration, because the admission that so much had been paid by the mortgagee to the mortgagor is a mere acknowledgment of the receipt of the amount paid in the past and is therefore a recital as to a fact and there is nothing in S. 92, which would debar a mortgagor from saying that although he admitted having received the full amount, he had not in fact received it. 'On the other hand, if a dispute arose as to whether the exact amount mentioned in the mortgage deed to be paid in future was the amount agreed to be advanced or was more or less, then both parties would be estopped from going behind the recital, because there would be an implied promise on the part of the mortgagee to advance the whole of that amount.

The present defendant in my opinion is not debarred from producing oral evidence in this case because of the terms entered in the mortgage deed, but the bar is really created by the execution of the sale deed, for in my opinion he is entitled to say that the money sought to have been borrowed by him had not in fact been borrowed though he cannot be allowed to say that the balance of the sale consideration was not for Rs. 5,000. The third question referred to us is:

"In any event whether it was open to the defendant respondent to say that the sums stated in the two documents were not the true sums having regard to the fact that it was his case that the consideration in the sale deed was incorrectly stated in order dishonestly to defeat the possible rights of a third person."

In view of the answers given to the first two questions, as to which all of us are agreed, though perhaps for different reasons, it is not necessary to answer the third question. There is the further difficulty that facts have not been gone into by the Courts below as to whether any person was in fact defrauded. Where a plaintiff comes to Court and wants to go back upon the terms of a contract entered into by him on the ground that such terms had been fraudulently entered by himself in order to cheat a third person and such fraud has actually succeeded, there can be no doubt that the plaintiff would be estopped from

alleging his own fraud and setting it up as against the defendant. The question whether a defendant can in similar circumstances be allowed to plead that the terms were fraudulent and that accordingly he may be allowed to show that there was a fraud because the plaintiff was also a party to it, may be a different question. It is however unnecessary to answer it in this case.

Bennet, J.—I am in agreement with the replies of the Hon'ble Chief Justice in the negative to questions 1 and 2 referred to this Full Bench and I also agree that question 3 need not be answered. I desire to add some remarks in regard to the ruling of a Bench of this Court in 36 All 537 (8). On p. 544 it is stated:

"The main contention of the learned advocate for the appellant (defendant) was that if the respondents (plaintiffs) are entitled, as they undoubtedly are, to go behind the recital and admission in the deed and prove that the entire consideration has not been paid, it is open to the appellant to produce oral evidence as to the true nature and extent of the consideration."

In that case the plaintiffs sued for the alleged balance of the purchase money although the sale deed acknowledged payment in full. This could be done under S. 92, proviso (1), Evidence Act, as this allows proof of want of consideration and it is to be noted that Ss. 91 and 92 do not deal with the question of mere receipts or acknowledgments that consideration was received. The defendant in reply desired to produce oral evidence that the sale consideration was less than that stated in the sale deed. On p. 547, Chamier, J., stated what he considered was the reason for the decision of their Lordships of the Privy Council in 33 All 340 (7), as follows:

"In some of the cases the decision rests upon a ground which applies as much to one kind of case as to the other, namely. that if one party to a deed alleges and proves that the consideration, the receipt of which was acknowledged in the deed, did not pass, the case falls within the first proviso to S 92 of the Evidence Act, and the other party is at liberty to prove what the real consideration was. It appears to me that it must have been upon this ground that their Lordships of the Privy Council admitted the evidence tendered by the defendant in that case."

He further held:

"On the authorities I would hold that as the respondents (plaintiffs) have alleged and proved that the whole of the consideration receipt of which is acknowledged in the deed did not pass, the appellant is entitled to produce oral evidence in support of her allegations."

The late Banerji, J., held on p. 549 in regard to the ruling of their Lordships of the Privy Council quoted:

"Their Lordships of the Privy Council reversed this decision and held that oral evidence could be given by the defendants to prove the real nature of the transaction. Apparently their Lordships were of opinion that the case would come within the first proviso to S. 92. I am unable to distinguish the present case from the principle of the ruling above mentioned. In view of that ruling I must hold that the appellant is entitled to produce oral evidence to prove her allegations."

It is clear therefore that both the learned Judges in this case admitted oral evidence for the defence because they considered that the case was covered by the ruling of their Lordships of 33 All 340 (7). Now in the ruling of their Lordships to which reference was made no reasons have been given for the decision. Their Lordships merely state on p. 341:

"Their Lordships think the decree appealed from cannot be sustained. They are of opinion that the proper course will be to remit the case to the High Court to be dealt with on the evidence."

I consider that if this ruling of their Lordships is to be taken as an authority for a proposition of law then that proposition of law must be applied to a case where the facts are similar. Is it correct to say that the facts in 1914 All 298 (8), cannot be distinguished from the facts in 33 All 340 (7)? The facts of the case before their Lordships of the Privy Council are quoted in some greater length in the report of the judgment of this Court in 27 All 612 (9), and I have also referred to the paper book of this case which was before their Lordships of the Privy Council. In para. 3 of the plaint it was set out:

"After the death of Kunwar Abdul Ghafur Khan, Abdush Shakur Khan, son of the plaintiff, became a great prodigal and profligate person and always compelled the plaintiff to give her money by exercising undue influence on her. Therefore under a pretence to protect herself against his undue influence, the plaintiff executed a fictitious sale deed on the 27th day of September 1889, in respect of the property mentioned below, in favour of all the three defendants (who were minors), merely with a view to change the names, by entering Rs. 60,000 in it as the amount of consideration."

These defendants were the defendants first party, the daughter of the plaintiff and her grandson and granddaughter. The first relief asked for was the recovery of possession of the property and a declaration that the document of 27th September 1889 had no effect and that the defendants have

9. Faizunnissa v. Hanifunnissa, (1905) 27 All 612=2 A L J 360=1905 A W N 129.

thereunder acquired no right in the property claimed. The second relief was:

"If the Court does not think it proper to award possession of the property claimed to the plaintiff, it may pass a decree in her favour for Rs. 60,000 the amount of consideration entered in the sale deed, etc."

The main case therefore of the plaintiff was that the document in question was a fictitious document. The pleading of the contesting defendants, who were transferees from the persons in favour of whom the document had been executed, was that the transaction was indeed fictitious in the sense that it was not a sale deed but that there was a transfer by way of gift. The finding of the trial Court was that the transaction amounted to a gift, and the suit of the plaintiff was dismissed. The plaintiff appealed to the High Court, and the first ground of appeal set out in the memorandum was:

"Because upon the evidence it has been fully established that the deed of sale dated 27th September 1889. . . . . was fictitious and not a real transaction, and that no transfer of property took place thereunder."

and the second ground set out that the plaintiff continued in possession of the property, and the third ground set out that in the absence of consideration and transfer of possession the said deed was invalid and void under the Mohammadan Law. It was only when we come to the sixth ground that the claim was put forward:

"Because in any case the Court below ought to have decreed the claim for the consideration of the sale claimed in the suit."

There is nothing whatever to show on the record that the appallent-plaintiff abandoned her first three grounds in the memorandum of appeal. It is true that the judgment of this Court contained in 27 All 612 (9), begins by stating:

"The only point involved in this appeal is whether or not extrinsic evidence is admissible for the purpose of showing that a document which purports to be and is on the face of it a deed of sale is in reality a deed of gift."

Now it is impossible to say what were the reasons which induced their Lordships of the Privy Council to allow oral evidence in this case because their Lordships considered that this was not a case in which any general principle should be laid down, and for that reason apparently they did not formulate their reasons. It is therefore in my opinion an extension of the doctrine of this particular case to apply it to a case such as 1914 All 298 (8), where the conditions which I have set out do not exist. It may have been that their Lordships considered that where the plaintiff herself set out in the plaint that the document was a fictitious document she could not at the same time claim that under S. 92, Evidence Act, the defendant was debarred from proving what the real nature of the transaction was. It is to be noted that in S. 92 the language used is:

'When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement etc."

Now, in S. 91, the last section, it is laid down, that:

"When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document. no evidence shall be given in proof of the terms of such contract, grant or other dispos tion of property or of su h matter except the document itfelf . ."

In a case where a party produces a document and relies on the document to prove the terms of a transaction of the nature stated in these Ss. 91 and 92, then that party may claim the protection of these sections and say that it is not open to the opposite party to produce oral evidence, contrary to the sections. But it would be obviously a different proposition to state that where a plaintiff produces a document and alleges it to be fictitious, at the same time the plaintiff can rely on these sections for preventing oral evidence by the opposite party of the real nature of the transaction. Some argument was made that a plaintiff might be allowed to make a pleading in the alternative as was done in this case. That may, possibly be so, but in my opinion a party cannot give evidence in the alternative. The sections relate to the case of where a document has been proved. I do not consider that a plaintiff can appear in a witness-box in a Court of law and state in the alternative: "I executed this document as a genuine sale" and also "I executed this document merely as a fictitious document."

When it is a question of evidence a statement must be precise. The plaintiff executed the document. It was within her knowledge whether she intended to be a genuine transfer or merely a fictitious document. I do not think that she can place her evidence in the alternative before the Court

stating at the same time that the document was both genuine and fictitious. It is not possible for me to say that these were considerations which weighed with their Lordships of the Privy Council in the case of 33 All 340 (7), but I can and do point out that these considerations were present in that case and that there were no similar considerations present in the case of 1914 All 298 (8). It is precisely because in the latter case those considerations were not present that I consider that that ruling is incorrect in assuming that the facts in that ruling were similar to the facts in the ruling in 33 All 340 (7), apart from the alleged authority in the ruling of their Lordships of the Privy Council. The ruling in 1914 All 298 (8) does not set out any definite authority for the proposition it lays down and it does not attempt to show how the proposition which it lays down can be brought under the terms of S. 92, Evidence Act. As I have indicated the ruling of their Lordships of the Privy Council can be brought under the terms of that section but the ruling in 1914 All 298 (8), cannot in my opinion be brought under S. 92, Evidence Act. For these reasons I consider that the extension of the doctrine of their Lordships of the Privy Council to a different set of circumstances by 1914 All 298 (8) is an extension which should not be followed by this High Court.

As a result I consider that the following three propositions of law are established, and I understand that my learned brother, Harries, J., agrees with them all and that the learned Chief Justice agrees with the first two: (1) The amount of sale consideration is a term of a deed of sale. When the terms of a deed of sale have been proved according to S. 91, Evidence Act, no evidence of any oral agreement or statement shall be admitted as between the parties to the deed of sale or their representatives for the purpose of contradicting, varying, adding to, or substracting from the amount of sale consideration. (2) The acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale and oral evidence may be given to show that the amount acknowledged or any part of it was not received. (3) When one party tendors oral evidence to prove that the amount acknowledged or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the amount of sale consideration was less than what is entered in the deed of sale.

Harries, J.—I agree that the questions should be answered in the manner indicated by the Hon'ble Chief Justice. The price stated in a sale deed is in my view a term of the contract and that being so, it is not open to either party to tender oral evidence with a view to showing that the price stated in the sale deed is greater or less than the actual price agreed between the parties.

It has been urged before us however that the decision of their Lordships of the Judicial Committee of the Privy Council in 33 All 340 (7) does allow a party to give oral evidence to vary the price stated in a written contract. The facts in that case were peculiar and exceptional. Both parties to the sale deed admitted that there never was a sale at all and that the sale deed as such was a purely fictitious document. It was common ground that the deed in no sense represented the transaction between the parties and that when the deed was executed there was no intention on the part of either of the parties to enter into a contract of sale. In those circumstances their Lordships of the Judicial Committee of the Privy Council held that oral evidence could be admitted to show what was the real nature of the transaction between the parties. As pointed out by my learned brother, Bennet, their Lordships give no reason for their decision and in my judgment the decision must be confined to the particular facts of that case. I entirely agree with the Hon'ble Chief Justice and my learned brother Bennet that the case of 33 All 340 (7), is no authority for the general proposition that a party may tender oral evidence with a view to showing that the price stated in a contract is not the true price.

In the case of 1914 All 298 (8) a Division Bench of this Court purported to follow the case of 33 All 340 (7). In that case the vendor tendered evidence to show that, though it was stated in a sale deed that the consideration had been paid, it had not in fact been so paid. In those circumstances it was held that it was open to the other party to the contract to show that the price stated in the sale deed was not the true price agreed between the parties. The statement that the money has been received is

a mere statement of fact and is in no way a term of the contract. That being so oral evidence may be adduced to contradict such a statement of fact, as the admission of such evidence in no way contravenes the provisions of S. 92, Evidence Act, which deals only with evidence tending to contradict, vary, add to, or substract from the terms of a contract, grant or other disposition of property. It is difficult however to understand why in a case where one party to a contract is entitled to tender oral evidence to contradict a statement of fact contained in a written contract, the other party to the contract should be entitled to give evidence which is made inadmissible by S. 92, Evidence Act. In my judgment there is nothing in the case of 33 All 340 (7) to warrant the view taken by the Bench of this Court in 1914 All 298 (8) and I agree with my learned brother Bennet that this latter case cannot be regarded as good law and should not be followed. In conclusion I desire to add that I agree with the three propositions of law enunciated by my learned brother Bennet in the concluding portion of his judgment.

By the Court.—The answer to the first question is in the negative. The answer to the second question is that it is not open to a mortgagor to say that the mortgage transaction was not for the sum stated therein, but it is open to him to show that he had not in fact received the full amount of the mortgage money. The third question remains unanswered.

K.S. *Questions answered.*

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* A. I. R. 1935 Allahabad 538

(Full Bench)

SULAIMAN, C. J., KENDALL AND RACHHPAL SINGH, JJ.

Pt. Shiam Lal—Plaintiff—Appellant.

v.

Abdul Raof—Defendant—Respondent.

Second Appeal No. 1149 of 1930, Decided on 18th February 1935, from decision of Dist. Judge, Bareilly, D/- 16th April 1930.

*** (a) Limitation Act (1908), Sch. 1, Art. 2—"In pursuance of any enactment" means acting in conformity with enactment—Person honestly believing that he is acting under some enactment is protected — But where he pretends that he is so acting and knows that he should not act under that enactment, Art. 2 does not apply.**

The expression 'in pursuance of any enactment' in Art. 2 must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment he is protected. But where a person merely pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment: *Case law discussed.* [P 541 C 2]

(b) Criminal P. C. (1898), S. 44—If police officer concocts false story and reports false story he does not come within Limitation Act, Sch. 1, Art. 2.

A police officer would certainly not be acting in pursuance of S. 44, Criminal P. C., if he concocts a purely false story and then makes a report of such a false story, knowing it to be false. It would therefore follow that where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art 2. If the defendant were to satisfy the Court that at the time when he made the report he acted honestly on some information received, he would be protected, even though the report might turn out to be absolutely false but not so to the knowledge of the defendant. [P 541 C 2]

B. Malik—for Appellant.

Muhammad Ismail—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for damages on the ground that the defendant, a police constable, who cherished a grudge against the plaintiff, made a false report on 28th August 1927 at the police station stating that the plaintiff was leading a riotous mob. It was not till 15th March 1928 that this first information report was produced in Court when the plaintiff became aware of its existence. The suit was filed on 28th August 1928. The defendant in addition to denying the allegation that there was any malice or bad faith on the part of the defendant and denying that the report was false, further pleaded that the claim was barred by limitation. Both the Courts below have applied Art. 2, Limitation Act, and dismissed the claim, without going into the question of whether the defendant had, in fact, acted in good faith or not. The case came up in second appeal before a learned Judge of this Court, who referred it to a Bench of two Judges which then referred this case to a Full Bench. In England where the question of interpretation of a similar statute containing the words "act done in pursuance of an enactment," has arisen, the view has been invariably expressed that the defendant cannot seek the protection of the enactment unless he shows that he act-

ed in good faith. In 6 Q B 724 (1) Lord Blackburn remarked:

"It has long been decided that such a provision as that contained in this section is intended to protect persons from consequences of committing illegal acts, which are intended to be done under the authority of an Act of Parliament, but which by some mistake are not justified by the terms and cannot be defended by its provision. . . . . I agree that if a person knows that he has not, under a statute authority to do a certain thing, and yet intentionally does that thing he canot shelter himself by pretending that the thing was done with intent to carry out that statute."

We may also refer to Halsbury's Laws of England, Vol. 23, p. 344, para. 965, where rulings on the interpretation of the corresponding section of the Public Authorities Protection Act (1893) are mentioned. See also 109 E R 453 (2). In 4 M I A 353 (3), at p. 379, their Lordships of the Privy Council observed:

"Our books actually swarm with decisions putting a contrary construction upon such enactments and there can be no rule more firmly established than that if parties bona fide and not absurdly believe that they are acting in pursuance of statutes, and according to law, they are entitled to the special protection which the legislature intended for them, although they have done an illegal act."

In the Indian Limitation Act of 1871, Art. 2 ran as follows:

"For doing or for omitting to do, an act in pursuance of any enactment in force for the time being in British India"

Taking the Article in its strict literal sense, it might well have been contended that the statute would have no application unless the act was done in strict pursuance of the enactment in force, and accordingly where the action was in excess of the power conferred by the statute, the Article of the Limitation Act would have no application. But the view expressed consistently was that even if the action is in excess of the powers conferred by the statute, there would be the protection provided the action was in good faith. For the first time in 1877, the language of the article was slightly changed and ran as follows:

"For compensation for doing, or for omitting to do, an act alleged to be in pursuance of any enactment in force for the time being in British India."

The words "alleged to be" were added, which had not appeared in the previous enactment, and yet the Courts did not consider that the introduction of these new words had made any substantial change in the law as it had stood before. In the case of 124 P R 1881 (4), it was laid down that the words "alleged to be in pursuance of any enactment" must be reasonably construed, and that the person who seeks to take advantage of the shorter period of limitation must show that he had reasonable ground for justifying his action under the particular enactment on which he then relied and not arbitrarily asserted or thought so, i. e., he must in short have assumed to act in the honest exercise of a supposed statutory power. The same view was re-affirmed in the case of 65 P R 1886 (5), and it was laid down that to bring a suit under the above article, it is requisite for the defendant to show that he acted with ordinary care and intelligence, and honestly believed his act to be in pursuance of an enactment for the time being in force. The same view was also assumed in the case of 105 P R 1886 (6). In the Bombay High Court also a Division Bench of that Court in the case of 25 Bom 387 (7), relying on the English authorities already quoted held that where the person seeking the protection of the Act cannot claim that his conduct has any relation to the "execution of the act" if he knowingly and intentionally acts in contravention of its provisions, he would not be entitled to the protection if he did not act bona fide.

In the case of 26 All 482 (8), Art. 2 was not applied by the High Court, but Art. 28 was applied, because it was considered that there was a special provision applicable to illegal issue of warrant of distress whereas Art. 2 would be a general article only.

Our attention has not been drawn to any ruling in India between 1877 and 1908 in which it was ever held that the defendant is entitled to the protection of Art. 2 even if he acted dishonestly and in bad faith, knowing that he had no right to act under any enactment. In 1908 the new Limitation Act was enacted and Art.

1. Selmes v. Judge, (1871) 6 Q B 724.
2. Smith v. Shaw, (1929) 109 E R 453.
3. Richard Spooner and Bomanjee Nowrojee v. Juddow, (1846-50) 4 M I A 353=6 Moo P C 257 =1 Sar 363 (P C).
4. Ganesh Dass v. C. F. Elliott, (1881) 124 P R 1881.
5. Narpat Rai v. Sirdar Kirpal Singh, (1886) 65 P R 1886.
6. Jai Ram v. Gurmukh Singh, (1886) 105 P R 1886.
7. Ranchordas Moorarji v. Municipal Commissioner City of Bombay, (1901) 25 Bom 387=3 Bom L R 158.
8. Municipal Board of Mussoorie v. H. B. Goodall, (1904) 26 All 482=1 A L J 195=1904 A W N 95.

2 was reproduced exactly as it was in the Act of 1877. There is accordingly a fair presumption that the legislature accepted the interpretation put by the Courts on the language of Art. 2, as it had stood in the Act of 1877.

Even under the new Act there is plenty of authority for the view that where a person acts dishonestly, knowing that he has no right to proceed under any enactment, he cannot bring himself within the scope of Art. 2: See 16 O C 211 (9), 72 P R 1909 (10) and 37 Bom 101 (11).

The learned advocate for the respondent relies on the case of 1918 All 63 (12). No doubt in that case the Bench expressed the opinion that for the purposes of Art. 2, it was not absolutely necessary that the defendant in doing or omitting to do the act should bona fide believe that he was acting correctly and in accordance with law. But the actual facts of that case were such that this general observation was not actually called for. In that case an Amin, who had been ordered to sell a certain property at auction, was proceeding to sell it in accordance with the provisions of the Code of Civil Procedure. The plaintiff's case was that he tendered the amount of the decree, but the Amin refused to take the money and proceeded to sell the property. The complaint therefore was that the the defendant had omitted to perform a duty which had been imposed upon him by the Code of Civil Procedure, while he was acting in pursuance of that Code. It was in these circumstances that the Bench held that however improperly the defendant might have acted in refusing to take the money the suit was governed by Art 2, Limitation Act, and no question of the good faith of the defendant arose. The case therefore is distinguishable on the ground that there the plaintiff had admitted that the defendant was purporting to proceed under the Code of Civil Procedure, though he had omitted to comply with one of its provisions making it incumbent upon him to accept the money when tendered.

The case of 1926 All 538 (13) does not directly decide this point. Art. 2, Limitation Act, was actually not applied to that suit which was held to be governed by S. 326 (3), Municipalities Act. In the case of 1932 All 16 (14), Art. 2, Limitation Act, was applied to a case where the District Judge had found that the defendant had a bona fide belief that he had a legal right to act, and had also found that the defendant had in fact such legal authority. There the Sub-Inspector, who apparently had cherished some malice against the plaintiff, arrested him on a complaint made by a person who was present on the spot and was prepared to identify the plaintiff. Having arrested him he also handcuffed him and took him to the police station. The District Judge had come to the conclusion that the Sub-Inspector had not exceeded his powers and had authority both to arrest the plaintiff and also to handcuff him. It was in these circumstances that the Bench held that the mere fact that the Sub-Inspector had a previous malice against the plaintiff would not deprive him of the protection of Art. 2, Limitation Act, because he obviously acted under S. 54, Criminal P. C., and was justified in acting under that section. In the judgment emphasis was laid on the fact that there was a finding of the District Judge that the defendant had a bona fide belief that he had the legal right to act and that he had such legal authority. This case is therefore no authority for the proposition that even where the facts are false to the knowledge of the defendant, he can seek shelter behind the provisions of Art. 2.

The language of the article is no doubt very unhappy, and the use of the ambiguous words "alleged to be" causes considerable difficulty. On the one hand, the learned advocate for the plaintiff contends before us that these words are a mere superfluity, and have no special significance, and accordingly much attention has not been paid to those words in the various judgments delivered by the Indian Courts. He urges that these words must mean doing or omitting to do an act as alleged by the plaintiff. On the other hand, the learned advocate for the respondent contends that these words must mean "alleged" at the

9. Waliullah v. Raj Bahadur, (1913) 16 O C 211 =21 I C 426.
10. Richard Watson and G. H. Gibbons v. Municipal Corporation of Simla, (1909) 72 P R 1909 =2 I C 819=108 P L R 1909.
11. Dhondu Dagdu v. Secy. of State, (1913) 37 Bom 101=17 I C 673.
12. Mukat Lal v. Gopal Sarup, 1918 All 63=48 I C 815=41 All 219.
13. Municipal Board of Benares v. Behari Lal, 1926 All 538=95 I C 1030=48 All 560.
14. Shariful Hasan v. Lachmi Narain, 1932 All 16=135 I C 558.

time of the commission or the omission of the act, i. e., alleged by the defendant. That the words do not mean alleged by the plaintiff in the plaint or alleged by the defendant in the written statement is clear from the decision of their Lordships of the Privy Council in the case of 1927 P C 72 (15), where the Canal authorities had cut the bank of a canal to avoid accident to an adjoining railway and not to the canal itself, and in consequence thereof the plaintiffs' adjacent mills had been damaged, it was held by their Lordships of the Privy Council that Art. 2 was not applicable, as the act alleged was not done in pursuance of any enactment. Their Lordships pointed out that it was quite clear that upon the plaintiffs' showing that was an act which the defendants performed at their own hands, and which, so far as the statutes were concerned, they did not seem on the statement contained in the plaint in a position to justify. Their Lordships pointed out that Art. 2 should not be applied as if it were proved against the averment of the plaintiffs, and that there should be an enquiry as to whether the action was done for any purpose of protecting the canal or as alleged by the plaintiffs only for the purpose of protecting the railway and letting the water away. The case was accordingly remanded to the Lahore High Court for a further investigation.

The question is certainly not free from difficulty, and we are alive to the danger of persons who profess to act in the exercise of powers conferred upon them by enactments being harassed by frivolous suits and called upon to establish their good faith in some cases. At the same time it would be unfair to concede exemption to persons who, knowing that there is no ground for any such action, invent a false story and profess to act under some enactments by abusing its provisions. It seems to us that although the words chosen by the legislature are not happy, their introduction was intended to obviate the difficulty of the article being interpreted too strictly. Taking it literally, it was not wide enough to cover the case of a person who in good faith had acted in pursuance of an enactment, when it was found later on that he had exceeded his powers. To protect such person it was necessary to widen the scope of the Article and give him protection where, although the power was exceeded, he still acted in good faith and honestly believed that he was acting in pursuance of the enactment. But the additional words should not be interpreted as implying that the legislature has shortened the period of limitation in favour of persons who, knowing the falsity of the facts, did an act or omitted to do an act in order to harm another person. As in England, the expression "in pursuance of any enactment" must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment he is protected. But where a person pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment. No doubt under S. 44, Criminal P. C., it is the duty of every person to make a report to the police of the commission of certain specified offences, but there is no such duty cast upon a citizen, much less on a police officer, to make such a report when no facts exist. He would certainly not be acting in pursuance of S. 44, Criminal P. C., if he concocts a purely false story and then then makes a report of such a false story, knowing it to be false. It would therefore follow that where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art. 2. It is only defendants who have acted honestly, although they might have exceeded the actual power conferred upon them by an enactment who would be protected. Of course, where it is established that the act done was in strict accordance with an enactment, there would be an obvious protection. But even where the power was exceeded, there would be protection in cases of good faith and bona fide belief. We are therefore of opinion that although the language of the section is unhappy, there is no good ground for departing from the view which had been expressed under the old Act and in support of which there is a preponderance of authority in India.

If the defendant were to satisfy the Court that at the time when he made the report he acted honestly on some

15. Punjab Cotton Press Co., Ltd, v. Secy. of State, 1927 P C 72=103 I C 1 (P C).

information received, he would be protected, even though the report might turn out to be absolutely false but not so to the knowledge of the defendant. We accordingly allow this appeal and setting aside the decrees of the Courts below send the case back to the trial Court through the lower appellate Court for disposal according to law.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 542

NIAMATULLAH, J.

Salig Ram and *others*—Defendants—Appellants.

v.

(Babu) Gauri Shankar Tandan—Plaintiff—Respondent.

Second Appeal No. 47 of 1933, Decided on 27th February 1935, from decree of Dist. Judge, Mainpuri, D/-10th December 1932.

Mortgage— Usufructuary mortgage — If mortgagor is not entitled to any kind of possession, mortgagor is not entitled to sue trespasser for possession—Only mortgagee can do so—If he fails to sue for more than 12 years his right is extinguished—Right accrues to mortgagor only from date of redemption—Limitation Act (1908), S. 28—Adverse possession.

If the mortgagor is not entitled to any kind of possession or enjoyment of the mortgaged property during the continuance of the usufructuary mortgage, the mortgagor is not entitled to sue a trespasser for possession. It is the mortgagee alone who can do so, and if the mortgagee does not care to bring such suit for more than 12 years, S. 28, Lim, Act. operates to extinguish the mortgagee's title to the property in possession of a trespasser. The mortgagor's right to sue for possession accrues for the first time when after redemption he is unable to take possession of part of the mortgaged property which he finds to be in possession of trespasser, who denies his title to it. He becomes entitled to sue the trespasser when he redeems the property and is opposed by the trespasser It is clear that the period of limitation for his suit is 12 years to be reckoned from the date of redemption, and the trespasser's possession would not become adverse to him till after redemption : 1914 *Mad* 334 *(FB) Foll.* [P 543 C 2]

S. P. Sinha—for Appellants.

Gopalji Mehrotra—for Respondents.

Judgment.—This appeal has arisen from a suit brought by the respondent for recovery of possession of plots 63, 64, 68 and 69 and for demolition of certain constructions made by the defendants on those plots. The plaintiffs' case was that the above mentioned plots were included in his zamindari which was in possession of a usufructuary mortgage for a considerable length of time, that he redeemed the mortgage in 1928 and found the defendants to be unlawful possession of portions of the aforesaid plots the latter having constructed certain buildings, such as "sahdari, latrine, etc., thereon. The suit was brought on 19th June 1931, so that there could be no question of limitation if the plaintiff's cause of action accrued when he redeemed the usufructuary mortgage. The defence was that many of the buildings in question in the case were not situate in any of the plots above referred to, that the defendants made the constructions, that might be found to be situate in those plots, with the permission of the usufructuary mortgagee 30 years before the suit. Limitation and adverse possession were also pleaded apparently on the ground that the cause of action for the present suit arose when the constructions were made. The plaintiff was also said to be estopped by acquiescence in not objecting to the constructions when they were made.

A Commissioner was appointed by the trial Court. According to his report, a well and the northern portion of the sahdari" were outside the plots claimed by the plaintiff, and the controversy was limited to the southern portion of the "sahdari," 5 "karis" of land and part of a "chabutra" and a "chappar," etc., which, according to the Commissioner's report, were situate in one or other of the plots already referred to. Both the Courts below found that the plaintiff was not estopped by any acquiescence, as the defendants constructed the buildings in dispute with their eyes open and in full knowledge and disregard of the plaintiff's right. No question of estoppel by acquiescence was argued in second appeal. Both the Courts below found that the defendants failed to establish that they had made the constructions with the permission of the mortgagee. The lower appellate Court expressed the opinion that the defendants made the constructions without obtaining the mortgagee's permission, but the mortgagee did not care to institute a suit for ejectment.

As regards limitation and adverse possession, both Courts held that adverse possession against the mortgagee is not adverse possession against the mortgagor, who can institute a suit for possession against a trespasser within 12 years after redemption. This view was controverted by the learned advocate for the appellant in second

appeal. It was argued, on the authority of 1914 Mad 334 (1), that adverse possession against the mortgagee might also be adverse against the mortgagor if a trespasser takes possession in denial of the mortgagor's right. Certain observations occurring in that case, are strongly relied upon but in my opinion they should not be divorced from the facts of the case which was one in which the mortgagor had sued for a declaration of his right during the subsistence of a usufructuary mortgage. The defendants in that case had trespassed into a house which had been mortgaged by the plaintiffs for a term of 20 years. The plaintiffs sued for a declaration of their right, reckoning limitation from a certain date. It was alleged that the plaintiffs' cause of action had arisen on a prior date. The questions referred to the Full Bench were: (1) Where a trespasser dispossesses a mortgagor in possession (the mortgage being simple), or a mortgagee in possession (where the mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case? (2) Whether a fresh cause of action for a suit for declaration of title arises from each distinct denial of the plaintiff's title so long as the title itself is not lost, or whether there cannot arise any new causes of of action based on new denials of title after the first denial.

The answer given by the Full Bench was:

"Possession may be adverse, but whether it is so or not in any case will depend upon the facts of each case. . . ."

The question whether the possession of a trespasser who dispossesses a mortgagor in possession is adverse against a simple mortgagee does not arise in the case, and we express no opinion with regard to it:

"As the cause of action in this case arose only in 1908, the second question, whether a fresh cause of action arises from each distinct denial of the plaintiff's title, also does not arise in the case, and we express no opinion with regard to it."

In the body of the judgment the Full Bench stated with reference to certain cases that:

"an equity of redemption may be lost by adverse possession, but for that purpose it is not sufficient for a trespasser who has ousted a mortgagee to prove that possession is held on an exclusive title, without also showing that it was acquired and retained with an assertion of an adverse title to the knowledge of the mortgagor."

It seems to me that the question whether the right of the mortgagor is lost by the adverse possession of a trespasser for more than 12 years during the continuance of the usufructuary mortgage depends upon the terms of S. 28, and Art. 144, Sch. 1, Limitation Act. S. 28 provides that at the determination of the period limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished. Under Art. 144 limitation begins to run when possession becomes adverse to the plaintiff. If the mortgagor is not entitled to any kind of possession or enjoyment of the mortgaged property during the continuance of the usufructuary mortgage, the mortgagor is not entitled to sue a trespasser for possession. It is the mortgagee alone who can do so, and if the mortgagee does not care to bring such suit for more than 12 years, S. 28, Limitation Act, operates to extinguish the mortgagee's title to the property in possession of a trespasser. The mortgagor's right to sue for possession accrues for the first time when after redemption he is unable to take possession of part of the mortgaged property which he finds to be in possession of a trespasser, who denies his title to it. He becomes entitled to sue the trespasser when he redeems the property and is opposed by the trespasser. It is clear that the period of limitation for his suit is 12 years to be reckoned from the date of redemption, and the trespasser's possession would not become adverse to him till after redemption. Cases in which the mortgagor is entitled to some sort of enjoyment of the mortgaged property in spite of the usufructuary mortgage stand on a different footing. Again, different considerations apply where a question of limitation arises in a suit for declaration. Failure to sue for declaration within time does not involve the extinguishment of the plaintiff's title, as S. 28 is applicable only to cases in which the plaintiff is entitled to sue for possession and fails to do so within the period of limitation prescribed for his suit. In my opinion the lower Courts have rightly held that the plaintiff's suit is not barred by limitation. The appeal fails, and is dismissed with costs. Leave to appeal under the Letters Patent is granted.

K.S. *Appeal dismissed.*

1. Periya Aiya Ambalam v. Shunmugasundaram, 1914 Mad 334=22 I C 615=38 Mad 903 (FB).

A. I. R. 1935 Allahabad 544

SULAIMAN, C. J. AND BENNET, J.

Bhajjan Kewat—Defendant — Appellant.

v.

Raghu and *others*— Plaintiffs — Respondents.

Letters Patent Appeal No. 43 of 1933, Decided on 22nd January 1935, against order of Collister, Puisne J., D/- 5th October 1933

(a) Agra Tenancy Act (1926), S. 3 (2), (8) and (15)—'Holding.'

Under S. 3, sub-Ss. (2), (8) and (15) land occupied by a grove is a holding within the meaning of the Act and the grove-holder is a tenant.

[P 544 C 2]

(b) Agra Tenancy Act (1926), Ss. 230 and 121—Suit for declaration of title properly maintainable in Revenue Court—Suit for injunction restraining rival tenant from asserting his right or interfering with possession brought in civil Court — Defendant claiming title only as grove holder — Held suit was not cognizable by civil Court.

In order to determine whether the suit is cognizable by the civil Court the allegations in the plaint have to be examined.

Where plaintiff would have properly brought a suit for declaration of their title in the Revenue Court but they brought a suit in the civil Court for an injunction restraining a rival tenant from asserting his right or interfering with his (plaintiff s) possession and the defendant was admittedly claiming title to the grove only as a grove-holder :

Held : that the suit was not cognizable by the civil Court and that the plaint should be returned for presentation to proper Court.

[P 545 C 1]

Mukhtar Ahmad—for Appellant.

Shiva Prasad Sinha — for Respondents.

Sulaiman, C. J.—This is a defendant's appeal arising out of a suit for an injunction restraining the defendants from interfering with the plaintiffs' possession over certain groves. In the plaint it was stated that the property in dispute consists of three groves with trees in a village, which belong to the plaintiffs'; that the defendant's ancestors were allowed to plant three trees with the permission of the plaintiffs' ancestors, and on the strength of their claim to these three trees the defendants got their names entered in respect of the three groves as grove-holders; it was further alleged that there was a dispute between the parties a year before the suit and the defendants were ready to claim possession over the groves and assert their own right, and that the plaintiffs made an attempt in the Revenue Court for the rectification of the papers but that they ultimately withdrew the application and brought the present suit. The defendants put forward the case that they themselves were the grove-holders. Both the Courts below decreed the plaintiffs' claim for an injunction on the merits, holding that the groves belong to the plaintiffs. On appeal that decree has been affirmed by a learned Judge of this Court. In the Courts below no plea as to want of jurisdiction in the civil Court was taken, but such a plea was raised before the learned Judges of this Court, and has been disallowed. The case is undoubtedly governed by the new Agra Tenancy Act, of 1926. Under S. 3, Sub-Ss. (2), (8) and (15) land occupied by a grove is a holding within the meaning of this act and the grove-holder is a tenant.

Section 230 of the Act confers exclusive jurisdiction on Revenue Courts in respect of all suits of the nature specified in Sch. 4, and bars the jurisdiction of the civil Court. The explanation makes it further clear that if adequate relief might be granted by the Revenue Court, then it is immaterial whether the relief actually asked from the civil Courts is or is not identical with that which the Revenue Court could have granted. We have therefore to see whether the present plaintiffs by framing a suit properly could have obtained an adequate relief from the Revenue Court.

The civil Court cannot grant a decree for injunction without first determining the plaintiffs' title and substantially giving the plaintiffs a declaration that they are the grove-holders and that the defendants are not. A suit for a declaration of right as a tenant during the continuance of a tenancy lies in the Revenue Court under S. 121 of the Act. Under Sub-S. (2) of that section not only the land-holder but any other person claiming to hold through the land-holder can be joined a party. It is therefore obvious that the present plaintiffs could have brought a suit for a declaration of title in the Revenue Court against the land-holder, impleading the present defendants. No doubt the relief which they could have got would not have been identical with the relief for injunction which they are claiming in the civil Court, but, in our opinion, adequate relief could have been obtained when a declaration of right was secured from the Revenue Court. If a suit for an injunction restraining a rival tenant from asserting his right

or interfering with the co-tenants' possession were cognizable by the civil Court, the result would be that almost all suits for declaration of title by a co-tenant would lie in the civil Court, if instead of claiming a relief for declaration the plaintiff chooses to claim a relief for injunction.

No doubt in order to determine whether the suit is cognizable by the civil Court, we have to examine the allegations in the plaint, but those allegations themselves disclose the fact that the defendants are not claiming title to this grove in any capacity other than that of grove-holders. There is no suggestion that they claim to be the proprietors or mortgagees of the groves. On the other hand, their names are admittedly recorded in the revenue papers as grove-holders and it is on the strength of such entry that they are resisting the plaintiffs' claim. They are, in our opinion, persons claiming through the land-holder within the meaning of S. 121, of the Act. It has been held by this Court that on a proper interpretation of S. 268 of the Act, the provisions of that section do not apply to a case where an appeal would not have lain to the District Judge, if the suit had been filed in the Revenue Court.

We therefore allow this appeal and setting aside the decrees passed in the case, order that the plaint be returned to the plaintiffs for presentation to the proper Court. As the point was not raised in the Court below, the parties would bear their own costs in both the Courts below, and the defendants will have their costs of both the hearings in this Court and the plaintiffs will bear their own costs.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 545

NIAMATULLAH AND ALLSOP, JJ.

Mt. Qudsia Jan—Plaintiff — Appellant.

v.

Zahid Husain and *others*—Defendants —Respondents.

Misc. Case No. 512 of 1934, Decided on 9th January 1935, from order on reference by Commissioner of Allahabad Division, United Provinces, D/- 24th September 1934.

(a) Agra Tenancy Act (1926), S. 267 — Conflicting opinions by Revenue Court and by single Judge of High Court — Reference under S. 267 can be made to Bench in High Court—Previous opinion of single Judge is no bar.

A single Judge of the High Court sitting in appeal or revision from the order of a subordinate civil Court is a civil Court within the meaning of S. 267. For the purposes of S. 267, Agra Tenancy Act, it does not matter that doubt as to jurisdiction arises from conflicting opinions expressed by a Court of Appeal, even the High Court in the exercise of its jurisdiction as a civil Court and by the Revenue Court. Once there is a doubt created by conflicting orders of civil and revenue Courts, the special jurisdiction of the High Court conferred by S. 267 can be invoked and can be exercised with the result stated in sub-S. (5), S. 267. Hence where conflicting opinions are entertained by the revenue Court and by a single Judge of the High Court, a reference can be made to a bench of the High Court and the judgment of the single Judge is no bar. [P 546 C 1, 2]

(b) Agra Tenancy Act (1926), S. 99 — Exproprietary tenure — Suit against cosharer for share of profits is cognizable by civil Court.

A suit against cosharers in an exproprietary tenure for share of the profits is cognizable by a civil Court: 1935 *All* 271, *Foll.* [P 546 C 2]

Hyder Mehdi—for Applicant.

A. P. Dube—for Opposite Party.

Judgment.—This is a reference under S. 267, Agra Tenancy Act, by the Commissioner, Allahabad. The plaintiff instituted a suit against his cosharers in an exproprietary tenure, in the Court of the Munsif, Allahabad, for his share of the profits. The Munsif returned the plaint for presentation to the Revenue Court, holding that the suit was within the exclusive jurisdiction of the latter Court. The plaintiff appealed to the District Judge who took a contrary view and held that the suit had been rightly instituted in the civil Court. A second appeal was preferred to this Court and came up for hearing before a learned Single Judge who treated the appeal as revision on the ground that no appeal lay to this Court. That learned Judge held that the suit was cognizable by the Revenue Court as held by the Munsif. Accordingly he set aside the District Judge's order and restored that of the Munsif. The plaintiff then presented his plaint in the Revenue Court. The Assistant Collector before whom the suit came on for hearing, dismissed it on the ground that the Revenue Court had no jurisdiction. The plaintiff went in appeal to the Court of the Commissioner who has made the present reference under S. 267, Agra Tenancy Act. We are of opinion that the learned Commissioner had adopted the proper procedure in view of the opinion expressed by a learned Single Judge of this Court.

It is argued by the learned advocate for the defendants that the order of the learned Single Judge of this Court already referred to is a bar to this Bench taking a contrary view and that whatever may be the correct law on the subject, it must be held for the purposes of this case that the Revenue Court has jurisdiction. We are unable to accede to this contention. S. 267, Agra Tenancy Act, has been enacted to meet the requirements of cases in which conflicting opinions are entertained by civil and Revenue Courts as regards the proper forum. The opening words of that section make it perfectly clear that:

"Where either a civil or a Revenue Court is in doubt whether it is competent to entertain any suit, application, or appeal, or whether it should direct the plaintiff, applicant or appellant, to file the same in a Court of the other description, the Court may submit the record, with a statement of the reasons for its doubt, to the High Court."

The Commissioner did entertain a doubt and has submitted the case with his own opinion to the effect that the suit is cognizable by the civil Court. Sub-S. (4), S. 267 further provides that:

"On any such reference being made, the High Court may order the Court either to proceed with the case or, to return the plaint, application or appeal for presentation to such other Court as it may declare to be competent to try the same."

Sub-section (5) contains the mandatory provision that.

"The order of the High Court shall be final and binding on all Courts Subordinate to it."

That a Single Judge of this Court sitting in appeal or revision from the order of a subordinate civil Court is a civil Court within the meaning of S. 267, Agra Tenancy Act, can admit of no doubt. We are sitting not in the exercise of our jurisdiction as a Court of first or second appeal but in the exercise of a special jurisdiction conferred by S. 267, Agra Tenancy Act, which as already stated, clearly declares that such order of this Court is final and binding on all Courts subordinate to the High Court. For the purposes of S. 267, Agra Tenancy Act, it does not matter that doubt as to jurisdiction arises from conflicting opinions expressed by a Court of appeal, even this Court in the exercise of its jurisdiction as a civil Court and by the Revenue Court. Once there is a doubt created by conflicting orders of civil and Revenue Courts, the special jurisdiction of this Court conferred by S. 267, Agra Tenancy Act, can be invoked and can be exercised with the result stated in Sub-S. (5), S. 267. We are clearly of opinion that the defendants' contention that the order of the learned Single Judge of this Court is a bar, has no force.

On the merits of the case much need not be said as this Bench has already held in a similar case, viz., 1935 All 271 (1) that the jurisdiction in such cases lies with the civil Courts. The argument put forward by the learned advocate for the appellant in reference to S. 99, Tenancy Act, has been disposed of by our judgment in that case. We need not repeat the grounds on which our decision in that case proceeds.

The result is that we hold that the plaintiff's suit is cognizable by a civil Court. Accordingly we direct that the plaint be returned to the plaintiff for presentation to the Court of the Munsif, East Allahabad, who has jurisdiction to entertain it.

K S. *Order accordingly.*

1. Jumna Das v. Misri Lal, 1935 All 271=155 I C 37.

A. I. R 1935 Allahabad 546

NIAMATULLAH, J.

Dwarka Prasad and *another* — Appellants.

v.

Mt. Sunder — Respondent.

Second Appeal No. 2 of 1934, Decided on 4th February 1935, from order of Dist. Judge, Farrukhabad, D/- 4th November 1933.

Provincial Insolvency Act (1920). Ss. 4, 28 and 56—Receiver claiming certain property as belonging to insolvent — Objection by person in possession dismissed for default —Sale of such property by receiver and application for delivery of possession by purchaser— Objection raised by person—Court cannot order delivery of possession without considering question of title.

In certain insolvency proceedings, certain property which was claimed by the receiver as belonging to the insolvent was objected to by the person in possession of same, but his objection was dismissed for default of appearance. Subsequently the receiver sold the property and the purchaser applied for possession of the same, to which the objector on the former occasion objected. The Court ordered delivery of possession without going into question of title on the ground that the objection had been dismissed on a former occasion.

Held: that the appellants-objectors were not bound to object in the insolvency Court They could have retainsd possession of the house and ignored the insolvency proceedings and the action of the receiver. If they had taken up that attitude, it would have been incumbent on the purchaser from the receiver to vindicate his right and obtain a decree for possession against the appellants. On the latter taking the initia-

tive in the matter, the insolvency Court should have taken action under S. 4 and decided the disputed question of title once for all. In the absence of au authoritative adjudication of the rights of the contesting parties, the insolvency Court was not justified in treating the property as belonging to the insolvents only because the appellants had not pressed their objection, on a certain occasion; before the question of title is decided either by a decree in a separate suit or by an order under S. 4, Insolvency Act, the appellants could not be dispossessed from the property which, to all appearnce. they claimed in perfect good faith to be their own. [P 548 C 2]

B. Mallik—for Applicants.

Babu Ram Awasthi — for Opposite Party.

Judgment.—This is an appeal from an order passed by the learned District Judge, Farrukhabad, in circumstances which are somewhat peculiar. The order appealed from was passed in appeal from the order of the Subordinate Judge sitting as an insolvency Judge. Murli and Shazade were adjudged insolvent by the insolvency Court at Cawnpore, and a receiver was appointed to take charge of their assets. The house, which is now in dispute, is situate in Farrukhabad, and was claimed by the receiver as the property of the insolvents. The appellants in this Court deny the title of the insolvents and claim to be the owners of the house in dispute. They preferred an objection in the insolvency Court at Cawnpore putting forward their claim and denying the right of the insolvents. The application and the order of the Court thereon could not be traced. The appellants allege that the only order which the Court passed was "file without consideration." The respondent, on the other hand, alleges that the objection was dismissed in default of appearance. The judgment of the lower appellate Court also assumes this fact. An application filed by the appellants at a certain stage of proceedings likewise mentioned that the objection had been dismissed in default. It is safe to assume, for the purpose of this appeal, that the appellants' objection above referred to was dismissed for non-appearance.

The appellants then instituted a regular suit in the Court of the Munsif, Farrukhabad, within whose jurisdiction the house in dispute lies, for a declaration of their right. The receiver, among others, was impleaded as a party. The suit did not proceed to trial, as it was withdrawn with liberty to bring a fresh suit. No fresh suit however has since been instituted.

The receiver subsequently sold the house to the respondent, Mt. Sunder, who applied to the insolvency Court at Cawnpore for delivery of possession of the house to her. That Court sent a rubkar to the Judge of the insolvency Court at Farrukhabad for delivery of possession, as prayed by the purchaser. The appellants objected to any delivery of possession being made. In their objection they reiterated their title to the house and repudiated that of the insolvents, questioning the receiver's power to transfer it and the Court's power to award possession in that summary manner. They emphasised that they had all along been in possession and could not be ousted in the manner desired by the purchaser. The insolvency Judge (Subordinate Judge) Farrukhabad summarily dismissed the objection on the ground that a similar objection had been previously dismissed. This refers to the appellants' objection in the insolvency Court at Cawnpore which, as above mentioned, was dismissed for non-appearance. From the order of the insolvency Judge, Farrukhabad, an appeal was preferred to the District Judge, Farrukhabad, who upheld it on grounds which, in my opinion, cannot be sustained. He assumed that the house in dispute was "attached" property, that the objection to attachment was dismissed under O. 21, R. 58, Civil P. C., and that the regular suit instituted by them in the Court of the Munsif, Kanauj, was one under O. 21, R. 63, Civil P. C. The learned Judge expresses the opinion that the dismissal of objection for non-appearance became final, as it has not so far been set aside by a decree passed in a suit under O. 21, R. 63, Civil P. C. The consequence, according to the learned Judge, is that the appellants must quietly submit to possession being delivered to the purchaser from the receiver. The learned Judge does not seem to have applied his mind to the further question whether it is open to an insolvency Court, without coming to a decision under S. 4 of the Act, to deliver possession of property sold by the receiver, which property is in possession of third persons. The Subordinate Judge and the District Judge of Farrukhabad have treated the case as if it were one of transfer of a decree for execution from a Court at Cawnpore to a Court at Farrukhabad and that they were Courts executing the decree.

The learned advocate for the respondent, who presented his case in such light as was possible, has not been able to draw my attention to any provision in the Insolvency Act, which justifies the adoption of this procedure by way of analogy which was quite fanciful. S. 4, Provincial Insolvency Act, undoubtedly empowers the insolvency Court to decide all questions of title which may arise in any case of insolvency or which the Court may deem it expedient or necessary to decide. Under S. 28 the property of the insolvent is vested in the receiver on the order of adjudication being passed: but in relation to third persons a receiver has no more right than the invent himself, nor can the insolvency Court allow the receiver to ride roughshod over rights of persons who do not derive any right to the property in dispute from the receiver but adversely to him. S. 56, which provides for the appointment of receivers, empowers the Court to remove from possession any person in whose possession or custody the insolvent's property is but there is an important proviso appended to that section which lays down:

"that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove."

In my opinion the mere fact that the respondent purchased the house in dispute from the receiver does not entitle him to dispossess the appellants. She cannot have better right than that of the receiver himself in this respect. The receiver has no better right than the insolvents, as already stated. The Court has no authority to remove the appellants from possession of the property, as the insolvents, have not been shown to have a present right to remove them. It was open to the insolvency Court to decide the question of title between the receiver and the appellants under S. 4, Insolvency Act, and if in those proceedings the title had been found to be with the insolvents, now represented by the receiver, the proviso to S. 56 might have been applicable and the Court might then have the power to treat it as the property of the insolvents and remove the appellants from possession. The Court has not taken proceedings under S. 4, and the title is in controversy. The appellants are in possession a fact which has not been disputed, Indeed, it is clear from the order of the Insolvency Court at Cawnpore, which required the insolvency Court at Farrukhabad to deliver possession to the purchaser by removing the appellants.

The view that the appellants are precluded from asserting their title, because their objection in the insolvency Court at Cawnpore was dismissed for non-appearance and they did not have it set aside cannot be sustained. It is based on O. 9, R. 9, Civil P. C., under which if a suit is dismissed in the absence of the plaintiff but in the presence of the defendant, no further suit can lie, the only remedy of the plaintiff being to have the order of dismissal set aside. The lower Courts treat the appellants' objection as a plaint in a suit and the order of dismissal for non-appearance to have the same effect as the dismissal of a suit for non-appearance of the plaintiff. There is no warrant for such a view. The appellants were not bound to object in the insolvency Court. They could have retained possession of the house and ignored the insolvency proceedings and the action of the receiver. If they had taken up that attitude, it would have been incumbent on the purchaser from the receiver to vindicate her right and obtain a decree for possession against the appellants. On the latter taking the initiative in the matter, the insolvency Court should have taken action under S. 4 and decided the disputed question of title once for all. An opportunity for adopting that procedure occurred when the insolvency Court was apprised of the fact that a certain house, alleged to belong to the receiver, is claimed by third persons. It could then have taken proceedings under S. 4, even though the objection was not pressed or was allowed to be dismissed for non-appearance. In the absence of an authoritative adjudication of the rights of the contesting parties, the insolvency Court was not justified in treating the property as belonging to the insolvents only because the appellants had not pressed their objection on a certain occasion. It may even now be open to the insolvency Court at Cawnpore, subject to any objection which may be taken by the appellants, to take proceedings under S. 4. But before the question of title is decided by a decree in a separate suit or by an order under S. 4, Insolvency Act, the appellants cannot be dispossessed from the property which, to all appearance, they claim in perfect good faith to be their own.

In my opinion the objection of the appellants, made in the Court of the insolvency Judge, (Subordinate Judge), Farrukhabad, protesting against possession being delivered to the respondent and against their own ejectment was unanswerable and should have been allowed. Accordingly I allow this appeal, set aside the order of both the Courts below and allow the appellants' objection with costs. They shall not be disturbed, except in due course of law.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 549

BENNET, J.

Ram Charan and *others*—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 808 of 1934, Decided on 20th December 1934, from order of Sess. Judge, Mainpuri, D/- 23rd August 1934.

(a) Evidence Act (1872), S. 25—Village headman is not police officer.

A village headman is not a Police Officer for the purpose of S. 25 of the Act: 1924 *Rang* 245, *Foll.* [P 551 C 1]

(b) Penal Code (1860), S. 394—Medical evidence not proving death from throttling—Confession not made before Magistrate—Ornaments found in house of accused but no connection of such ornaments with deceased—Charge held was not proved.

Where the medical evidence did not prove that the deceased died from asphyxiation by throttling as was alleged and the confession was not made before a Magistrate but it was only stated to have been made in the village to three villagers whose evidence was of little weight to prove that a confession was made, and though there was the evidence of ornaments being found in the houses of the accused but the prosecution failed to connect those ornaments with the deceased:

Held: that the charge was not proved. [P 552 C 1]

B. S. Darbari and *N. C. Tewari*—for Appellants.

Government Pleader—for the Crown.

Judgment.—This is an appeal by four persons, Ram Charan, Ram Dayal, Bhimma and Jodha, who have been convicted by the learned Sessions Judge of Mainpuri, under S. 394, Penal Code, and sentenced to seven years' rigorous imprisonment each. The accused were charged under S. 396, Panal Code, by reason of having been participants in a dacoity in the house of Bahora Meghraj on the night of 5th and 6th March 1934, in which Bahora Meghraj was killed. The learned Sessions Judge found that the prosecution case was proved, but because two other persons who are alleged to have taken part in the crime were not before him, the number of accused was less than five and therefore S. 396, Penal Code, did not apply and he says that the accused committed robbery and voluntarily caused hurt to the deceased which was the least proved against them. He therefore did not find that the accused persons had caused death of the deceased, but only that they caused certain injuries to the deceased. These nine injuries noted in the post mortem report which he found had been caused were external abrasions and would amount only to simple hurt. The sentence therefore was very severe for a robbery in which simple hurt was caused and it appears to me that although he did not expressly state so, the learned Judge must have passed the sentences on the view that the accused had caused the death of the deceased. If that were his view, he should have convicted the accused of the offence under S. 302, Penal Code, but he has not done so. The case for the prosecution rests on the alleged confession made in the village to three witnesses by one of the accused, Jodha, on 28th March 1934, and on the discovery of ornaments pointed out by the accused on 30th March 1934. When the accused Jodha was brought before a Magistrate, he refused to make a confession. The history of the affair is as follows:

The deceased died sometime during the night and no outcry was made and no one in the village became aware of a crime. At the time he was living alone in his house. Next morning attention was drawn by the fact that the cattle were unattended and that the door remained shut. Balwant Singh, the zamindar, went to the house accompanied by Ajudhia Prasad, the Mukhia, and Kesari. These persons stated that they found Bahora Meghraj lying dead on his bed covered with a cloth and as the witnesses were not of his caste, they sent for Khem Chand, who was a Bahora, of an adjourning village called Seonra. Meanwhile the body had remained covered with the cloth. When Khem Chand came, he removed the cloth preparatory to funeral preparations and he found that there were injuries on the body. He therefore said that matter must be reported at the thana. The chaukidar was sent to make a report. The chaukidar was a dhanukh, a low caste, and he was not taken inside the house or yard and he did not see the injuries on the corpse. He was told to go and make a report and he did so. This

was not a first information report of a crime, but a report made in order that an inquest might be held. The report was entered in the general diary at the thana at 7 p. m., and the report did not mention any injuries on the deceased. The report says that the deceased used to take intoxicating drugs that his eyes were dilated and it seemed that he had died on account of the effects of over-intoxication from opium and bhanga. The second officer and the mortuary box were sent for an inquiry into the cause of death which was not clear from the report of the chaukidar. The second officer held an inquest and noted some injuries in regard to which the medical witness observes in a letter on p. 7 that most of these injuries were probably due to post mortem staining. In the post mortem it was stated that no definite opinion could be given as to the cause and manner of death owing to the fairly advanced state of the decomposition of the body. There were nine places in which there were one or more abrasions. Of some of these marks the Medical Officer stated in evidence:

"The above-mentioned injuries could have been produced in struggle when the deceased was being throttled. Injury No. 4 could have been caused during the act of closing the nostrils by force. Injury No. 8 could have been caused by pressure on side of chest by knees, elbow or any other hard substance. The above-mentioned injuries could not cause death separately or jointly; in all probability, therefore it is possible that some other act might have caused the death of the man. Cyncses of the face, bluing of tongue and nails combined with the congestion of brain and meningitis and redness of eyes may indicate that asphyxia may have been the cause of death. The above injuries cannot be caused by fall from a stair-case as they are on the different parts of the body."

There is one point in regard to which the Medical Officer was not cross-examined and that is the internal appearances of the throat. The alleged confession stated that death was due to throttling and the medical witness has stated that some of the points he observed point to death by asphyxiation. In Modi's Medical Jurisprudence, 1924, Edn. 3, p. 142, I find it stated as follows:

"Internal appearances.—There is extravasation of blood due to ecchymoses in the subcutaneous tissues under the ligature mark or finger marks, as well as in the adjacent muscles of the neck . . . Both the larynx and trachea are congested, and contain frothy mucus. The larynx or the rings of the trachea may be fractured when considerable force is used."

In the post mortem report it is stated "Larynx trachea and bronchi. Empty." There is no injury noted in these organs. The opinion of Modi is that these organs should show signs of internal injury in asphyxiation. In the present case there is no injury shown and it was not suggested by the medical witness that they were so decomposed that examination from this point of view would be impossible. And there were no external injuries on the neck. This appears to me to be one weakness in the theory that the accused died from throttling as stated in the confession.

The next point is in regard to the confession. After the Sub-Inspector came to the village and held his inquest and made an inquiry, nothing further happened until 28th March. Balwant Singh states that at that date Jodha accused came to him of his own accord and said that he and five other persons, including the other three accused had committed this murder and had stolen a number of ornaments and that he was making a confession because he had not been given his share out of the proceeds of certain gold ornaments—Lar, Goph and two guineas —which were taken by Ram Charan and Jiwa Ram to Shikohabad and sold. This motive for making the confession is frequently put forward, but it does not seem to be very natural that an accused person should merely from the annoyance at not getting his proper share of the loot take an action which he must know will put himself in jail. Balwant Singh states that when he heard the confession he took the accused, Jodha, before the mukhia Ajudhia Prasad and Kesari and Jodha repeated this confession to these persons. All the three persons give evidence as to what Jodha said to them. No attempt was made by them to take down this confession in writing although they must be literate. They did however send for the Sub-Inspector and after the production of various ornaments, the Sub-Inspector put Jodha and Ram Charan before a Magistrate and they refused to make a statement. It seems extraordinary that if Jodha had been willing to make a confession on the 28th and had been of the same opinion on the 30th when he pointed out various ornaments that he should have changed his mind when he was brought before the Magistrate and no reason is given for this change. This fact throws a doubt on the statement that Jodha did make a confession in the village on 28th March. It was argued for defence that in any case a

confession to a mukhia would be to a Police Officer and would be barred by S. 25, Evidence Act. It has been held in 1924 Rang 245 (1), that a village headman is not a Police Officer for the purpose of S. 25, Evidence Act. No ruling to the contrary has been shown.

Now, in regard to the ornaments, three exhibits have been sent to this Court. The Sub-Inspector states that Bhiman accused handed over hamel, Ex. P-3, from his house and that Ram Dayal accused handed over a bera Ex. P-4, from an earthen vessel inside his house. In regard to the two karas, Exs. P-2/1 and P-2/2, the Sub-Inspector stated that Ram Charan handed over one of them from under the threshold of his house and that Jodha handed over the other from under the floor of his house. This was confirmed by the two search witnesses, Ajudhia Prasad, Mukhia and Balwant Singh. As to the identity of these articles that property had belonged to the deceased: there was a statement of Balwant Singh that he knew that the karas Exs. P-2/1 andP-2/2 had been worn by Mt. Gaura, sister of the deceased and that the bera, Ex. P-4 was worn by the deceased. There was also the evidence of Mt. Gaura that the karas were hers and the bera was worn by the deceased at times only and she said that the hamel Ex. P-3 belonged to Churna Lodh and she afterwards explains she meant Ram Charan accused and that her brother, Meghraj, told her that Ram Charan had pawned this hamel with him. She says that she had seen the hamel hanging on a peg in the house. Now, as regards the identification of these articles, the gold earrings, Ex. P-4, are mere plain circles of gold which have no mark on them by which they could be identified and there are many such ornaments in villages. The silver karas are also of a very ordinary type with very little ornamentation. Mt. Gaura says that these were made for her by her brother-in-law, Kashi Ram, who died 12 years ago and therefore no sonar was called to prove that he made them. She says that she stayed occasionally from one to four months with her brother, Meghraj, and at other times she stays with her other relatives. At the time of the murder, she was staying with other relatives and did not come until the next morning when she was called. Her explanation of how she came to leave the karas in the house of the deceased is:

"I had kept my pair of karas with the deceased last year in the month of Jeth. I was then ill and felt rather uncomfortable with them so I put them with the deceased."

Her suggestion is that she allowed her karas to remain with the deceased from the hot weather of 1933, because they were rather uncomfortable. It seems unlikely. Further she admits:

"The second officer came to me and asked me to see if the things in the house were in order and I replied that they were. I was much grieved and I had not the strength to go upstairs myself."

She made no attempt to see whether her karas were missing or not and it was not till after the discovery of the karas that she came forward apparently with a claim that they were hers. These facts render her evidence that these karas belonged to her extremely doubtful. The other article, the hamel, is one which is quite easily capable of identification as it has a number of coins and a large square of silver with various small ornaments on it and an elaborate pattern. This article however is stated by Mt. Haura to have been pawned by the accused, Ram Charan, with the deceased. Her only knowledge on the pawning is attributed to a statement of the deceased. No books are produced to show that there was such a transaction. The suggestion for the prosecution is that the deceased was a man of considerable property and he apparently traded in money-lending as he was a Bahora. Such persons usually keep books of account in which these transactions of pawning are entered. No witness for the prosecution has stated that there were no books of deceased, but no books are produced. Another point in regard to this hamel is that if the hamel had belonged to Ram Charan accused and Ram Charan had taken part in this robbery, he would naturally have asked that this hamel should be given back to him. But the prosecution case is, according to the confession, that it was given to the accused Bhimma and the evidence is that Bhimma handed this hamel up from his house. He is not the brother of Ram Charan as they have different fathers and the evidence of the Sub-Inspector indicates that they have different houses. The confession mentions only a few ornaments as having been found. It would be, in my opinion, quite impossible that at a distribution of the loot Ram Charan would not have recognized his hamel and ask for it, but

1. Mga Myin v. Emperor, 1924 Rang 245=81 I C 540=25 Cr L J 924=2 Rang 31 (FB).

the confession makes no mention of any such demand by Ram Charan. I think therefore the prosecution altogether fails to show any connexion between the hamel and the deceased. The hamel may no doubt have been found in the house of the accused person Bhimma, but that does not prove that it was in any way connected with the alleged robbery. A lantern was stated to have been taken out from a pond. This was stated to have belonged to the deceased, but lanterns are of a common type and cannot be identified as belonging to any particular person.

To sum up the case, the medical evidence does not prove that the deceased died from asphyxiation by throttling. Some symptoms favour that view and some do not. The confession was not made before a Magistrate and it is only stated to have been made in the village to three villagers whose evidence is of little weight to prove that a confession was made. The evidence of ornaments being found in the houses of the accused may be correct, but the prosecution fails to connect those oranments with the deceased. For these reasons, I find that the prosecution has not proved the charge against these four appellants. I therefore acquit them of the offence of S. 394, Penal Code, and direct that they be set at liberty.

K.S. *Accused acquitted.*

A. I. R. 1935 Allahabad 552

KENDALL, J.

Shander or Shanker and *others* — Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1062 of 1934, Decided on 11th February 1935, from order of Sess. Judge, Agra, D/- 22nd October 1934.

Criminal P. C. (1898), S. 144 — Whether person has knowledge of order promulgated is matter of evidence — Order promulgated for several weeks and notice posted in various places—Disturbances in city—Ignorance of order not pleaded before Magistrate nor made one of grounds in appeal — Held accused must be deemed to have knowledge of order—Prosecution can only prove circumstances to enable Court to draw proper inference—Penal Code (1860), S. 188.

The question of whether the person has knowledge of the order promulgated must be a matter of evidence. Where the order had been promulgated for several weeks, and there had been disturbances in the city, and notices containing the order had been posted up at various places in the city and not one of accused pleaded ignorance of the order when he made his statement in the Magistrate's Court, though this plea was taken by some of them in the written statements subsequently filed, and it was not made one of the grounds of appeal to the Sessions Judge, nor was it apparently argued before him:

Held : that it was scarcely conceivable that the accused had no knowledge of the order in such cases. [P 553 C 1]

B. S. Darbari—for Appellants.

Asst. Govt. Advocate—for the Crown.

Order.—The present applicants have been convicted by a First Class Magistrate of Agra, of an offence under S. 188, Penal Code, and that order has been maintained by the lower appellate Court. The facts briefly are that the applicants were caught throwing bricks at the houses of theiir neighbours. There were eleven of them, and at this period the relations between the Hindus and Mahomedans of Agra City, were very strained, and consequently a notice had been promulgated under S. 144, Criminal P. C., preventing the members of the public when frequenting or visiting certain places within the Municipal area from collecting bricks, carrying sticks, etc., or missiles and gathering in public places, etc. A number of arguments have been addressed to me in support of the present application for revision, but they are of a purely argumentative description.

It has been said that as the notice under S. 144 was addressed to the "public when frequenting or visiting" these specified areas, it was not sufficiently precise. I have been referred to one or two decisions in which it has been held that a Municipal area or a city are not sufficiently precise. But the areas specified in the present notice are obviously much more precise, and although this is a point that might be argued in appeal. I am by no means satisfied that the decision of the lower appellate Court is wrong. It has next been argued that as the applicants are themselves residents of one of the areas specified in the notice, they cannot be said to be frequenting that area. To live in an area is of course to frequent it, though a resident would ordinarily be said to reside in and not to frequent his part of the city. It has also been argued that although a number of brickbats were collected, it has not been definitely proved that the applicants collected them there, and that although the evidence showed that they were throwing brickbats, there was nothing in the notice to prevent them from throwing these

brickbats, although they were forbidden to collect them or to carry them. This is only a quibble. Before throwing the missiles the applicants must have lifted them, and I presume that lifting comes under the definition of carrying.

The only ground that has been given me which calls for serious consideration is that the applicants had no knowledge of the promulgation of the order under S. 144, Criminal P. C. It has undoubtedly been held by the Calcutta and the Lahore High Courts that it is not sufficient for the prosecution to prove that an order has been promulgated to succeed in obtaining a conviction under S. 188. Under that section:

"whoever knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, etc., disobeys such direction, shall be punished."

The question of whether the person has knowledge of the order promulgated must be a matter of evidence, and in the present case we know that the order had been promulgated for several weeks, that there had been disturbances in the city, and that notices containing the order had been posted up at various places in the city. It is scarcely conceivable that the applicants had no knowledge of the order passed. Not one of them pleaded ignorance of the order when he made his statement in the Magistrate's Court though this plea was taken by some of them in the written statements subsequently filed. It was not however made one of the grounds of appeal to the Sessions Judge, nor was it apparently argued before him. The prosecution cannot be expected to prove everything that takes place in the minds of the accused. They can only prove the circumstances which will enable the Court to infer either that the accused knew of the order or that the accused did not know of it. In the present case it appears to me that the circumstances justified the inference that the applicants had this knowledge, and that the plea of ignorance is not made in good faith, or it would have been made at once.

There appears to me to be no substance in any of the arguments for the applicants. The application is therefore dismissed.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 553

BAJPAI, J.

Mehrzia Begam—Plaintiff — Appellant.

v.

Gulzar Singh and *others*—Defendants —Respondents.

Second Appeal No. 432 of 1933, Decided on 7th March 1935, from decision of Dist. Judge, Fatehgarh, D/- 19th January 1933.

(a) Civil P. C. (1908), S. 105 (2) — Prohibition under S. 105 (2) exists only if appeal lies from order.

The prohibition under S. 105 (2) exists only if an appeal lies from the order of remand. Where no appeal lies, there is no prohibition. [P 554 C 1]

(b) U. P. Land Revenue Act (1901), S. 142 —All proprietors are jointly and severally responsible to Government for revenue or to assignee of revenue.

Under S. 142, U. P. Land Revenue Act, all the proprietors of a mohal are jointly and severally responsible to Government for the revenue for the time being assessed thereon. The liability of the proprietors is therefore joint and several and an assignee of revenue, when he sues the proprietors for arrears of revenue due from them, is entitled to enforce this joint and several responsibility. [P 554 C 1]

P. L. Banerji, Ram Narain Verma and *Jugal Narain Saksena*—for Appellant.

P. M. L. Verma—for Respondents.

Judgment.—This is a plaintiff's appeal. She is an assignee of land revenue in respect of certain zamindari property and the defendants are cosharers in the same property. She brought a suit under S. 223, Agra Tenancy Act, Local Act 3 of 1926 against the defendants for arrears of land revenue in respect of the years 1334,1335 and 1336 fasli. So far as the present appeal is concerned the only question which is in controversy is the question whether a joint decree should be passed against the cosharers for the entire claim or whether the separate liability of the various defendants should be apportioned and a decree fixing the separate liability of the various cosharers should be passed.

When this point was taken before the assistant collector for the first time he held that the suit could be filed against the cosharers collectively and the decree should be passed against them jointly. On appeal the learned District Judge was of the opinion that the "liability of the defendants should be specified in the decree" and he therefore remanded the case to the learned Assistant Collector. On re-

mand the trial Court apportioned the liability and passed a decree fixing the share of each cosharer. On appeal the learned District Judge confirmed the decree of the trial Court and, when the point was taken before him that the order of his predecessor in office directing that each defendant was liable separately only to the extent of the revenue due from him was wrong, he held that he could not sit in appeal over the order of his predecessor and he could not grant any relief on that point to the plaintiff.

The plaintiff has therefore come to this Court and urges this plea before me. A preliminary objection is taken by the respondents that by reason of the provisions of S. 105, Cl. 2, Civil P. C., the plaintiff is precluded from disputing correctness of the order of remand, but there is no force in the preliminary objection because the prohibition exists only if an appeal lay from the order of remand and under S. 249, Agra Tenancy Act, no appeal lies from any order passed in appeal. The plaintiff is therefore not debarred from urging the point after the decree of the lower appellate Court on the second occasion.

Coming now to the merits of the case I am of the opinion that the original decree of the learned Assistant Collector before remand was correct. Under S. 142, U. P. Land Revenue Act, all the proprietors of a mohal are jointly and severally responsible to Government for the revenue for the time being assessed thereon. The liability of the proprietors is therefore joint and several and the plaintiff being an assignee of revenue, when she sues the proprietors for arrears of revenue due from them, is entitled to enforce this joint and several responsibility. The learned Assistant Collector also sought some strength from S. 228, Tenancy Act. That section says that in any suit under Ss. 221, 222 or 227, the plaintiff may sue any number of cosharers collectively, but in such case the decree shall specify the extent to which each of the defendants is affected thereby. It is worthy of note that S. 223 is not one of the sections mentioned in S. 228 and the learned Assistant Collector was of the opinion that if the cosharers in a suit under S. 223 were also to be liable separately then S. 223 would also have been included in S. 228, Agra Tenancy Act. The learned District Judge on appeal has noticed this argument and while confessing that he was not able to find out why the Legislature made a distinction between suits under Ss. 221, 222 and 227, on the one hand and S. 223 on the other has also attempted to answer it. He says that S. 228 definitely gives the plaintiff a right to sue the cosharers collectively in suits under Ss. 221, 222 and 227 and then enacts that the extent of the liability of each of the defendants shall be specified in the decree. There is no provision for a muafidar or an assignee of revenue suing the cosharers collectively and therefore it was not necessary to say that the separate liability of the various defendants shall also be specified. The learned Judge then proceeds to discuss O. 1, R. 3, Civil P. C., which points out as to what persons can be joined as defendants and then to O. 1, R. 4 which says that the respective liabilities of the defendants will have to be determined. The reasoning of the learned District Judge does not appeal to me. Ss. 221, 222 and 227 ordinarily speak of a chsharer who is a defaulter and the ordinary suit under these provisions would be a suit by the plaintiff against a single cosharer and it was therefore thought necessary to enact S. 228 in order to give the plaintiff a right to join several persons as defendants if several cosharers were in default. S. 228, Agra Tenancy Act, is only a branch of O. 1, R. 3 and O. 1, R. 4, Civil P. C.

In the case of a muafidar or assignee of revenue if there are several cosharers liable to pay revenue the right of the assignee to proceed against all is obvious and there was no necessity to make a provision that he could sue the cosharers collectively. The only point that one has then got to see is whether in the suit the liability of the defendants has got to be specified or whether the liability is joint and several, and in this case under S. 142 the liability is joint and several and there cannot be an apportionment of the liability unless specially provided for and there is no such special provision in the case of S. 223.

The learned District Judge noted S. 142, Revenue Act, but he said that the provisions contained therein are for the Government alone and:

"the position of the assignee of the Government is not the same. There are rulings of the Allahabad High Court to that effect."

It would have been better if the learned District Judge had taken me into his confidence so far as these rulings are concerned because it was conceded at the bar before me that there

were no such rulings which could be of use in connexion with the present case. It may be that the position of the assignee is not the same as the position of the Government so far as their respective rights are concerned because it is conceded that it is not open to an assignee to proceed under S. 146, Land Revenue Act, for recovery of the revenue. But it is not the right of the plaintiff that has got to be considered, but the corresponding duty of the defendants. The assignee is given the right to sue under S. 223 for arrears of revenue and under section 142, Land Revenue Act, it is provided that the proprietors of a mohal are jointly and severally responsible. It is true that they are jointly and severally responsible to Government, but I can see no reason why they should not be burdened with the same liability in the case of an assignee of revenue.

For the reasons given above I am of the opinion that this appeal ought to be allowed. It is conceded by parties that if I hold that the liability of the various defendants is not to be specified the decree of the Court of first instance dated 25th September 1930. is to be restored. I therefore allow this appeal, set aside the decree of the lower appellate Court dated 19th January 1933, the decree of the Assistant Collector dated 28th September 1931, the order of the learned District Judge dated 23rd June 1931, and restore the decree of the learned Assistant Collector dated 25th September 1930. The plaintiff is entitled to her costs in all Courts. Leave to file an appeal by way of Letters Patent is granted.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 555

SULAIMAN, C. J. AND BENNET, J.

Ram Charan and *another*—Defendants—Appellants.

v.

Gajadhar and *another* — Plaintiffs — Respondents.

Second Appeal No. 1171 of 1931, Decided on 22nd February 1935, from decree of Addl. Sub-Judge, Allahabad, D/- 22nd May 1931.

Landlord and Tenant — Right to cut down wood—Tenant must prove custom to do so—Presumption is zamindar is owner of parti soil and trees thereon—Custom.

It is for the tenants to plead and prove a custom by which they could be entitled to take the wood of trees. In the absence of any proof of custom, prima facie, the presumption is in favour of the zamindar. The zamindar is the owner of the soil of a parti land and presumably the tree which is grown on that parti land and attached to the soil is transferable with a transfer of land and presumably therefore the tree goes with the land and must be regarded as pertaining to the land. In the absence therefore of a pleading and proof that the tenants had a right to cut the trees, they can have no such right : 1921 *All* 168 ; 1923 *All* 417 ; 5 *I C* 256 ; 1929 *All* 146, *Ref.* [P 556 C 1, 2]

A. K. Khan and *K. N. Sinha*—for Appellants

G. P. Bhargava and *Deo Narain Singh*—for Respondents.

Bennet, J.—This is a second appeal by the defendants against concurring decrees of the two lower Courts awarding the plaintiffs Rs. 75 damages for the cutting down of a neem tree in parti land in the village site by the defendants. The plaint set out that the tree was owned and possessed by all the zamindars of the village and that the defendants cut it down without any right. The written statement alleged that the tree was planted by the father of defendant 1 close to his house which was now used as a cattle-shed and was still in the possession of the defendants, and that the tree was planted more than 40 years ago, and that the defendants required wood for the construction of their house and and therefore got the tree cut down. The written statement did not clearly say that the tree was planted with the permission of the zamindars. Further it did not say that there was any custom in the village by which the defendants tenants were entitled to the wood of trees planted by them on parti land in the village abadi. The sole issue framed was whether the plaintiff is the owner of the tree in suit and to what sum the plaintiff is entitled. The lower Court found that the plaintiff did not know who planted the trees, that the trees were planted by the ancestor of the defendant in parti land of the abadi, that there was no evidence of the custom, that the defendants were mere trespassers, and therefore the suit was decreed. The lower appellate Court found that there was no permission of the zamindar pleaded nor proved and it upheld the decree regarding the defendants as trespassers.

The defendants have appealed to this Court on the ground that they had a legal right to take the wood of this tree. The defendants rely on the ruling reported in 72 I C 108 (1), of Daneils,

1. Ramnath v. Mata Sahay, 1923 All 417=72 I C 108.

J., in which he dealt with other matters and at p. 109 he stated:

"It is next argued that in the absence of proof of special custom Jagannath, though in possession of the trees, had no right to transfer them. The lower Court relies on the ruling in 1921 All 168 (2), and I agree with the lower Court that whatever views may formerly have been held, the presumption now is that a tenant has a right to cut and sell trees planted by him."

The judgment shows that the suit related to the possession of certain trees and of a house in the abadi. The reasons given by the learned Judge are vague and the ruling to which he refers relates to the case of trees planted on what had been an occupancy holding. That ruling in 1921 All 168 (2), does not apply, in our opinion, to the case of trees planted on parti land in the abadi. On behalf of the plaintiffs reliance is placed on the case of 5 I C 256 (3), in which Sir John Stanley and Piggott, J., held that trees planted in a grove outside the occupancy holding of a tenant could not be sold by the tenant and in the case of 1914 All 529 (4), the sate Sundar Lal, J., held that a tenant had no right to sell trees planted on the waste land in a village. We consider that these two latter rulings should be followed. For the plaintiffs reliance was also placed on the case of 1929 All 146 (5). This was the ruling by a learned Single Judge, Boys, J., and in regard to trees planted on parti land in the abadi he held that the criterion was where a person who has planted the trees gives or gives up something in return for the permission to plant the trees and that in the absence of other special considerations, the tree becomes the property of the person who plants it, but where he gives nothing, the property in the tree becomes as that of a zamindar. We do not think that this is a general criterion which we should follow, as it is not apparent from where the doctrine of consideration is derived, but the case does not apply to the present suit, because in the present suit there was no previous permission to plant.

It is usual that in cases like the present there is evidence of custom and a finding of custom, and we consider that it lay on the defendants to plead and prove a custom by which they could be entitled to take the wood of this tree. In the absence of any proof of custom, we consider that prima facie the presumption is in favour of the zamindar. The zamindar is the owner of the soil of a parti land and presumably the tree which is grown on that parti land and attached to the soil is transferable with a transfer of land and presumably therefore the tree goes with the land and must be regarded as pertaining to the land. In the absence therefore of a pleading and proof that the defendants had a right to cut the tree, we hold that the defendants had no such right. We accordingly consider that the decision of the lower Courts is correct and we dismiss this second appeal with costs.

K.S. *Appeal dismissed.*

2. Jabsar Sahu v. Raj Mangal, 1921 All 168=63 I C 437=43 All 606.
3. Jagdish Narain Singh v. Jokhan Ahir, (1910) 5 I C 256.
4. Ram Sarup v. Jagannath, 1914 All 529=25 I C 152.
5. Gobardhan Pande v. Debi Bux Kurmi, 1929 All 146=114 I C 750.

A. I. R. 1935 Allahabad 556

GANGA NATH, J.

Ram Naresh Singh and *another*—Plaintiffs—Appellants.

v.

Muneshwar Prasad Tewari — Defendant—Respondent.

Second Appeal No. 276 of 1933, Decided on 11th March 1935 from decision of Addl. Sub-Judge, Gorakhpur, D/- 12th December 1932.

Cosharer—One of joint owners is not entitled to make building without consent of other owners—If building is erected long ago and no suit is brought by others, consent is presumed—Suit must be brought within reasonable time.

One of several joint owners is not entitled to make a building on the joint property without the consent of other joint owners. But if the building has been erected long ago it will be presumed that the cosharer in exclusive possession, who erected building, did so with the permission of the other cosharers, especially when a suit is brought several years after the commenecment of constructions and when the constructions have been completed at a considerable expense. No such presumption can be made in a case where the erection is of recent date and has been objected to from the beginning. It is very necessary that a co-owner should bring his suit for demolition of a building constructed by another cosharer and for joint possession within a reasonable time : 1927 *All* 709 ; 1928 *All* 59, *Rel on.* [P 557 C 2]

Shiva Prasad Sinha—for Appellants.

N. Upadhiya—for Respondent.

Judgment.—This is a plaintiffs' appeal and arises out of a suit brought by them against the defendant for demolition of a building alleged to have been constructed by the defendant respondent on the joint land. The parties are co-sharers and it is alleged by the

plaintiffs that the defendant had recently constructed a building which he had no right to construct on the joint land. The defendant contended that he had purchased the zamindari share and the house of Durga Pathak from his heir Padarath Pathak in 1918 and has since been in possession of the same and that he has built his house on the site of the cattle house and courtyard of Durga Pathak. The defendant also contended that he started his constructions in 1922 and has spent about Rs. 17,000 and that he had been in exclusive possession of the land in dispute since 1918. He further contended that in 1927, suit No. 35 of 1927 was brought by Achal Bahadur, own brother of plaintiff Ram Naresh Singh, a member of the joint family of the plaintiffs in respect of the constructions in dispute which failed.

The trial Court decreed the suit, but on appeal the learned Additional Subordinate Judge dismissed the suit. He found that the constructions commenced, as found by the trial Court, in 1925. The plaintiffs had all along knowledge of the constructions. In fact a suit (suit No. 35 of 1927) referred to above was brought by Achal Bahadur a member of the plaintiffs' joint family to get the constructions demolished. After the withdrawal of the suit by Achal Bahadur no other member of the family of Achal Bahadur including the plaintiffs did anything till February 1931 when the present suit was brought. The respondent had spent Rs. 4,000 on the constructions till the suit of 1927 was brought. Futher constructions have been made since then and as stated by the learned Additional Subordinate Judge the constructions must have cost a substantial sum. The house stands substantially constructed. The outside walls are of pucca bricks and there are as many as 7 or 9 rooms. The roof is tiled. The learned Additional Subordinate Judge states further that apart from finishing touches the main building stands already constructed according to the statement of the plaintiff 1 himself and is in the occupation of the defendant respondent. The area covered by the building is only 70 by 67 feet. The learned Judge observed:

"It is obvious therefore that the plaintiffs respondents have been guilty of laches for the suit has been unreasonably delayed. The prayer for demolition if allowed would be too severe."

It will thus appear that the suit has been brought six years after the constructions were started and when the constructions have been substantially finished at cost of a considerable sum of money. There is no explanation for any delay since the withdrawal of the last suit of Achal Bahadur, plaintiff 1's own brother and a member of the plaintiff's family. It can obly be explained by one conclusion, namely, that the plaintiffs had no objection to the constructions. If they had any objections they should have pursued the former suit and fought it out and if there was any legal defect on account of which Achal Bahadur plaintiff was compelled to withdraw it, another suit should have been brought at once.

There can be no doubt that one of several joint owners is not entitled to make a building on the joint property without the consent of other joint owners. But if the building has been erected long ago it will be presumed that the cosharer in exclusive possession, who erected the building, did so with the permission of the other cosharers, especially when a suit is brought several years after the commencement of the constructions and when the constructions have been completed at a considerable expense. No such presumption can be made in a case where the erection is of recent date and has been objected to from the beginning. It is very necessary that a co-owner should bring his suit for demolition of a building constructed by another cosharer and for joint possession within a reasonable time. This view is fully supported by 1927 All 709 (1) and 1928 All 59 (2). As would appear from the facts given above there can be no doubt that a presumption can be safely raised that the constructions were continued at least after the suit of 1927, and completed with the consent of the plaintiffs. The learned Additional Subordinate Judge has therefore rightly exercised this discretion in refusing to order the demolition of the constructions. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

K S. *Appeal dismissed.*

1. Sheo Harakh Upadhya v. Jai Gobind Tewari, 1927 All 709=104 I C 414.
2. Mohammad Sher Khan v. Bharat Indu, 1928 All 59=106 I C 656.

A. I. R 1935 Allahabad 558

SULAIMAN, C. J. AND BENNET, J.

Chargeability of Stamp Duty, Reference re.

Misc. Case No. 307 of 1934, Decided on 28th January 1935, from reference by District Judge, Meerut, D/- 30th April 1934.

(a) Stamp Act (1899), Sch. 1, Art. 57—Exemption (e)—Property attached by amin handed over to supurdar — Document executed by supurdar agreeing to produce same whenever demanded by Court — Held document came within exemption (e).

A simple money decree had been put in execution and certain moveable property of the judgment-debtor was ordered to be attached. The amin went to the spot and attached the property and handed over the same to a supurdar who executed a document. The terms of the document were that the supurdar acknowledged having received the attached property from the amin and agreed to produce the same whenever demanded by the Court of the amin and further agreed that in case of failure the Court would be at liberty to realise the price thereof from his person and property.

Held : that the position of the supurdar was that of a surety for the amin, undertaking duly to account for the property received from the amin by virtue of the document executed by the supurdar and was covered by Exemption (e) and was not liable to duty : 1931 *All* 567 (*FB*), *Dist.* [P 558 C 2

(b) Stamp Act (1899), Sch. 1, Art. 57—Bond executed by surety to account for property received is security bond.

A bond executed by way of security to account for property received by virture thereof even though executed by a surety is a security bond within the meaning of that Article. [P 553 C 2]

Muhammad Ismail—for the Crown.

Sulaiman, C. J.—This is a reference by the Munsif of Ghaziabad under O. 46, R. 1 of a question of law which arose before him when executing a decree. A simple money decree had been put in execution and certain movable property of the judgment-debtor was ordered to be attached. The amin went to the spot and attached the property and handed over the same to a supurddar who executed a document which is the subject-matter of consideration. On report to the Court, the Court approved of the arrangement made by amin.

There is no question before us as to the legal liability of the supurddar to restore the goods placed in his custody. The only question is whether the document executed by him was chargeable with stamp duty. The terms of the document were that the supurddar acknowledged having received the attached property from the amin and agreed to produce the same whenever demanded by the Court of the amin and further agreed that in case of failure the Court would be at liberty to realise the price thereof from his person and property. The question before us is whether this document is exempt from duty or whether it is chargeable with duty as an agreement or as a security bond.

As the supurddar was not paid any remuneration for his offering to take charge of the property there may be some difficulty in holding that the document amounted to an agreement. But there can be no doubt that the language brings it within the scope of the definition of security bond as given in Sch. 1, Art. 57, Stamp Act. A bond executed by way of security to account for property received by virtue thereof, even though executed by a surety, is a security bond within the meaning of that article. But Exemption (e) under that article exempts from the payment of stamp any instrument executed by a surety for an officer of Government to secure the due accounting for property received by virtue thereof. The point for consideration is whether this document comes under this exemption. Under O. 21, R. 43, where property to be attached is movable property in the possession of the judgment-debtor attachment is to be made by actual seizure and the attaching officer is to keep the property in his own custody or in that of one of his Subordinates and "shall be responsible for the due custody thereof"; therefore the legal responsibility for the due custody of the attached property lies on the attaching officer. Rr. 122 and 123, provide for the approval or permission of the Court as to the arrangement made by the attaching officer, which when approved would exonerate the attaching officer personally. Nevertheless the supurddar who keeps the property in his own custody on behalf of the amin is really a surety for the amin and undertakes to restore the goods or pay their price if not produced before the Court. The position of the supurddar was therefore that of a surety for the amin undertaking duly to account for the property received from the amin by virtue of the document executed by the supurddar and is covered by Exemption (e).

The learned advocate for the Secretary of State relies on the Full Bench case of 1931 All 567 (1), but that case in no way helps him because it was laid down there that although the amin

1. Shakir Husain v. Chandoo Lal, 1931 All 567 = 134 I C 836 (F B).

ceases to be liable after the Court has approved of the arrangement or given him permission to make the arrangement, the supurddar was liable as a surety under S. 145, Civil P. C. It follows that the position of the supurddar as surety for the amin undertaking to produce the goods was accepted by the Bench and his liability as a surety was actually enforced.

We are therefore of opinion that the supurdnama in question was not liable to duty because it was exempted under Exemption (e) to Art. 57. This is our answer to the reference.

K.S. *Reference answered.*

A. I. R. 1935 Allahabad 559

NIAMATTULLAH, J.

Mewa Singh— Defendant—Appellant.

v.

Beni Madho Singh and *others*— Plaintiffs— Respondents.

Second Appeal No. 585 of 1933, Decided on 1st February 1935, from decision of Addl. Sub-Judge, Ballia, D/- 16th January 1933,

Malicious prosecution — Suit for damages — Absence of reasonable and probable cause for prosecution must he proved by plaintiff — Plaintiff not proving this— Court cannot grant some damages merely because both parties have indulged in falsehood and by fact of acquittal of plaintiff in criminal case.

In a suit for damages for malicious prosecution the burden of proving absence of reasonable and probable cause for the defendant's action in prosecuting the plaintiff lies on the latter. It is not for the defendant, in the first instance, to prove that the charge which he preferred against the plaintiff was true. The plaintiff must establish prima facie that there was no reasonable and probable cause for the defendant to prosecute the plaintiff. If the facts alleged by the defendant in the criminal case were within his knowledge, the form which the issue relating to the absence of reasonable and probable cause generally takes is whether the charge was false.

Where the plaintiff has failed to prove this, the Court cannot act on principle, that both parties have indulged in falsehood and some damages ought to be awarded to the accused who were acquitted. Plaintiff's suit must be dismissed. [P 559 C 1, 2]

K. Verma—for Appellant.

S. P. Sinha—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for damages for malicious prosecution brought by the plaintiffs-respondents. On 27th November 1930 two complaints were filed in the criminal Court, one by Kapal Deo Singh against eight persons, including the present defendant, Mewa Singh, and the other by Mewa Singh, against Kapal Deo, the complainant in the counter case, and the three plaintiffs-respondents. It was common ground that a fight had ensued in which Kapal Deo received injuries and so did the defendant, Mewa Singh. The latter's injuries were grievous, as was subsequently discovered on medical examination. The plaintiffs were acquitted. It is immaterial for the purposes of this case whether the other accused in the two cases were convicted.

The suit which has given rise to the present appeal was brought by the plaintiffs-respondents on the allegation that they had been prosecuted by the defendant, Mewa Singh, for an offence under S. 325, Penal Code, though as a matter of fact, the plaintiffs were not present on the scene of occurrence. The defendant pleaded that the plaintiffs joined Kapal Deo in causing grievous hurt to him (Mewa Singh). On these pleadings there was one one material issue in the case, viz., whether the complaint made by the defendant against the plaintiffs was false. The facts alleged in the criminal Court by the defendant against the plaintiffs were such that they must have been true or false to his knowledge. It was not a case in which the defendant had received information that the persons accused had committed a certain offence. In a case like the present the truth or falsehood of the complaint is decisive so far as reasonable and probable cause is concerned.

The plaintiffs produced evidence to establish an alibi. Their case was that they were not present on the scene of occurrence, but the defendant implicated them out of malice. The trial Court accepted this evidence and decreed the plaintiffs' suit for damages amounting to Rs. 372-8-0. There can be no doubt that if the evidence led by the plaintiffs be accepted, as was done by the first Court, their suit must be decreed. On that supposition the defendant deliberately prosecuted the plaintiffs for an offence under S. 325, Penal Code, causing grievous hurt, though he must have known that the plaintiffs were innocent and that such charge was groundless. From the decree of the trial Court the defendant appealed to the lower appellate Court, whose judgment is remarkable for the confusion of thought which it discloses both as regards the issues involved and the grounds on which the plaintiff in a suit for malicious prosecution is en-

titled to rely. That Court did not accept the finding arrived at by the trial Court, but held:

"The respondent's (plaintiffs') alibi is untrue and their taking part in the fight at the place where Kapil Deo was laying foundation of his house is certain."

He proceeded to hold that:

"this finding of fact makes matters somewhat complicated. In my opinion this finding must affect the amount of damages. Both parties have invented untrue stories, the respondents invent the alibi and the appellant created false scene of occurrence. The appellant must pay damages to the respondents, but in determining damages the respondents' part in causing hurt to the appellant and their untrue alibi must be considered."

Accordingly he reduced the damages decreed by the trial Court by half. In my opinion the decree of the lower appellate Court cannot be sustained. It cannot be disputed that in a suit for damages for malicious prosecution the burden of proving absence of reasonable and probable cause for the defendant's action in prosecuting the plaintiff lies on the latter. It is not for the defendant, in the first instance, to prove that the charge which he preferred against the plaintiff was true. The plaintiff must establish prima facie that there was no reasonable and probable cause for the defendant to prosecute the plaintiff. If the facts alleged by the defendant in the criminal case were within his knowledge, the form which the issue relating to the absence of reasonable and probable cause generally takes is whether the charge was false. In the present case, the plaintiffs realised that they had to prove the falsehood of the defendant's allegations in the criminal case. The manner in which they attempted to establish it was to prove an alibi. Their evidence on that point has been disbelieved by the lower appellate Court, whose finding on that part of the case is conclusive in second appeal. In these circumstances, it is not possible for the plaintiffs to rely on any evidence on the record to show that apart from their evidence of alibi it is established that they did not take part in the fight as there is no such evidence. On the contrary, the lower appellate Court deninitely finds that they did take part in the fight. If the lower appellate Court had correctly applied the law to its own findings, the plaintiffs' suit should have been dismissed. It seems to me that that Court did not appreciate the issues involved in the case and awarded damages according to its own peculiar notions of right or wrong. It acted on the principle that both parties have indulged in falsehood and some damages ought to be awarded to the accused who were acquitted. This is a palpably incorrect view, and the decision of the lower appellate Court cannot stand. The result is that the appeal succeeds. The decrees of both the Courts below are set aside, and the plaintiffs' suit is dismissed with costs throughout.

The plaintiffs filed a cross-objection against that part of the decree which reduced the amount of damages awarded to them by the trial Court. In the view of the case I have taken, the cross-objection. must fail. It is accordly dismissed with costs. Leave to appeal under the Letters Patent is applied for by the plaintiffs, but is refused.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 560

BENNET, J.

Gopal Sahai—Plaintiff—Appellant.

v.

Nasir Uddin and *another*—Defendants—Respondents.

Second Appeal No. 320 of 1933, Decided on 6th March 1935, from decision of Dist. Judge, Meerut, D/- 30th November 1932.

Agra Tenancy Act (1926), S. 227—Suit for profit—Usufructuary mortgagee—Exproprietary tenant executing kabuliyat to usufructuary mortgagee — Mortgagee is entitled to collect rent but cannot retain whole of it against another cosharer.

In a suit for profits under S. 227 a usufructuary mortgagee is entitled to collect a share of the assets of the mahal proportionate to a share in a mahal, i. e., the share which he has in his usufructuary possession. The mere fact that an exproprietary tenant, has executed a kabuliyat in favour of the usufractuary mortgagee entitles him to collect that rent, but it does not entitle him to retain the whole of that rent against another cosharer. On the creation of an exproprietary tenancy the exproprietary tenant is the tenant of the coparcenary body and not the tenant of any particular coparcenary.

[P 561 C 2]

Vishwa Mitra—for Appellant.

Mushtaq Ahmad—for Respondents.

Judgment.—This is a second appeal by a plaintiff whose suit was dismissed by the lower appellate Court. The plaintiff brought a suit under S. 227, Agra Tenancy Act, for his share of profits against the defendant 2, Nasiruddin, as a cosharer in possession under a usufructuary mortgage. The Revenue Court granted a decree to the plaintiff for a certain amount of mesne profits. The facts apparent from the

pleadings, which are admitted by learned counsel in this Court for the parties to be correct, are that the khewat number in question consisted of 7 biswanis 8 tanwansis and was held originally by defendant 1, Chhidda Khan, and Chhidda Khan was in cultivating possession of the total area 36 biswas odd in this khewat number 24/6. Chidda Khan executed a usufructuary mortgage of 2 biswansis 8 tanwansis share in favour of defendant 2, Nasiruddin, and he executed a qabuliat agreeing to pay rent to defendant 2 of Rs. 95-2-9 per annum for a portion of the cultivated land in this khewat number. Subsequently the plaintiff purchased the equity of redemption of Chhidda Khan but he has not redeemed the usufructuary mortgage. Plaintiff also purchased the remaining 5 biswansis share in the khewat number which is not encumbered by mortgage and plaintiff got the Revenue Court to assess exproprietary rent on the remaining portion of the cultivated area in possession of Chhidda Khan which was fixed at Rs. 40. This Rs. 40 exproprietary rent was rent payable to all the cosharers in the khewat number because an exproprietary tenant is the exproprietary tenant of all the cosharers. Similarly in regard to Ruppees 95-2-9 rent under the qabuliat between Chhidda Khan and Nasiruddin this must be taken to be exproprietary rent and to be due to all the cosharers. The plaint in para. 3 set out that the total rental of the khewat in question was Rs. 135-2-0 and learned counsel points out that that sum is composed of the two items . Rupees 95-2-9, due under the qabuliat from Chhidda Khan, and Rs. 40 due from Chhidda Khan as the exproprietary rent fixed by the Court. These facts were admitted in para. 2 of the written statement and are not in dispute.

Now the plaintiff brought a suit in the Revenue Court in his capacity of a cosharer in possession of a 5 biswansis share in this khewat number. He had no right to sue in regard to the 2 biswansis 8 tanwansis because he only held the equity of redemption in that share and defendant 2 was in possession of that share as a usufructuary mortgagee. But unfortunately this position was not appreciated by the two lower Courts and the issue framed was "Is the plaintiff-mortgagor and defendant a mortgagee and hence no profit is due from him?" The trial Court although it framed this issue, actually decided the suit on correct lines by taking the evidence of the patwari as to the total amount of the collections in the mahal which it held to be the payment of the rent under the qabuliat Rs. 95-2-9, and it held that the plaintiff had not realised any of the Rs. 40 exproprietary rent. The net assets therefore after deduction of land revenue coming to Rs. 247-9-6, the Court gave the plaintiff a two-third share, Rs. 165-1-0 with proportionate interest and costs. Defendant 2, Nasiruddin, brought an appeal before the lower appellate Court alleging in ground No. 3 that the trial Court had erred in holding that the plaintiff was entitled to claim 2/3rd share of the rent received by the appellant from Chhidda Khan, defendant 1. The lower appellate Court has considered the matter solely from the point of view of the mortgage and it held:

"Until the mortgage is redeemed by the plaintiff-respondent the appellant Nasiruddin is entitled to this sum (Rs. 95-2 9) by way of interest on his mortgage money and the plaintiff-respondent cannot get any share in it."

Now the question is whether such a finding is legally correct in a suit for profits. The position of Nasiruddin in a suit for profits under S. 227, Agra Tenancy Act, is that he is entitled to collect a share of the assets of the mahal proportionate to a share in the mahal. The share which he has in his usufructuary possession is a share of 2 biswansis 8 tanwansis. The mere fact that Chhidda Khan, an exproprietary tenant, has executed a qabuliat in favour of Nasiruddin to pay Rs. 95 odd rent per annum entitles Nasiruddin to collect that rent, but it does not entitled him to retain the whole of that rent against another cosharer. The position will be more easily seen if we assume that Chhidda Khan had put the whole of the land in the mahal in its khewat and agreed to pay the whole rent to Nasiruddin. On the theory of the lower appellate Court in such a case the plaintiff would have been entitled to nothing although he was the owner of a 5 biswansis share in the khewat number, a share which was unencumbered by any usufructuary mortgage. This shows that the theory of the lower appellate Court is unsound. A further point apparently influenced the lower appellate Court and that was that the plaintiff had not collected any of the Rs. 40 which had been assessed as rent payable by Chhidda Khan, and the lower appellate Court goes on to say that this rent was payable to the plaintiff. In

this the lower appellate Court has fallen into a legal error because on the creation of an exproprietary tenancy the exproprietary tenant is the tenant of the coparcenary body and not the tenant of any particular coparcenary. There is no reason in law for the conclusions arrived at by the lower appellate Court. It is clear that the assets as found by the trial Court correctly represent the collections of rent in this mahal during the years in suit and no ground has been shown in this Court that there is anything incorrect in the findings of fact of the trial Court. Nor does it appear necessary to remand any further issue on a question of fact. Under these circumstances I set aside the decree of the lower appellate Court and I restore the decree of the trial Court, and I allow the plaintiff costs throughout. No case has been made out for a Letters Patent appeal.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 562

BAJPAI, J.

B. Bhanes Chandra Singh and *another* —Plaintiffs—Appellants.

v.

Babunandan Singh and *others*—Defendants—Respondents.

Second Appeal No. 1137 of 1932, Decided on 10th January 1935, from decree of Addl. Sub-Judge, Benares, D/- 27th April 1932.

Agra Tenancy Act (1926), S. 273—For applicability of S. 273, suit must relate to agricultural holding — Mere plea of defendant that he is tenant of plaintiff is not sufficient.

Before S. 273 could be applicable the suit must relate to an agricultural holding and it is not sufficient if the defendant merely pleads that they are tenants of plaintiff but admits that the land is not taken for agricultural purpose.

[P 563 C 1]

Haribans Sahai and *Sri Narain Sahai* —for Appellants.

P. L Banerjee and *Ram Narain Verma*—for Respondents.

Judgment.—This is an appeal by the plaintiffs who object to the procedure adopted by the trial Court in sending the record to the Revenue Court for a finding under S. 273, Agra Tenancy Act, Local Act 3 of 1926. The facts are that the plaintiffs brought a suit for a declaration that a certain plot was owned by them and that the defendants had no concern with it who who might be ordered to remove certain trees and constructions on the same. The defendants alleged that their house stood on a portion of the land in question for a very long time and in another portion nim, jack-fruit, kela, babul trees, bamboo clumps and rubbish heaps stood and in a portion of the land vegetables, etc., were grown. They stated that the plaintiffs' plea that on the land in question the house of one Ganesh Ahir stood and the said Ganesh Ahir had planted certain jack-fruit trees and bamboo clumps with the permission of the zamindar but the defendants recently without the consent of the zamindar took possession of the land and made certain other constructions was incorrect; on the contrary the defendants had been in possession of the said land for a number of years on payment of rent. No plea was taken that the suit related to an agricultural tenancy and the defendants were the tenants thereof; it was not said that the record should be sent to the Revenue Court for the decision of the issue as to whether the defendants held land as the tenant of the plaintiff. One of the defendants was examined under O. 10, R. 10, Civil P. C., and therein also he said that the land was taken for the purpose of tethering cattle, building houses, planting trees and growing vegetables. He said that he had planted an orchard, that on a portion of the land cowdung cakes were prepared and on a certain portion vegetables and chillies were grown. He ended by saying that the land had not been taken for agricultural purposes and no grain had been sown on the same.

The Court of first instance was in some doubt as to whether S. 273, Tenancy Act, applied or not and it therefore on 2nd May 1931 passed an order to the effect that:

" the pleader for the defendants should show by Monday whether he pleaded tenancy or not and whether any issue regarding it be sent to the revenue Court or not because the written statement is not quite clear on this point."

The defendants on 4th May 1931 stated that a portion of the disputed plot was sown with vegetables and on a portion there was a bela (a place for tethering cattle) of the defendants and on a portion there were trees and bamboo clumps. It was said that the defendants were the tenants of the plaintiff and S. 273 was applicable. It seems that in the Court below proper attention was not paid to the fact that before S. 273 could be applicable the suit must relate to an agricultural holding, and it was thought that in order to make that provision applic-

able all that is necessary was that the defendants should plead that they were tenants of the plaintiffs. In this the trial Court was wrong. The position that was taken by the defendants was that they were tenants but they admitted that the land was not taken for agricultural purposes. Under these circumstances even if I were not to look at the report of the Commissioner appointed by the Revenue Court, which goes to show that no vegetable cultivation was goint on on the plot, it is not possible to hold that the dispute related to agricultural holdings. That being so, the entire procedure adopted by the trial Court was irregular. I have not gone into the other evidence in the case but I do not agree with the lower appellate Court that:

"the plot of land is an agricultu ral land in view of the admissions made by the defendants."

It is however contended by Mr. Upadhia on behalf of the respondents that the Courts below on the evidence have found that the defendants are the tenants of the plaintiff qua this plot on payment of rent which has been paid by them regularly for a number of years and the plaintiffs' suit for ejectment and for declaration would not therefore succeed. That may be so, but I must set right the procedure adopted by the trial Court. The record should not have been sent to the Revenue Court, but on the pleadings of the parties the civil Court should have proceeded to determine the controversy between them. It may be that the civil Court might still come to the conclusion that the plaintiffs are not entitled to any relief because of the fact that they had let out the land to the defendants for the purposes mentioned by them, and the defendants have in no way acted in contravention of the purposes for which the land was let out to them.

For the reasons given above, I allow this appeal, set aside the decrees of the Courts below and remand the case through the lower appellate Court to the Court of first instance for disposal on the merits. As I have decided only a preliminary point, the remind should be deemed to be under O. 41, R. 23, Civil P. C., and the appellants will be entitled to a return of court-fees. Costs here and heretofore will abide the event. Leave to file an appeal by way of Letters Patent is granted.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 563

HARRIES AND BAJPAI, JJ.

Emperor

v.

Bandhoo Ahir and *others*—Accused.

Criminal Appeal No. 770 of 1934, and Appeal No. 618 of 1934, Decided on 30th January 1935, from order of 3rd Addl. Sess. Judge, Gorakhpur, D/- 18th June 1934.

(a) Penal Code (1860), S. 333—When person causing grievous hurt to public servant can be convicted explained—Assult made on sub-inspector in consequence of what he had done to accused—Held it came within S. 333.

Under S. 333 a person who causes grievous hurt to a public servant can be convicted under three circumstances: (1) wnen grievious hurt is caused while the public servant is in the discharge of his duty as such public servant; in this case motive and object are irrelevant; (2) when a public servant is prevented or deterred from discharging his duty as such public servant in this case it is necessary that the object of the accused should be to deter the public servant from discharging his duty but it is not necessary to prove any motive; (3) when the public servant is assaulted in consequence of anything done or attempted to be done by that public servant in the discharge of his duty; in this case it is necessary that the public servant should be discharging his duty at the time of the assault. The object too is irrelevant. The only thing that has got to be seen is the motive.

Where the assult was made on the sub-inspector in consequence of what he had done against three accused:

Held: the third circumstance mentioned above undoubtedly applied. [P 565 C 1]

(b) Penal Code (1860), S. 333—Assault on public servant within precincts of Court in open and high handed manner—Held 18 months' rigorous imprisonment was not sufficient.

Where the assault was made by three desperate persons in an open and high handed manner within the precincts of a Court in the presence of a number of persons and the motive of the assault was revenge at the action of the sub-inspector.

Held: high handedness of this description ought not be lightly dealt with aud public servants should be protected in the fearless discharge of their duties. The proper sentence in a case of this kind was a sentence of two years' rigorous imprisonment and that 18 months rigorous imprisonment was not sufficient.

[P 565 C 1,2]

Ismail and *N. Upadhaya* — for the Crown.

Kalim Jafri and *Kanhaiya Lal Misra* — for Accused.

Bajpai, J.—Bandhu Ahir, Badal Dube and Magan Beldar were placed on their trial before the Additional Sessions Judge of Gorakhpur for offences under Ss. 307, 325 and 333, Penal Code. They were acquitted of of-

fences under Ss. 307 and 333, Penal Code, but were convicted of an offence under S. 325, Penal Code. The Local Government has filed an appeal against the acquittal of the three accused under S. 333, Penal Code, and in the appeal of the Local Government the accused are represented by Mr. Kalim Jafri; Badal Dube and Magan Beldar have appealed against their conviction under S. 325, Penal Code, and are represented by Mr. Kanhaiya Lal Misra. Bandhu has remained content with his conviction under S. 325, Penal Code. We have heard the learned Government Advocate in support of the Government appeal and Mr. Jafri in answer. We have also heard Mr. Misra who has taken us through the entire record in connection with the appeal filed by Badal and Magan.

The facts alleged by the prosecution are that Nurul Huda, the Sub-Inspector in charge of Gola thana, had made several reports against the three accused and therefore on 7th February 1934 when the Sub-Inspector had gone to Gorakhpur to give evidence in a criminal case the three accused surrounded the ekka of the Sub-Inspector and struck him with lathis. Bandhu was caught on the spot, but the other two managed to run away. Before the committing Magistrate the two accused, Badal and Magan, denied the charge and said that they were falsely implicated and Bandhu simply said that he was caught in the Court compound at Gorakhpur but he did not beat the station officer of Gola as narated by the prosecution witnesses. Before the Court of session Badal and Magan stuck to their denial but Bandhu raised a plea of self defence. He said that the darogha had met him at Kauri Ram and he (Bandhu) had come to the Court at Gorakhpur and got an application written against the darogha. The darogha came up in an ekka and saw Bandhu's application and abused him and beat him with stick and fists and also gave slaps. When the darogha was snatching away the application Bandhu also beat him with a lathi.

After a magisterial enquiry the accused were committed to the Court of session and in support of the prosecution case the Sub-Inspector and eleven other eye-witnesses were examined. The Sub-Inspector says that from May 1933 he had made as many as eight reports in the diary against the three accused or some of them and members of their party. He had a warrant for the arrest of Bandhu and he had executed Magan's warrant. On 7th February 1934 he came on an ekka to the collectorate as he had challaned the case of Tehl against Sheoraj and the case was pending in the Court of Munshi Abdul Hamid Khan, Deputy Magistrate, where the Sub-Inspector had come to prosecute the case and to give his evidence. He goes on to say that just as he was coming down from the ekka Bandhu gave a lathi blow on the left calf and another on the left knee. He fell down from the ekka and then Badal gave him a lathi blow on the head. Afterwards Magan gave a lathi on the head, but the Sub-Inspector warded it off with his hand and the lathi struck the thumb of the right hand. He says that he then got dazed and the accused struck him with some more lathis. He was unable to pursue his duties up till 2nd March 1934. Chandrika Prasad, a naik constable, was also present in the Court compound at the time of the assault and he says that he saw the Sub-Inspector being beaten as he got down from the ekka by Bandhu and Badal and a third man who was not known to him. He speaks of the arrest of Bandhu and says that the kotwal Abdul Rahim Khan who had come on the spot directed the witness to go to the kotwali with the accused Bandhu to make a report. The witness then went to the thana and made the first information report which was recorded at 2 p. m. In this Chandrika Prasad gave all the facts which were observed by him. He also says that the Sub-Inspector had lost his consciousness and that he was not able to speak and that is why the name of Magan, who was very well known to the Sub-Inspector, was not mentioned in the first information report. (After discussing the evidence, his Lordship held that grievous hurt was caused. The judgment then proceeded). The question of the particular offence of which the accused are guilty is the subject of the Government appeal and requires to be determined. The learned Judge says that on the day of the occurrence the Sub-Inspector had not come to launch proceedings under S. 110, Criminal P. C., against Bandhu. He had come to prosecute another case and there is nothing to show that to deter him from discharging that duty this assault was committed. Further it cannot be said that the Sub-Inspector had come that day in dearch of Ban

dhu against whom it is said that there was a warrant. We are of the opinion that the learned Sessions Judge has taken a wholly unwarranted view of the provisions of S. 333, Penal Code. Under that provision of law a person who causes grievous hurt to a public servant can be convicted under three circumstances: (1) when grievous hurt is caused while the public servant is in the discharge of his duty as such public servant; in this case motive and object are irrelevant, (2) when a public servant is prevented or deterred from discharging his duty as such pubvant: in this case it is necessary that the object of the accused should be to deter the public servant from discharging his duty but it is not necessary to prove any motive (3) when the public servant is assaulted in consequence of anything done or attempted to be done by that public servant in the discharge of his duty; in this case it is not necessary that the public servant should be discharging his duty at the time of the assault. The object too is irrelevant. The only thing that has got to be seen is the motive. In the present case there cannot be the slightest doubt that the assault was made on the Sub-Inspector in consequence of what he had done against the three accused and the third circumstance mentioned by us undoubtedly applies. We are therefore of the opinion that the accused ought to have been convicted under S. 333, Penal Code, and the acquittal recorded by the learned Sessions Judge is incorrect.

For the reasons given above we allow the appeal, set aside the acquittal of Bandhu, Badal Dube and Magan Beldar under S. 333, Penal Code, and alter the conviction from S. 325, Penal Code, to S. 333, Penal Code.

The question of sentence now remains. It was argued on behalf of the defence that whatever view we might take of the facts of the case and as to the guilt of the individual accused the sentence of 18 months' rigorous imprisonment is sufficient to meet the ends of justice. We find ourselves unable to agree with this submission. The assault was made by three desperate persons in an open and high handed manner within the precincts of a Court in the presence of a number of persons. The motive of the assault was revenge at the action of the Sub-Inspector. High handedness of this description ought not to be lightly dealt with and public servants should be protected in the fearless discharge of their duties. We think the proper sentence in a case of this kind is a sentence of two years' rigorous imprisonment.

As a result of what we have stated above the Government appeal is allowed the opposite parties. Bandhu Ahir, Badal Dube and Magan Beldar, are convicted under S. 333, Penal Code, and sentenced to two years' rigorous imprisonment.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 565

BENNET, J,

Ram Saran Das — Plaintiff — Applicant.

v.

Mallu and *others*—Defendants—Opposite Parties—Respondents.

Civil Revn. No. 502 of 1934, Decided on 20th December 1934, against order of Munsif, Moradabad, D/- 11th August 1934.

(a) Civil P. C. (1908), O. 9, R. 13—Finding as to sufficient cause is necessary.

Under O. 9, R. 13, it is necessary that the Munsif should find that defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing.

[P 566 C 1]

(b) Civil P. C (1908), O. 17, R. 2 — Case fixed for final hearing—Adjournment asked by pleader refused — Pleader saying no instruction — Decree passed—Defendant's remedy is by appeal and not by application under O. 17, R. 2.

Where on the date fixed for hearing the defendant's pleader asked for an adjournment but the Court refuses it and on the pleader saying no instructions a decree is passed, the proper remedy of the defendant is by way of an appeal and not by an application for restoration under O. 17, R. 2.

[P 566 C 1]

S. N. Seth — for Applicant.

M. L. Chaturvedi — for Opposite Parties.

Order.—This is an application in revision by a plaintiff against an order of a Munsif restoring a suit which was dismissed. ex parte. The defendants made an affidavit alleging various grounds, but the Munsif has merely recorded:

"The defendants' counsel had then stated that he had no instructions from his client. Ground is consequently sufficient."

The Munsif has not recorded any reason why the defendants' counsel had no instructions or why the defendants were absent. Under O. 9, R. 13, it is

necessary that the Munsif should find that defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing.

Another point was taken in ground No. 1 of the revision that the Court below had no jurisdiction to set aside an ex parte decree and the remedy open to the defendants was only an appeal against the decree as it stood. The defendants entered an appearance in the suit and filed a written statement. Therefore the case did not come prima facie under O. 9, R. 6. The date in question on which defendants were held to have failed to appear was the date which was fixed for final hearing in the suit. It was therefore a date which came under O. 17, R. 2 as a date to which the hearing of the suit had been adjourned. It is shown from the order sheet that on that date the pleader for defendants asked for an adjournment which was refused and he then stated that he had no instructions. In the Explanation to R. 2, O. 17 it is stated that no party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making application. The pleader for defendants was engaged in making an application and therefore I must hold that the defendants did appear on the date in question. All that happened was that they did not produce their evidence and the case was heard and decided. No application by way of restoration under O. 17, R. 2, which applies the provisions of O. 9 therefore lies as the defendants must be held to have actually appeared. The order therefore of the lower Court allowing restoration must be set aside. The only remedy which the defendants had against the decree was by way of appeal.

For these reasons I set aside the order of the lower Court and allow this civil revision with costs.

K.S. *Revision allowed.*

A. I. R. 1935 Allahabad 566

KENDALL, J.

Mt. Wasima and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 866 of 1934, Decided on 14th February 1935, from order of Sess. Judge, Azamgarh, D/- 1st October 1934.

Penal Code (1860), Ss. 366 and 368—Kidnapping from lawful guardianship of husband—Prosecution must prove marriage between woman and alleged husband—If legal marriage is not proved, there is no legal guardianship and no enticement.

In a case of kidnapping from lawful guardianship of husband it is necessary that the prosecution must prove a legal marriage between the woman and the alleged husband. If no legal marriage is proved, there is no legal guardianship and no enticement from her lawful guardian and no offence under Ss. 366 or 368 is committed. [P 568 C 1,2]

S. M. Husain and *Shah Jamil Alam*—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—The four appellants, Mt. Wasima, Juned, Shujat Ali and Hafiz Abdul Samad, have been convicted of offences as follows: Mt. Wasima under S. 366, Penal Code, and sentenced to three years' rigorous imprisonment, Juned under S. 368 and sentenced to five years' rigorous imprisonment, Shujat Ali under S. 419/109, and sentenced to 18 months' rigorous imprisonment and Abdul Samad under S. 420, Penal Code, and sentenced to five years' rigorous imprisonment and under S. 419, Penal Code, to two years' rigorous imprisonment. They have all appealed, and have been represented by counsel in this Court.

The story for the prosecution, a large part of which is admitted to be true, is that Mt. Badarul Nissa came with her widowed mother, Mt. Miraim, some time after 1920 to the village of Bamhaur where the mother married Najib Khan. About 1930 when Mt. Badarul Nissa was about 12 years of age, one of the residents of the village, Siddiq, wished to marry his son Haidar to her, and according to the story for the prosecution, but not for the defence, a nika ceremony was performed. The girl continued to live after it with her mother, but in November 1932, she was forcibly taken away to the house of Siddiq and Haidar, and she lived there under some constraint at any rate for about a year. At the end of this time the incidents occurred which led to the institution of the present proceedings. It is the case for the prosecution that Mt. Wasima, appellant 1, enticed Mt. Badarul Nissa away from the house of Siddiq and Haidar, and took her to the house of Juned, appellant 2, which is adjacent to Siddiq's. There she stayed for about nine days, and then Wasima again took her out, and they met Juned with the fourth appellant, Hafiz Abdul Samad. She was taken across the river where they were joined by Shujat Ali,

appellant 3. The party then went to Azamgarh railway station where Shujat left then, and the others went on to Saraimir station and so on to the house of Abdul Samad, in Sikraur, where the girl stayed for three months, while arrangements were being made for her marriage to Aziz of Mubarakpur. In the course of these proceedings it is said a sum of Rs. 125 was paid to Abdul Samad on behalf of the bridegroom. It is the case for the prosecution that this was the price of the girl. About ten days after this marriage the Sub-Inspector of Police, who was making enquiries about the abduction of a totally different girl, found that Mt. Badarul Nissa was in Aziz's house and learnt from her that she came from Bamhaur, and on inquiry he unravelled the story which is now made the case for the prosecution against the four appellants.

It should be remarked that no report appears to have been made by Siddiq or Haidar about the disappearance of the girl from their house, nor do they appear to have complained to anyone about it, until the Sub-Inspector of Police found the girl and brought her back four months later. The learned Sessions Judge has accepted the story for the prosecution. He has found that the nika or marriage between Haidar and Mt. Badarul Nissa has been proved at any rate sufficiently for the purposes of the present case, and that if there was anything irregular in the ceremony, it has been cured by the conduct of the girl in living in Haidar's house as his wife after she had attained the age of 15 years. He has also found it proved that Mt. Wasima enticed the girl away in the manner stated on behalf of the prosecution, and that the rest of the events followed very much as they are described above. The defence is that there was no marriage between Haidar and Mt. Badarul Nissa, that Mt. Badarul Nissa was forcibly taken to Haidar's house, that she escaped of her own accord and went back to her mother's house, that her mother was all along with her in the arrangements about the marriage with Aziz, and that the money paid to Abdul Samad by the bridegroom was merely to help Mt. Miriam with the expenses of the wedding.

So far as the facts of the case are concerned, it must be stated that Mt. Badarul Nissa has testified to the fact that Mt. Wasima did entice her away, and she has also stated that her first marriage with Haidar actually took place. She has further stated that she agreed to the second marriage with Aziz. Her mother gave evidence for the defence and entirely supports the story for the defence, and she also admits having received the money which was paid by the bridegroom. It is clear moreover that Mt. Miriam has always refused to recognize the alleged marriage with Haidar in 1930 and complained to the police in 1932 when the gril was forcibily taken from her house though she afterwords had to acquiesce in the accomplished fact.

The story for the prosecution must clearly fall to the ground if it is found that no marriage with Haidar took place. According to the defence, there was no ceremony at all, but if there was a ceremony, it did not amount to a legal marriage. In order that a marriage may be legally celebrated under the Mahomedan law, it is necessary that the contract should be witnessed by two adult witnesses. The prosecution tried to prove that the ceremony took place, but of the witnesses to the marriage, one was not summoned and the other denied that it took place. The Kazi who was alleged to have officiated was also summoned as a witness but he did not remember anything about it, and had no record of it in writing. The only evidence of any ceremony having taken place at all is that of the interested parties, Siddiq, Haidar and Siddiq's brother, Osman. It is true that the girl herself said that there was such a ceremony, but she was only 12 years old at the time and probably did not understand much about it. It was certainly for the prosecution in a criminal case to prove that there was a marriage, because if there was no marriage, Haidar had no authority whatever over Mt. Badarul Nissa, and she could not be said to be in his lawful custody. The most important point that has been made against this marriage by the defence is, that nobody consented to it on behalf of the bride. The bride was undoubtedly minor, being only 12 years old. She had a brother living who was her natural guardian for purposes of marriage, and he was not disqualified in any way and it has not been proved that he was disqualified by age from being her guardian and the person who is alleged to have given his consent on her behalf is her uncle, Hawaldar, who gave evidence which certainly does not amount to clear proof that he consented. What he said was that while Haji Najib went to him and informed him that

there was a talk of marriage of Mt. Bunia (Mt. Badarul Nissa):

"He asked me to come along with him, but I said that he was to find out a suitable match and marry Mt. Bunia . . . He had given out the name of the person with whom the marriage had been settled, but I do not remember it."

It appears therefore that even if Hawaldar was the legal guardian of the girl for purposes of marriage, he did not in terms give his consent to this particular marriage, and a contract of marriage must be at least as definite as any other contract. The learned Judge was evidently of opinion that there was something irregular in this nika ceremony, but he held that:

"the invalidity was removed when Mt. Badarul Nissa ratified the marriage by living with Haidar after she had attained the age of 15 years before she was kidnapped."

But the fact is that Badarul Nissa was forcibly taken from her mother's house by Haidar and Siddiq and was kept there under some restraint for about a year. She may have been persuaded that there had been a legal ceremony of nika, and she may have been persuaded to allow the alleged marriage to be comsummated, but it would be hard to believe that these circumstances are sufficient to show that she ratified the marriage by living with Haidar and when she disappeared Haidar himself suspected that her mother must be concealing her as she had been brought forcibly. This admission was made by him in the course of his statement in the committing Magistrate's Court, and he further admitted that after her disappearance he made no complaint and did not ask the police to restore "his wife" to him.

Now, if there was no legal marriage and I am certainly of opinion that although some ceremony may have taken place, a binding and legal marriage has not been proved it follows that Haider was not the lawful guardian of Mt. Badarul Nissa, and that Mt. Wasima was not committing any offence if she really did entice her away. Even this part of the case however is very unsatisfactory, because the evidence against Mt. Wasima is solely that of Mt. Badarul Nissa herself, and she, if the prosecution story is true and if she believed that she was married, was conniving with Mt. Wasima in an act of bigamy, so that her statement against the appellant must be held to be that of an accomplice and it is open to grave suspicion. If there was no marriage and no enticement from her lawful guardian, none of the other appellants committed any offence at all under S. 366 or 368, Penal Code. As regards the charges under S. 419, Abdul Samad has been convicted of cheating by personation because he pretended to Rafiq and Aziz that he was the brother-in-law of Abdulla, the father of Mt. Badarul Nissa, in order to explain the interest that he was taking in this marriage of the girl to Aziz. Abdul Samad maintains that this relationship is correct, and he is supported in this by the mother of the girl, and no evidence has been brought to show that the statement is untrue. The Judge however very light-heartedly convicted Abdul Samad and sentenced him to two years' rigorous imprisonment for cheating by personation without having any evidence or recording any finding that there was any cheating or any false personation. Equally unjustified was the conviction of Shujat, against whom it was only alleged that, after the girl had been recovered by the police and brought home, he made a false statement that he was her cousin in order to support Abdul Samad's statement that he was related to the girl. Even if Shujat's statement about being a cousin was false, it was made long after the offence alleged by the prosecution to have been committed by Abdul Samad, and it was clearly not made in furtherance of a design to cause Rafiq or Aziz to pay money to Abdul Samad. The money paid to Abdul Samad, according to Mt. Miriam, was paid over to her for the expenses of his marriage between Badarul Nissa and Aziz, which undoubtedly did take place, so that the charge under S. 420 also falls to the ground.

For these reasons I accept all the appeals, set aside the orders of conviction and sentences passed by the learned Sessions Judge against the appellants, and direct that they be acquitted, and as they are on bail their sureties may be released.

K.S. *Appeals accepted.*

A. I. R. 1935 Allahabad 568

GANGA NATH, J.

Sheo Dihal Dube and *others* — Plaintiffs—Appellants.

v.

Moti Lal Ahir and *others*—Defendants—Respondents.

Second Appeal No. 1168 of 1932, Decided on 30th January 1935, from decree of Dist. Judge, Gorakhpur, D/- 10th June 1932.

Agra Tenancy Act (1926), S. 243 — Question of ownership of *sir* land is question of proprietary title.

A question of ownership of a *sir* land is a question of proprietary title and as such an appeal lies to the District Judge from order of Collector : 1930 *All* 455, *Rel on*. [P 569 C 1]

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by them against Moti Lal, defendant. The plaintiffs' case was that the land that was in occupation of the defendant was their sir. The defendant contended that the plaintiffs alone had no right to bring the suit. The other cosharers were also impleaded as defendants. The trial Court found in favour of the plaintiff and decreed the suit. An appeal was preferred to the Collector who found in favour of the defendant and held that the plaintiffs were not the sole owners of the sir and that it belonged to the plaintiffs as well as other defendants cosharers and the plaintiffs had no right to bring the suit alone. An appeal was preferred to the learned District Judge who dismissed the appeal on the ground that, as there was no question of proprietary title, no second appeal lay. He also recorded a finding that the land in dispute belonged solely to the plaintiffs and the plaintiffs alone had a right to bring the suit. An appeal has been preferred by the plaintiffs against the decision of the lower appellate Court. The chief point for consideration in this appeal is whether any question of proprietary title is involved in it or not. As already stated, the contention of the defendant was that the plaintiffs alone were not the sole proprietors of the whole of the sir for which rent was claimed. The defendant stated that the plaintiffs as well as the other defendants were cosharers in the sir. Defendant 1 (the tenant) admitted the plaintiffs' right in the sir in suit only partly. The plaintiffs' proprietary title was denied by the defendant to the extent of the share which, as alleged by him belonged to the other cosharers. So far as the share of the other cosharers was concerned and in respect of which the plaintiffs' title was denied there remained a question of proprietary title between the plaintiffs and defendant 1. The question of the ownership of a sir land is a question of proprietary title. This point was considered in 1930 All 455 (1). There a suit for recovery of arrears of rent was dismissed by an Assistant Collector on the ground that the plaintiffs had no rights in the sir land, but, on appeal, the Collector, holding that plaintiffs and zamindar-defendants were jointly proprietors of the sir land and that therefore the plaintiffs were entitled to sue, remanded the suit under O. 41. R. 23, Civil P. C. It was held that an appeal lay from such appellate decree of the Collector to the District Judge under S. 243, Tenancy Act. It was observed that an appeal would lie from an appellate decree of a Collector under S. 243, Tenancy Act, because the proprietary rights had been in issue between the parties in the first appellate Court and was certainly in issue in appeal. Therefore there can be no doubt that there was a question of proprietary title in issue in this suit and an appeal lay to the learned District Judge. As regards the title of the plaintiffs, as already stated, the learned Judge has found that the plaintiffs were the sole proprietors of the sir in dispute and were entitled to sue alone for the rent. In this connection it may also be mentioned here that the land in dispute has been recorded as khudkasht of Rudra Prasad, predecessor in title, of the plaintiffs. It was Rudra Prasad who gave the land in dispute under a lease to Wahid Ali for seven years and after ejecting him on the expiry of the term of the lease let these plots on seven years' lease to Ram Harakh, father of defendant 1 on 22nd September 1925. Defendant 1, thus took the land from the predecessor-in-title of the plaintiffs as his tenant. The plaintiff therefore had every right to claim rent from him, and to bring a suit for it. It is therefore ordered that the appeal be allowed with costs, the decree of the lower Court be set aside and the plaintiffs' suit be decreed with costs in all Courts.

Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal allowed.*

1. Gambhir Singh v. Surendra Singh, 1930 All 455=129 I C 373=52 All 714.

A. I. R. 1935 Allahabad 569

BENNET, J.

B. Suraj Patish Nandan Lal—Plaintiff—Appellant.

v.

Mt. Atul Bibi and *others*—Defendants—Respondents.

Second Appeal No. 149 of 1933, Decided on 8th March 1935, from decision of Addl. Sub-Judge, Mirzapur, D/- 5th November 1932.

Limitation Act (1908), Arts. 113 and 144 —Suit by lessee for possession under lease is one for specific performance and is governed by Art. 113 and not 144—Lease.

Where a contract of lease has been executed by which the lessee is entitled to be put in possession, but he is not given possession and he sues for possession under the lease, the suit is one for specific performance that the contract to be put in possession of the property should be carried out. Such a suit is governed by Art, 113 and not by Art. 144: 5 *A L J* 529, *Rel on*; 5 *A L J* 534, 33 *Cal* 343, 10 *O C* 218; 1918 *P C* 85; 31 *Mad* 51 *Dist.* [P 510 C 2]

N. P. Asthana and *B. N. Sahai*—for Appellant.

Harnandan Prasad—for Respondents.

Judgment.—This is a second appeal by a plaintiff whose suit has been dismissed by both the lower Courts. The facts are that on 9th October 1918 one Muhammad Khan, the deceased husband of defendant 1, executed a perpetual lease in favour of the plaintiff of certain plots of sir which were in his possession as a zamindar. Two days later on 11th October 1918 Muhammad Khan executed a mortgage of his zamindari share in this khewat with possession to one Brij Pathish, who was a cousin of the plaintiff and who was held by the trial Court to be joint with the plaintiff. The possession of the sir was never transferred by Muhammad Khan. The mortgage in question was later redeemed by a subsequent mortgagee. The plaintiff has brought a suit for possession under this lease on 27th June 1930, almost within 12 years of the execution of the lease. The finding of the Courts below is that the plaintiff has never been in possession. The Courts below have held that the suit for possession is barred by Art. 113, Sch. 1, Limitation Act. The sole argument on behalf of the plaintiff in second appeal is that the correct article to apply is Art. 144, and that his suit should be treated as a mere suit for possession, and learned counsel argues that the contract for the lease having once been executed it ceased to be an executory contract and became an executed contract, and therefore there is no contract for which specific performance should be carried out. His argument is that Art. 113, Limitation Act, would apply to a suit for specific performance of a contract to make a lease, but once the lease has been made Art. 113 did not apply, that the rights have arisen from the lease and that the correct article to apply is Art. 144, for which a period of limitation is 12 years, and therefore the suit is within time. Unfortunately for learned counsel he is not able to produce any ruling of any High Court in India in which this view of a lease has been taken. He relied on 5 A L J 534 (1) where the question was what was the proper court-fee for a lease. The learned Judge who decided that case had shortly before in 5 A L J 529 (2) decided a question similar to the present where there was a lease and possession had not been given to the lessee and the lessee brought a suit for possession. On that occasion the Bench held that the correct article to apply was Art. 113 and not Art. 144.

Learned counsel has not attempted to distinguish this ruling from the present case. Another ruling of the Allahabad High Court is reported in 6 All 231 (3). In that case there was a contract for the sale of certain immovable property in the event of the vendor obtaining a decree establishing his title to the property in a suit which had been brought for that purpose. The vendor obtained a decree establishing his title. The purchaser brought a suit to have a sale deed executed and completed and for possession of the property. The Court held that Art. 113 applied and not Art. 144. Learned counsel attempted to distinguish that case by saying that that case only applied to an agreement to sell and that the case would have been different if it had been a sale deed. I do not consider that the ruling draws any such distinction. It appears to me that under S. 105, T. P. Act, a lease is defined as a transfer of a right to enjoy immovable property. The plaintiff claims that this contract had been made with him but that the right to enjoy has not been transferred to him by possession, and he asks that the contract to be put in possession of the property should be carried out. I consider that this is a suit for specific performance of a contract. Learned counsel relied on 33 Cal 343 (4) at p. 347, but that was not a case in regard to limitation. In 10 O C 218 (5) there was a ruling by Chamier, J.. that a suit for possession by enforcement of a clause in a mort-

1. Gulam Sabir v. Narain Prasad, (1908) 5 A L J 534=1908 A W N 201.
2. Charna v. Bans Lal, (1908) 5 A L J 529=1908 A W N 245.
3. Muhi-ud-din Ahmad Khan v. Majils Rai, (1884) 6 All 231=1884 A W N 42.
4. Ferguson v. Uma Chand Boid, (1906) 33 Cal 343.
5. Kalka Singh v. Himayat Ali, (1907) 10 O C 218.

gage deed that the mortgagee had a right to possession on failure to pay interest was not a suit for specific performance of a contract. That however dealt with the specific case of a mortgage and in my opinion cannot be applied to the present case which deals with a lease. In 1918 P C 85 (6) their Lordships held that the grant in question in that case although it had been declared to be a contract within the meaning of S. 51 of Bengal Act 6 of 1870 did not create rights contractual in the sense that the contract by its terms creates or regulates the personal obligations and duties of the granter in the circumstances that had arisen which were not contemplated and necessarily not referred to at the time the grants were made. This case dealt with certain chaukidari chakaran lands in villages and the interpretation of a grant of such lands. That has nothing to do with the circumstances of the present case. In 31 Mad 51 (7) there was a peculiar kind of tenure called an Arthamulgeni deed which was distinguished by the Court from a lease. That was not a case of a suit based on contract. As already stated learned counsel has not shown a single ruling in which plaintiff sued for possession under a lease under which it had been held that he had never been in possession and where the Court held that Art. 113 of the Limitation Act did not apply. For these reasons I dismiss this second appeal with costs. Permission is given for a Letters Patent appeal.

K.S. *Appeal dismissed.*

6. Ranjit Singh Bahadur v. Maharaj Bahadur Singh), 1918 P C 85=48 I C 262=45 I A 162=46 Cal 173 (P C).
7. Mogera Nandi v. Parameswara Udpa, (1908) 31 Mad 51.

A. I. R. 1935 Allahabad 571

SULAIMAN, C. J. AND BENNET, J.

Mt. Mahginiya—Defendant — Appellant.

v.

Sri Ram Chandraji and *others*—Plaintiffs—Respondents.

Second Appeal No. 907, of 1931 Decided on 28th January 1935, from decision of 2nd Addl. Sub-Judge, Benares, D/- 30th March 1931.

Occupancy Holding—Cutting down bamboos and selling them does not depreciate value of such holding—Sale of bamboos is only sale of produce.

There is a certain difference from the sale of bamboos in a clump and the sale of a tree. When a tree is sold the tree is cut down and taken away and there is nothing remaining. The value of the holding therefore is depreciated by the cutting of the tree. On the other hand where bamboos are cut down and sold from a clump, in a few years other bamboos grow up from the same clump. The value of the holding therefore is not depreciated by such a sale. The sale is rather of the produce of the land and the growth of the bamboos is in the nature of the growth of a crop. [P 572 C 1]

Haribans Sahai—for Appellant.

P. L. Banerji and *Srinarain Sahai*—for Respondents.

Bennet, J.—This is a second appeal by a defendant against concurring decrees by two lower Courts. The plaintiff sued as a zamindar of a certain village and stated in the plaint that the defendant was an occupancy tenant of a plot of land No. 81, area 70 acres, in his zamindari on which stand clumps of bamboos belonging to defendant and that out of the clumps of bamboos defendant 1 had sold 46 bomboos to defendant 2 for Rs. 23 and that there was a custom of realisation of zar chaharum of the sale proceeds by the zamindar at the time of sale of groves or scattered trees, and accordingly the plaintiff claimed Rs. 5-12-0 and interest. The case was first brought in the Revenue Court and defendant 1, who is an old lady, admitted the claim but later she disputed it in the Revenue Court and the Revenue Court held that it had not got jurisdiction and the plaint was returned and has been presented in the Court of the Munsif. The case has been opposed by the appellant on the ground that the custom in question does not apply to the sales of these bamboos because they are not trees. For the plaintiff-respondent reliance is placed on the custom recorded in 1291 F. corresponding to 1883-84, in the "halat dehi" containing the customs of the village. The custom there is recorded as applying "bawaqt farokht baghat wa darakhtan mutafarrika." The question before us is: Can it be said that the sale of 46 bamboos out of certain bamboo clumps in an occupancy holding does come under this custom? The onus of proof was on the plaintiff to show that the custom would apply in such a case. No decision has been shown by the plaintiff in which the custom has been enforced for the sale of bamboos from a clump. There is we consider a certain difference from the sale of bamboos in a clump and the sale of a tree. When a tree is sold the tree is cut down and ta-

ken away and there is nothing remaining. The value of the holding therefore is depreciated by the cutting of the tree. On the other hand where bamboos are cut down and sold from a clump, in a few years other bamboos grow up from the same clump. The value of the holding therefore is not depreciated by such a sale. The sale is rather of the produce of the land and the growth of the bamboos is in the nature of the growth of a crop. Attention has been directed to a ruling of the Board of revenue in 15 L R A Rev 132 (1). The question before the Board was different from the question before this Court. The question before the Board was whether the land on which a large number of bamboo clumps were planted would be grove land. The Board held that the existence of these bamboo clumps would prevent cultivation and therefore within the meaning of the present Tenancy Act (Act 3 of 1926), S. 3 (15), the land would be grove. But what we have to see is whether the custom applies in the present case. It is not argued that a grove has been sold, but the plaintiff desires to bring his claim under the words of the custom which refer to the sale of scattered trees. We consider that the plaintiff has failed to make out his case and as the onus of proof was on the plaintiff we therefore allow this second appeal and dismiss the suit of the plaintiff with costs throughout.

K.S. *Appeal allowed.*

1. Ali Husain v. Marium Bibi, (1934) 15 L R A Rev 132.

A. I. R. 1935 Allahabad 572

NIAMATULLAH AND BENNET, JJ.

Shivnath Prasad—Applicant.

v.

Commissioner of Income-tax Central and *United Provinces, Lucknow* — Opposite Party.

Misc. Case No. 677 of 1934, Decided on 1st March 1935.

(a) Income-tax Act (1922), Ss. 66 (2), 31, 32, 33—High Court can direct Commissioner to state case only if conditions under S. 66 (2) are satisfied—Appeal dismissed as time barred—High Court cannot direct commissioner to state case.

The High Court can require the Income-tax Commissioner to state a case only if the conditions required by S. 66 (2) are made out and one of those conditions is that an order under S. 31 or S. 32, or S. 33 should have been passed in the case. The Assistant Commissioner is authorised to admit an appeal after the expiration of that period, if he is satisfied that the appellant had sufficient cause for not presenting it within that period. If the Assistant Commissioner is satisfied and admits the appeal, the order is one under S. 30 (2). If he is not satisfied that the appellant had sufficient cause, he refuses to admit the appeal, in which case no appeal can be registered and disposed of in the manner laid down by S. 31 and no order under S. 31 can be passed. It follows that action under S. 66 (2) cannot be taken if the appeal has not proceeded beyond the stage referred to in S. 30 (2), and the High Court cannot direct the Commissioner to state a case: 1934 *All* 559 *Rel on.* [P 572 C 2; P 573 C 1]

(b) Income-tax Act (1922), S. 31—Appeal rejected as time barred—Question of assessment not considered—Order is not one confirming assessment.

An order confirming the assessment is an order which has reference to the assessment and which affirms it. Where the question of assessment is not even considered and the appeal is rejected as one barred by limitation, the order of dismissal cannot be considered to be one confirming the assessment. [P 573 C 1]

Shabd Saran—for Applicant.

Order.—This is an application under S. 66 (3), Income-tax Act, for an order of this Court requiring the Income-tax Commissioner to state a case under S. 66 (2) of the same Act. The applicant was assessed to tax by the income-tax officer. He preferred an appeal to the Assistant Commissioner after more than thirty days from the date of the notice of demand. The Assistant Commissioner fixed a date calling upon the assessee to show cause why the appeal should not be rejected as one filed beyond time. On the date so fixed and after hearing the assessee the appeal was rejected. The assessee applied to the Income-tax Commissioner for revision of the order of the Assistant Commissioner. His application was dismissed. He then applied to the Income-tax Commissioner for statement of case under S. 66 (1). This application was also rejected. Thereupon he filed the present application.

It has already been held by this Bench of 1934 All 559 (1) that the High Court can require the Income-tax Commissioner to state a case only if the conditions required by S. 66 (2) are made out and that one of those conditions is that an order under S. 31 or S. 32 or S. 33 should have been passed in the case. It appears to us that no order under any of those sections was passed in the present instance. A reference to Ss. 30 and 31, Income-tax Act, shows that an appeal is filed under the for-

1. Jot Ram Sher Singh v. Commissioner of Income-tax, 1934 All 559=150 I C 197=56 All 933

mer section, and if it is admitted as an appeal presented in time, the appeal is ripe for hearing and a date is fixed for its disposal on the merits. It is only after that stage that the Assistant Commissioner functions under S. 31 and can dispose of the appeal by confirming, reducing, enhancing or annulling the assessment or setting aside the assessment and directing the income-tax officer to make a fresh assessment, etc., S. 30 (2) prescribes the period of limitation for appeals which according to that sub-section should:

'ordinarily be presented within thirty days of receipt of notice of the demand relating to the assessment or penalty objected to or of the date of the refusal to make a fresh assessment under S. 27, as the case may be."

The Assistant Commissioner is however authorised to admit an appeal after the expiration of that period, if he is satisfied that the appellant had sufficent cause for not presenting it within that period. If the Assistant Commissioner is satisfied and admits the appeal, the order is one under S. S. 30 (2). If he is not satisfied that the appellant had sufficient cause, he refuses to admit the appeal, in which case no appeal can be registered and disposed of in the manner laid down by S. 31 and no order under S. 31 can be passed. It follows that action under S. 66 (2) cannot be taken if the appeal has not proceeded beyond the stage referred to in S. 30 (2), and the High Court cannot direct the Commissioner to state a case.

The learned advocate for the appellant contends that the Assistant Commissioner dismissed the appeal presented before him though it may be that it was dismissed on the ground that it was barred by limitation. Accordingly, he argues that the order is one confirming the assessment within the meaning of S. 31, Income-tax Act. We do not think that this contention is sound. An order confirming the assessment is an order which has reference to the assessment and which affirms it. Where the question of assessment is not even considered and the appeal is rejected as one barred by limitation, the order of dismissal cannot be considered to be one confirming the assessment. As already stated the order of the Assistant Commissioner in this case properly described is not an order dismissing the appeal but is an order refusing to entertain the appeal.

For the reasons stated above we hold that S. 66 (2), Income-tax Act, does not apply, and the High Court cannot direct the Commissioner to state a case for the decision of the question of law said to arise from the order of the Assistant Commissioner. We express no opinion as to whether the question which the applicant desires to be considered by the High Court is a question of law. The application is dismissed.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 573

KENDALL, J.

Abdul Ghani Khan—Applicant.

v.

Ram Mohan Lal—Opposite Party.

Civil Revn. No. 455 of 1934, Decided on 20th February 1935, against order of Addl. Sess. Judge, Allahabad, D/- 1st August 1934.

Criminal P. C. (1898), Ss. 476-B and 195 (3)—Order of Small Cause Court directing prosecution—Appeal lies to District Judge and Subordinate Judge has no jurisdiction.

An appeal under S. 476-B, Criminal P. C., lies to the Court to which the Court making the complaint is subordinate. Hence where an order directing prosecution is passed by a Judge of a Small Cause Court, the appeal lies to the District Judge and the Subordinate Judge has no such jurisdiction, even though in disposing of the appeal he signs as Additional Sessions Judge. [P 574 C 1]

A. M. Khwaja—for Applicant.

A. P. Pandey and *S. B. Johari*—for Opposite Party.

Order.—This application is made for the revision of an order passed by Mr. K. Banerji on 1st September 1934 purporting to act as an Additional Sessions Judge of Allahabad. That order was passed in the course of the hearing of an appeal from an order passed by the Judge of the Small Cause Court Allahabad on 20th December 1932 directing the prosecution of the opposite party Ram Mohan Lal for offences under Ss. 193 and 209, Penal Code.

The circumstances are fully stated in the order of the Judge of the Small Cause Court, and if the opinions which he expresses in that judgment are supported by the evidence, it is clear that it was not only proper but necessary to grant the application made by Abdul Ghani Khan the present applicant, for the prosecution of the opposite party.

An appeal was made under S. 476-B, Criminal P. C., to the District Judge of Allahabad against the order passed by the Judge of the Small Cause

Court. By some inadvertence the hearing of this appeal was transferred to Mr. Banerji, who as it now appears had no jurisdiction to dispose it of. An appeal under S. 476-B, Criminal P. C., lies to the Court to which the Court making the complaint is subordinate, and under S. 195 (3), Criminal P. C:

"In the case of a civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary civil jurisdiction within the local limits of whose jurisdiction such civil Court is situate."

The Court ordering the complaint being the Judge of the Small Cause Court of Allahabad it is clear that the District Judge himself had jurisdiction to hear the appeal, but that the Subordinate Judge had no such jurisdiction. and Mr. Banerji though he signed himself Additional Sessions Judge in disposing of the appeal was really purporting to act in the exercise of his civil jurisdiction, which was that not of a District Judge but of a Subordinate Judge.

It follows therefore that his appellate order quashing the orders of the Judge of the Small Cause Court was passed without jurisdiction. I have been asked by Mr. Panday not to interfere because it is not part of the duty of the Court to pass orders that will have the effect of injuring any of the parties to a litigation. The position however is that the Judge of the Small Cause Court, who has heard the evidence and knows the facts has thought it necessary to order a prosecution and has given reasons which, (as I have said above) if they can be supported by the evidence are good reasons for ordering prosecution. The appellate order which has been passed reversing this order does not give good reasons for reversing it. I have read it, but Mr. Banerji does not appear to have faced the real issues in the case, and his order ought not to be allowed to stand even if it could be said to have been passed with jurisdiction.

The result is that I allow the present application, without making any order as to costs, and direct that the order passed by Mr. Banerji of 1st August 1934 be set aside. The appeal must be readmitted on its original number, but as it has been pointed out that the present District Judge of Allahabad Mr. Tej Narain Mulla, has made a remark in an official document which may be regarded by the present opposite party as showing that the Judge is likely to disbelieve his statement. I direct that the appeal be transferred for decision to the District Judge of Benares.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 574

BAJPAI, J.

Sulaiman Husain Khan—Plaintiff—Appellant.

v.

Sita—Defendant—Respondent.

Second Appeal No. 1201 of 1932, Decided on 21st December 1934, from decision of Sub-Judge, Farrukhabad, D/- 11th June 1932.

Civil P C. (1908), Ss. 102 and 24—Suit for value below Rs. 500 rightly instituted in Honorary Munsif's Court—Munsif informing District Judge that he was related to one of parties—District Judge transferring case to Munsif, not being Small Cause Court—No second appeal lies from decision of Munsif.

A suit of value below Rs. 500 was rightly instituted in the Court of the Honorary Munsif and there was nothing to prevent that Court from proceeding to dispose of the suit. The Munsif however wrote to the District Judge that as he was related to one of the parties he would not like to try the suit. The District Judge then under S. 24. Civil P.C., transferred the suit from the Court of Honorary Munsif to the Court of the Munsif which was not a Small Cause Court.

Held: that it was not obligatory for the District Judge to transfer case to Small Cause Court and he could transfer the suit to any Court subordinate to him and competent to entortain the same. The suit was of a nature cognizable by a Small Cause Court, but it was heard by a Munsif against whose decision an appeal did lie, but the decision of the lower appellate Court was not appealable by way of a second appeal to High Court under S. 102, Civil P. C. [P 575 C 1]

Shiva Prasad Sinha—for Appellant.

R. C. Ghatak—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit brought by him for the recovery of a sum of money less than Rs. 500. The suit was decreed by the trial Court but was dismissed by the lower appellate Court. There is therefore a preliminary objection that no second appeal lies because the suit was of a nature cognizable by a Court of small causes. The contention of the learned advocate for the plaintiff-appellant, however is that the suit ought to have lain in a Small Cause Court and the entire proceedings are vitiated and the proper order that I should pass in the present case is to return the plaint for presentation to the proper Court.

In order to appreciate the contention of the appellant and the preliminary objection of the respondent it is ne-

cessary to state a few facts. The suit was filed in the Court of the Honorary Munsif at Shamshabad which Court had jurisdiction to entertain the suit. It is contended by the plaintiff that although he filed this suit in the Court of the Honorary Munsif at Shamshabad he should have filed it in the Court of small causes at Farrukhabad. He has not been able to support his contention by a reference to any enactment or notification except S. 16, Provincial Small Cause Courts Act, which says that save as expressly provided by this Act or by any other enactment for the time being in force a suit cognizable by a Court of small causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of small causes by which the suit is triable. I shall assume for the purposes of this appeal that there is a Court of small causes at Farrukhabad which might have had territorial jurisdiction over the present suit, but S. 7, Cl. 4. Honorary Munsifs Act. provides that nothing in S. 16, Provincial Small Cause Courts Act of 1887, shall be deemed to affect the jurisdiction of Honorary Munsifs or Benches under the Honorary Munsifs Act.

It would therefore appear that the suit was rightly instituted in the Court of the Honorary Munsif at Shamshabad and there was nothing to prevent that Court from proceeding to dispose of the suit. The learned Honorary Munsif however wrote to the learned District Judge that as he was related to one of the parties he would not like to try the suit. The learned District Judge then under S. 24, Civil P. C., which is applicable to the Honorary Munsifs Act by reason of S. 9 of the said Act transferred the suit from the Court of the Honorary Munsif to the Court of the Munsif at Kaimganj. It is said that the learned District Judge ought to have transferred the suit to the Court of Small Causes at Farrukhabad but it was not obligatory for the learned District Judge to do so and he could transfer the suit to any Court Subordinate to himself and competent to entertain the same. The suit was therefore of a nature cognizable by a Small Cause Court, but it was heard by a Munsif against whose decision an appeal did lie, but the decision of the lower appellate Court is not appealable by way of a second appeal to this Court under S. 102, Civil P. C.

The result is that the preliminary objection is sound and there is no force in the contention advanced by learned counsel for the appellant that the suit ought to have been instituted in the Small Cause Court and I should return the plaint for presentation to that Court. Moreover the objection comes with a very bad grace from the mouth of the appellant who himself filed the suit in the wrong Court and invited that Court to give a decision in his favour. The finding of the learned Subordinate Judge is a finding of fact which is fatal to the appellant's claim the finding being that the amount of the debt was paid up by the defendant. There is no force in this appeal and I dismiss it with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 575

NIAMATULLAH, J.

Jafar Husain and *others*—Defendants—Appellants.

v.

Pearey Lal add *others* — Plaintiffs—Respondents.

Second Appeal No. 1644 of 1934, Decided on 25th February 1935, from decision of Addl. Sub-Judge, Moradabad, D/- 28th September 1934.

Criminal P. C. (1898), S. 144 — Person desiring what he is entitled to do should have support of those responsible for law and order—Right to celebrate Ram Lila and to take out procession, even though not exercised before should not be disallowed merely because another section of people who have no manner of right or interest object to it—Public Rights.

Ordinarily a person desiring to do what he is lawfully entitled to do should have the support of those responsible for law and order. Orders under S. 144 are to be directed not against those who desire to do what the law permits them to do but against those who attempt to prevent the exercise of a legal right. Persons, of whatever sect, are entitled to conduct religious processions through public streets, so that they do not interfere with the manner and use of such street by the public and subject to such directions as a Magistrate may lawfully give to prevent obstructions of the thoroughfares or breaches of the public peace. The right thus recognized is again not one which is dependent for its enforcement on the previous exercise of it. Hence where a section of Hindus want to celebrate the Ram Lila and take out procession, the Magistrate should not take action under S. 144 merely because some Mahomedans who have no manner of interest or right, object to it and even though the Hindus above referred to celebrate the festival only for the first time: 1925 *P C* 36 *Applied*.

[P 577 C 1]

A. M. Khwaja—for Appellants.

Judgment.—This is an appeal by the defendants in a suit brought by the plaintiffs for a perpetual injunction which has been granted by the lower appellate Court. The defendants have appealed.

The plaintiff-respondents represent the Hindu population of village Aghwanpur (Mughalpur) in the District of Moradabad. The defendants were impleaded in a representative capacity and defended the suit on behalf of the Muslim community of the same village. The plaintiffs' case was that they desired to celebrate Ram Lila in 1932 and to take out a procession from a certain place in the village to another place in the same village. The Mahomedans objected on the ground that both the Ram Lila and the procession were "innovations" and that the Hindus had no right either to celebrate the Ram Lila or to take out any procession. as they were opposed to the sentiments of the local Muslims. It appers that the District authorities embarked upon an inquiry as to whether Ram Lila had been celebrated in previous years and as to whether the procession attempted to be taken out by the Hindus had been taken out on previous occasions. They also appear to have made an attempt to bring about an amicable settlement between the parties, but failed. Eventually an order under S. 144, Criminal P. C., was passed prhibiting the performance of Ram Lila and taking out the procession. The suit which has given rise to this appeal was instituted for an injunction restraining the defendant (Mahomedans) from interfering with the right of the Hindus to take out procession and to celebrate the Ram Lila. It was alleged on behalf of the plaintiffs (the Hindus) that Ram Lila had been celebrated in the village for many years in the past and that the procession was a ceremony connected with the Ram Lila celebration. The defendants (Mahomedans), on the other hand, maintained that both these functions were recently thought of and should not be allowed. They disputed the right of the Hindus to celebrate the Ram Lila at certain places and to take out a procession contrary to the established practice. The trial Court held that Ram Lila celebration was an old institution in the village, and to that extent the injunction prayed for by the plaintiffs was granted. As regards the right to take out a procession by the plaintiffs, the trial Court's view was that it was an innovation. Accordingly the injunction prayed for was refused by that Court. The plaintiffs preferred an appeal to the Subordinate Judge, and the defendants filed cross-objections impugning the finding of the trial Court so far as it permitted the celebration of Ram Lila at certain places. The lower appellate Court agreed with the finding of the trial Court as regards the celebration of Ram Lila and maintained the decree appealed from to that extent. As regards the right to take out procession, the lower appellate Court held:

"That although the processions are an innovation, the plaintiffs are entitled to take them out on the public roads subject, of course, to limitations as to time, place and manner as may be imposed upon them by the district authorities under the powers given to them for the prevention of the breaches of the peace."

In the present second appeal filed by the defendants a number of grounds have been taken in the memorandum of appeal. They are somewhat discursive, and may be compressed into the following: (1) That it is not open to the Hindus to celebrate Ram Lila at given places and to take out processions contrary to the local usage. (2) That the two enclosures in which the Hindus desire to celebrate did not belong to the plaintiffs and therefore no injunction could be obtained by them restraining the Mahomedans from interfering with the celebration of the Ram Lila. (3) That the taking out of procession being an innovation as found by the lower Courts, the Hindus have no right to take them out and no injunction should be issued, as prayed by the plaintiffs.

It seems to me that the defendants' pleas are misconceived. Celebration of Ram Lila by itself is a function which every Hindu has a right to perform in his own house or in the house of his neighbour or friend, if he so allows it. The fact that it was never celebrated in a village is no ground for objecting to its celebration for the first time in any particular year. It is only if the manner of its performance comes in conflict with the civil rights of Mahomedans that any question may possibly arise: but in this case the sole ground on which the right of the Hindus to celebrate the Ram Lila is objected to is that it is an "innovation." As regards the Ram Lila itself, the lower Courts have found, after an elaborate enquiry, that it is not an "innovation." In my opinion this was a waste of time. The issue was wholly immaterial; and the trial Court should have ruled out the plea on the first

hearing and should have declined to give any finding as to whether it was an innovation or was according to an established practice. As already stated, every Hindu has a right to celebrate the Ram Lila at any place, where those occupying or having the use of it have no objection to its performance. Of course, it is not open to them to trespass upon land belonging to a person who objects to the performance of Ram Lila relying upon his ownership. That is a different question altogether. In this instance, though the defendants take objection to the celebration of Ram Lila in two particular enclosures, it is not suggested that they have any proprietary or other interest in them which can justify their assertion of a right to those enclosures or interference with the celebration of the Ram Lila with the consent of the owners or occupiers of those enclosures.

As regards the right to take out a procession, the position is not materially different. It is open to the Hindus to conduct a procession from one particular place to another through public thoroughfares subject to such restrictions or conditions as may lawfully be imposed by those responsible for public peace and tranquillity. Their Lordships of the Privy Council have clearly held in 1925 P C 36 (1), that persons of whatever sect are entitled to conduct religious processions through public streets, so that they do not interfere with the manner and use of such street by the public and subject to such directions as a Magistrate may lawfully give to prevent obstructions of the thoroughfares or breaches of the public peace. The right thus recognized by their Lordships is again not one which is dependent for its enforcement on the previous exercise of it. It is easily conceiveable that a resident of a village might for the first time in his life think of celebrating the Ram Lila on a large scale and taking out procession from one place to another. It cannot be doubted that, subject to the limitations recognized by their Lordships of the Privy Council, he has an absolute right to take out a procession. If the intentions of those in charge are otherwise than peaceful, it is a matter for the Magistrate to take them into consideration in determining whether he should impose any limitations to ensure the peace and tranquillity. The members of any other community or sect, however cannot on the sole ground that it is an innovation, arrogate to themselves the right to object. In the present case, the Magistrate appears to have recognized it as a rule of law that any religious observance by one section of the population of a village is not permissible if it is objected to by another section of the population and if it is an innovation. This, in my opinion is an undesirable attitude to take in settling communal disputes. Ordinarily a person desiring to do what he is lawfully entitled to do should have the support of those responsible for law and order. Orders under S. 144 are to be directed not against those who desire to do what the law permits them to do, but against those who attempt to prevent the exercise of a legal right.

The two enclosures, which are apparently the places where the Hindus desire to celebrate the Ram Lila and to take out processions from, do not belong to any of the Mahomedans of the village. It is not stated that they have any right of occupation or user of those enclosures. All that is said is that they do not belong to the plaintiffs, that is to say, to the individuals whose names are mentioned in the array of the plaintiffs. Apparently the plea does not go so far as to suggest that the enclosures did not belong to any of the Hindus of the locality. It is likewise, not suggested that the owners or occupiers of those enclosures object to the celebration of the Ram Lila therein or to the processions being taken out therefrom. It is clear to me that in these circumstances the defendants have no locus standi whatever in objecting to any of these functions.

I have already dealt with the third question as part of the first, and need not repeat the reasons on which I overrule the appellants' contention. The lower appellate Court has taken a correct view on all the questions involved in the case. The appeal fails and is dismissed under O. 41, R. 11, Civil P. C. The questions involved in this appeal are, in my opinion so easy of determination, and the view taken by the lower appellate Court is so palpably correct that I do not think any useful purpose will be served by granting leave to appeal under the Letters Patent. Leave is accordingly refused.

K. S. *Appeal dismissed.*

1. Manzur Hasan v. Mohmed Zeman, 1925 P C 36=86 I C 236=52 I A 61=47 All 151 (P C).

A. I. R. 1935 Allahabad 578

GANGA NATH, J.

Mt. Shamrati Koer and *another*—Defendants—Appellants.

v.

Kalika Singh—Plaintiff—Respondent.

Second Appeal No. 915 of 1933, Decided on 12th March 1935, from decision of Subordinate Judge, Azamgarh, D/- 10th February 1933.

Mortgage—Usufructuary mortgage—Mortgage not registered — Suit for possession by redemption—Mortgage deed is inadmissible and plaintiff in order to succeed must prove title independently of mortgage — Plaintiff so proving title - Defendant in possession as mortgagee for over 12 years—Plaintiff must redeem mortgage as condition precedent to decree for possession.

Where a usufructuary mortgage-deed is not registered and a suit for possession of the property by redemption is filed, the mortgage being unregistered it will not be admissible in evidence and no other evidence can be produced to prove the mortgage. A suit for redemption of a usufructuary mortgage is in substance a suit for possession of immovable property. Though a suit for redemption could not lie, yet there is nothing against the plaintiff's claiming a decree for possession, if he can prove his title independently of the mortgage : 1927 *All* 311 ; 1932 *All* 259, *Rel on.* [P 578 C 2]

And where the plaintiff proves it, the mortgages being invalid, the plaintiff is entitled to possession over the property in suit but as the defendants have been in possession for more than 12 years as a usufructuary mortgagee, they must be deemed to have acquired mortgagee's rights and thus there come into existence a legal operative mortgage which the plaintiff must redeem as a condition precedent to a decree for possession. [P 579 C 1]

M. Waliullah—for Appellants.

A. P. Pandey—for Respondent.

Judgment.—This is a defendants' appeal and arises out of a suit brought against them by the plaintiff-respondent to recover possession over the property described in the plaint by redemption of a mortgage by payment of Rs. 300. The plaintiff's case was that his father mortgaged the property in suit to Sanoo Singh, the predecessor-in-title of the defendants by three mortgage deeds for Rs. 300. The mortgage was usufructuary. On the death of Sannoo Singh his wife, Mt. Bodha sub-mortgaged half of the mortgagee rights to Chhabboo Kandu and subsequently she made a gift of the mortgagee rights to defendant 2. Defendant 2 redeemed the sub-mortgage from the heirs of Chhabboo Kandu and acquired possession over the other half of the mortgaged property also. The defendants contended that they were the owners of the property in suit and that no mortgage had been made and their possession was adverse as well as that of a proprietor. The trial Court found that no mortgage was proved and dismissed the suit. On appeal by the plaintiff the learned Subordinate Judge of Azamgarh found that the defendants' possession over the property in suit was not as owners but was as mortgagee and that the mortgage money was Rs. 300. The learned Subordinate Judge decreed the suit for possession on payment of Rs. 300. Against this decision the defendants have come up here in appeal. The chief point taken by the appellants is that as, according to the evidence of the plaintiff-respondent, each mortgage was for Rs. 100 and as, the mortgage was not effected by a registered document, the secondary evidence of the mortgages was inadmissible There can be no doubt that the mortgages being unregistered, the deeds even if they were available would not have been admissible in evidence and no other evidence could have been produced to prove the mortgages. A suit for redemption of a usufructuary mortgage is in substance a suit for possession of immovable property. Though a suit for redemption could not lie yet there was nothing against the plaintiff's claiming a decree for possession, if the plaintiff could prove his title independently of the mortgage. This view is fully supported by 1927 All 311 (1) and 1932 All 259 (2). In 1932 All 259 (2) the plaint was framed as if it were one in a suit for redemption and the substantive relief was one for possession as in this suit. The mortgage deed being unregistered was invalid and no suit for redemption could lie. The plaintiff succeeded in proving his title independently of the mortgage. It was held that the defendants must be deemed to have acquired at least the mortgagee's rights. and the plaintiff was entitled to recover possession on payment of the mortgage money admitted by him in the plaint.

The chief point for consideration in this case is whether there is any evidence independently of the evidence of the alleged mortgages to prove the plaintiff's title and to entitle him to a decree for possession. There are copies of three khewats. In the copy of the khewat for 1868 the property is entered in the

1. Maha Mangal Rai v. Kishun Kandu, 1927 All 311=100 I C 346.
2. Halka v. Nannhon, 1932 All 259=140 I C 42.

name of Sheo Pal Singh, the predecessor-in-title of the plaintiff. The property was similarly entered in his name in the khewat of 1304-F. In the settlement khewat of 1309 Sheo Pal Singh was entered against the property in suit as the mortgagor and Mt. Bodha as the mortgagee of half and Arjun and Chhannoo, sons of Chhabboo, as sub-mortgagees of the other half of the property in suit. In 1895 Mt. Bodha Kuar, widow of Sannoo Singh, executed a sub-mortgage of half of the mortgaged property in favour of Chhabboo Kandu in which she admitted that the property in suit had been mortgaged with her husband, Sannoo Singh, by Sheo Pal Singh and that her husband and after him she had been in possession as a mortgagee. At the time of the sub-mortgage, that is on 30th July 1895 Mt. Bodha Kuar admitted that she was in possession as a usufructuary mortgagee over the property in suit under the mortgage made by Sheo Pal Singh in favour of her husband Sannoo Singh. The entries in the settlement khewat of 1306F along with the admissions in the sub-mortgage of 30th July 1895 and the very fact of the sub-mortgage and thereafter the fact of the redemption of this sub-mortgage by defendant 2 leave no room for doubt that the defendants' possession has been all along as that of a mortgagee. On this documentary evidence, independently of the evidence of the mortgage, the learned Subordinate Judge has recorded a finding that the defendants were not the owners and their possession was as that of a mortgagee.

The mortgages being invalid, the plaintiff is entitled to possession over the property in suit, but as the defendants have been in possession for more than 12 years as a usufructuary mortgagee they must be deemed to have acquired mortgagee's rights and thus there came into existence a legal operative mortgage which the plaintiff must redeem as a condition precedent to a decree for possession. The plaintiff himself admits the amount of the mortgage as Rs. 300, on the condition of the payment of which the lower Court has decreed the plaintiff's suit for possession.

The judgment of the Court below is correct. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 579

SULAIMAN, C. J. AND BENNET, J.

Sahdeo Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 996 of 1934, Decided on 15th March 1935, from order of Sess. Judge, Ghazipur, D/- 5th November 1934.

(a) Oaths Act (1873), Ss. 6 and 13—Child of tender years able to understand sufficiently of deeds seen and to inform Court thereof, examined as witness—Intentional omission to administer oath—S. 13 cures defect—But intentional omission will not be cured in all cases.

The mere fact that the Court advisedly refrains from administering the oath does not render the statement of the wituess inadminsible. A Court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently of the deeds seen and to afterwards inform the Court thereof. If the Court is of opinion that by reason of tender years the child is unable to do this it ought not only to refrain from administering the oath but from examining the child at all. If, on the other hand, the Court thinks that the child, though of tender years, is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions of S. 6 in the case of a child just as in the case of any other witness. S. 13 of the Oaths Act does cure a defect where there was not an accidental omission but an intentional omission to administer the oath: 1915 *All* 437 *Rel on; Case Law Ref.* [P 581 C 2]

Per *Sulaiman, C.J.*—But it cannot be held that where a Court defies the law and knowing that the law requires that an oath should be given and that it is his duty to administer oath or to make an adult witness affirm it, deliberately omits to ask him to do so or prevents the witness from taking oath the defect is cured and a record of his verbal statement is legal evidence. In such a case it may be difficult to say that the act was a mere omission within the meaning of S. 13 and was not something more than a mere omission. [P 584 C 2, P 585 C 1]

(b) Criminal P. C. (1898), S. 423 (a) (b)—Appellate Court ordering Magistrate to pass commitment order—Magistrate cannot hold enquiry under Chap. 18.

The appellate Court under S. 423 may either itself commit the accused for trial before the Sessions Court or it may direct a Magistrate to do so. But where it adopts the latter course, does not give the Magistrate any jurisdiction to any further enquiry and the enquiry already held is sufficient for the purposes of Chap. 18. The Magistrate then frames a charge or amends under S. 210 Criminal P. C., and under S. 211 requires the accused to give in his list of witnesses, and the Magistrate makes a formal order of commitment: *Case Law Ref.* [P 583 C 1, 2]

Sir C. Ross Alston and *K. D. Malaviya*—for Applicant.

Asst. Govt. Advocate—for the Crown.

Bennet, J.—This is a criminal revision on behalf of one Sahdeo Ram, who has been convicted by an Assistant Sessions Judge under S. 377, Penal Code, and sentenced to two years' rigorous imprisonment, 12 stripes and and a fine of Rs. 100 or in default four months' further rigorous imprisonment. He appealed to the Sessions Judge and his appeal was dismissed. This revision is filed against the appellate order of the Sessions Judge. The facts found by the Sessions Court were that a small boy Modan aged six and a half years was playing with another boy at the house of the accused and that the accused took him into a room and committed the offence of sodomy on him and the boy Modan was seen by two witnesses to run out of the house of the accused weeping, and the boy went to his father and told his father his story and took his father with a constable to the house of the accused and the boy pointed out the house and a head constable was called and the boy pointed out the accused and the accused was arrested and taken to the thana. On the next day medical examination by the civil surgeon took place of the boy and of the accused and injuries were detected on the anus of the boy which showed that he had been a victim of sodomy and an abrasion was found on the penis of the accused, which the medical witness stated might have been caused by committing sodomy. There were also some blood stains on the dhoti of the boy and none on the dhoti of the accused and the dhoty of the boy was also stained with some kind of oil. This was certified by the chemical examiner and the imperial serologist stated that the dhoty was stained with human blood. A number of witnesses were produced at the trial two of whom stated that they saw the boy coming from the house of the accused weeping, and the medical witness appeared before the Magistrate and gave his evidence. The trial in the first place took place before a Magistrate. The Magistrate convicted the accused under S. 377, Penal Code, and sentenced him to 18 months rigorous imprisonment and a fine of Rs. 300. The accused made an appeal to the Sessions Judge. The Sessions Judge was of the opinion that the sentence passed by the Magistrate was quite inadequate and that the case ought to have been committed to Sessions. He passed an order stating:

"I, therefore in the exercise of the power conferred on me by S. 423 (b) of the Criminal P. C. reverse the finding and sentence of the learned Magistrate and direct him to commit the case to the Sessions for trial."

On this order the Magistrate corrected the charge sheet into a charge triable by the Court of session and passed an order:

"Under the order of the Sessions Judge dated 5-7-1934 I commit the accused to the Court of Sessions where he will stand his trial. I have amended the charge and explained it to the accused."

Some argument was made that the accused did not have sufficient opportunity for summoning witnesses, but the record shows that the Magistrate called on the accused to furnish a list of witnesseses when he amended the charge and the accused did in fact file such a list next day. The case was tried by an Assistant Sessions Judge and no less than twelve witnesses were produced for the defence, Several points of law have arisen in this proceeding. The first point of law which was argued is in regard to the method adopted by the Assistant Sessions Judge in regard to the boy Madan. This boy was called as prosecution witness No. 2 and the Court noted:

"No oath was administered, being of tender age cannot understand its significance."

The boy then made a statement which was recorded in full, more than 2 typed pages of which the cross-examination occupied rather more than half. It is clear that the boy fulfilled the criterion for a witness laid down by S. 118, Evidence Act, and that he was not a person who was prevented by tender years from understanding the questions put to him or from giving rational answers to those questions. In fact if he had been prevented by his tender years from being able to understand the questions and giving right answers his statement would probably not have been taken at all. He having given his statement at a considerable length and in an intelligent manner is a person who according to S. 118, Evidence Act, should have testified as a witness. Now under the provisions of S. 6, Oaths Act, where a witness has an objection to making an oath, he shall make an affirmation and in every other case he shall make an oath. The Oaths Act does not recognise the criterion adopted by the Assistant Sessions Judge that an oath should not be administered because a child being of tender years cannot understand its significance. The oath therefore should have been made by this boy Madan under S. 6, Oaths

Act. The oath was not made and the question arises whether this omission comes or does not come under the language of S. 13, Oaths Act, which states

"No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

On the one hand on behalf of the accused it has been argued with great ability by Sir Charles Ross Alston that the words "no omission to take any oath or make any affirmation" mean "no accidental omission" and that those words cannot cover the present case where the Court deliberately refrained from administering an oath to this child on the ground that the child could not understand the nature of the oath. On the other hand it is argued on behalf of the Crown that the words "no omission to take any oath" are not qualified in any way by the statute and that it is improper for the Courts to read into that section the word "accidental" when the word "accidental" is not in the section. This is a matter on which different views have been taken in this High Court and in other High Courts. In the case of 10 All 207 (1) a learned Single Judge, the late Mahmud, J., took the view that these words in S. 13 will only cover an accidental omission and the view was taken in 11 All 183 (2) by a Bench of this Court that having regard to the language of the Oaths Act a Court has no option when once it has elected to take the statement of a person as evidence but to administer to such a person either an oath or an affirmation as the case may require. and reference was made to the ruling of 10 All 207 (1); but in this Bench ruling no reference was made to the provisions of S. 13, Oaths Act, and therefore this ruling cannot be taken as an authority on that section. In a later ruling of 1915 All 437 (3) a Bench of this Court specifically dissented from the ruling of the Single Judge in 10 All 207 (1) and it held as follows on p. 51 (of 38 All):

"We are unable to hold that the mere fact that the Court advisedly refrained from administering the oath renders the statement of the witness inadmissible. In our opinion a Court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently of the deeds seen and to afterwards inform the Court thereof. If the Court is of opinion that by reason of tender years the child is unable to do this it ought not only to refrain from administering the oath but from examining the child at all. If, on the other hand, the Court thinks that the child, though of tender years is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions of S 6 in the case of a child just as in the case of any other witness."

In that case the child in question was about six years, that is about the same age as the boy Madan whose age is given as six and a half years. In the particular ruling no reference was made to 11 All 183 (2). Now the matter has been considered by other High Courts and a Full Bench of the Calcutta High Court in the 23 W R 12 Cr (4) held that S. 13, Oaths Act, would cover any omission whether intentional or otherwise. In this case four learned Judges were in favour of this view and the remaining learned Judge Jackson, J., held the opposite view. In the case of 16 Mad 105 (5) there was a difference of opinion between the learned Chief Justice who held that S. 13 would not cure the defect and Parker, J. who held that it would cure the defect. In the case of 1921 Pat 109 (6) a Bench of the Patna High Court held that S. 13 would cure the defect and that was also held in the case of 1923 Lah 332 (7). Therefore there is a great preponderence of opinion in favour of the view that S. 13, Oaths Act, does cure a defect such as in the present case where there was not an accidental omission but an intentional omission to administer the oath. I consider this view is the correct one and I agree with the quotation which we have made from the case of 1915 All 437 (3), I may note that in the present case the learned Sessions Judge applied the criterion of English Law as to whether the child understood the nature of an oath. In Powell's Law of Evidence, 1921, Edition, p. 187, it is stated that a child of tenders years who does not in the opinion of the Court understand the

1. Queen Empress v. Maru, (1888) 10 All 207=1888 A W N 86.
2. Queen Empress v Lal Sahai, (1889) 11 All 183=(1889) A W N 65.
3. Emperor v. Dhani Ram, 1915 All 437=31 I C 1005=16 Cr L J 829=38 All 49.
4. Queen v Sewa Bhogta, (1875) 23 W R 12 Cr=14 Beng L R 294 (P C).
5. Queen Empress v. Viraperumal, (1893) 16 Mad 105.
6. Fatu Santal v. Emperor, 1921 Pat 109=61 I C 705=22 Cr L J 417=6 Pat L J 147.
7. Hussain Khan v. Emperor, 1923 Lah 332=76 I C 1037=25 Cr L J 317.

nature of an oath may now give unsworn testimony in all proceedings for any criminal offence if in the opinion of the Court the child is possessed of sufficient intelligence to justify the reception of the evidence and to understand the duty of speaking the truth. but an accused person cannot be convicted unless the evidence of the child is corroborated in some material particular implicating the accused. This provision comes from the statute of the Children Act, 1908, 8 Edward, 7 C. 67. S. 30. We consider that this provision of the English Law is sounder than the provision of the Indian Law in two respects: In the first place it makes provision for a child who may not understand the meaning of an oath but mav be able to give intelligent replies, and in the second place it makes the provision that the evidence of the child requires corroboration. In my opinion it would be well if the Indian Evidence Act and the Oaths Act were amended in this particular and if it were not left to the Courts to apply S. 13, Oaths Act, in this connection.

The next point on which arguments centred was in regard to the provisions of S. 423, Criminal P. C., which prescribes in Sub-S. (1) (b) for an appellate Court that the appellate Court may:

"in an appeal from a conviction (1) reverse the finding and sentence, acquit or discharge the accused, or (2) order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial."

Now learned counsel for the accused has argued at considerable length that what the appellate Court is empowered to do by the second alternative in this sub-section is only to direct a Magistrate to hold an enquiry under Ch. 18, Criminal P. C., and he argues that in the present case as the Magistrate merely made a formal order of commitment the provisions of S. 423 have not been carried out, and he says that the duty of the Magistrate was to re-summon all the witnesses for the prosecution and hear their evidence again in the presence of the accused and have them cross-examined and have the statement of the accused taken and after that draw up a charge sheet under S. 210 and carry out the procedure laid down in Ss. 211, 212 and 213; whereas in the present case all that the Magistrate did after receiving the order of the Sessions Judge was to amend the charge and call on the accused to give a list of witnesses and make a formal order of commitment. Now learned counsel relies on a ruling of a learned Single Judge of this Court reported in (1907) A. W. N. 178 (8). In that case an accused person had been sentenced by a Magistrate and the learned Sessions Judge committed the accused to his own Court and tried and convicted him. The learned Single Judge of this Court held that under S. 193, Criminal P. C. no Court of session shall take cognizance of any offence unless the case has been committed by a Magistrate duly empowered, and S. 477 was the only section which authorised a Court of session to commit the accused person to itself, and under S. 423, Criminal P. C., a Court of appeal may order an accused person to be committed for trial. That it was clear that what the section means is that the Court of appeal can direct the Magistrate competent to make a commitment to commit the accused to the Court of session for trial and that the learned Judge was in error in thinking that he had a power to make a commitment to his own Court. The ruling does not support the proposition of learned counsel because it is no where laid down in the ruling that when the Magistrate is directed to commit the accused to the Court of session for trial, the Magistrate is required to make an enquiry under Ch. 18, Criminal P. C., and to re-summon and re-hear the witnesses for the prosecution and take the statement of the accused again. Learned counsel in fact has not produced any ruling whatever in which such a procedure is laid down. His argument however is that when a Magistrate has been ordered to commit an accused person for trial, the Magistrate can only act under Ch. 18, Criminal P. C., and if he acts under that chapter, he must therefore hold an enquiry.

We consider that this is a very narrow view to take and that the particular view of the learned counsel for the accused would lead to great difficulties and would be prejudicial to accused persons. On this view if an appellate Court directs that a commitment should be made, it would give the prosecution an opportunity to call fresh witnesses who had not been produced before. Such a matter would be definitely to the disadvantage of an accused person. It would also lead to the conclusion that al-

8. Emperor v. Maula Khan, (1907) A W N 178= 6 Cr L J 7.

though the appellate Court had ordered that the accused should be committed for trial, the Magistrate would have jurisdiction to decide whether the accused person should be committed for trial or not and if he thought fit to disregard the order of the appellate Court and discharge the accused person. I consider that there is nothing whatever in the language of S. 423 to warrant the view which has been taken by learned counsel. There has been some difference of opinion in different rulings as to whether the language in S. 423 which we have quoted means that the actual order for commitment is the order passed by the Sessions Court or whether it means that the appellate Court directs the Magistrate to pass an order of commitment under S. 213. In 31 Mad 40 (9). 10 Bom 319 (10) and 27 Mad 54 (11) this matter has been considered. Those Courts have come to the conclusion that the appellate Court may order the commitment itself, and in 31 Mad 40 (9), it was held that both the courses are open to the appellate Court. In 1922 All 345 (12) a learned Single Judge of this Court made an order that the commitment should be to the Sessions Court and apparently he intended that there should be no intervention by a Magistrate. In 15 All 205 (13) a Bench of this Court on p. 207 used language which can be read as intending that the order of the appellate Court is sufficient without the intervention of a Magistrate and this can also be deduced from the ruling of a Bench in 1915 All 185 (14) I think that this point is of no great importance, and I consider that both courses are legal. that is, that the appellate Court under S. 423 may either itself commit the accused for trial before the Sessions Court or it may be direct a Magistrate to do so. But where it adopts the latter course, it does not not give the Magistrate any jurisdiction to make any further enquiry and that the enquiry already held is sufficient for the purposes of Ch. 18. Some difficulty however arises from the provisions in S. 291, Criminal P. C., that the accused shall be allowed at the trial to examine any witness not previously named by him, if such witness is in attendance, but he shall not except as provided in Ss. 211 and 231 be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistate by whom he was committed for trial. S. 231 which allows further witnesses only applies in those cases where there has been an alternation of the charge after the accouncement of the charge. It is important therefore that the right of the accused to give the list of witnesses under S. 211 should be maintained in the case we are considering. It is therefore more convenient if an appellate Court adopts the course of directing a Magistrate to make an order of commitment. The Magistrate then frames a charge or amends the charge under S. 210, Criminal P. C., and under S. 211 requires the accused to give in his list of witnesses and the Magistrate makes a formal order of commitment similar to the order in the present case under S. 213. I consider that the course adopted in the present case is therefore most convenient for the ends of justice and there is nothing whatever in that course which is irregular.

The next point which was argued was in regard to the statement of the accused. The Magistrate had originally taken the statement of the accused and at the trial the Assistant Sessions Judge took the statement of the accused at the close of the prosecution in the usual way. The case was argued and the opinions of the assessors were taken and all the assessors stated that they consider that the accused is not guilty. This was on 12th September 1934. A date was then fixed for judgment, 25th September, and on that date the accused appeared before the Court and the following order was recorded:

"Today is the date for the pronouncement of judgment in this case. The accused is present. On being enquired he told that the hurt observed by the Civil Surgeon on his male organ was due to the fact that he was kept in the Kotwali in the night and there the Police people had handled it and during that it might have got hurt by the nails of the fingers of those people. I did not tell this to the Civil Surgeon, as he did not ask me about it. I did not mention this fact up till now."

The trial Court stated in its judgment:

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9. Sessions Judge of Mangalore v. Malinga, (1908) 31 Mad 40=7 Cr L J 29.
10. Queen Empress v. Krishna Bhat, (1886) 10 Bom 319.
11. In the matter of Kalagava Bapiah, (1904) 27 Mad 54.
12. Hasan Raza v. Emperor, 1922 All 345=67 I C 728=23 Cr L J 456.
13. Queen Empress v. Maula Bakhsh, (1893) 15 All 205=1893 A W N 105.
14. Emperor v. Mohan Lal, 1915 All 185=29 I C 65=16 Cr L J 439.

"Before taking up the defence I shall further like to note that today I had asked the accused how he got the hurt on his male organ and he replied that he was kept by the police in the Kotwali and there they had handled it and thus got scratches by their finger-nails. This explanation was never put forward by the accused up till now. It was no doubt suggested during argument by his advocates but I am not ready to believe it,"

and the Court rejected it. A point was taken about this in appeal, when the learned Sessions Judge stated that the further statement of the accused can and should be disregarded, and that the accused was not prejudiced thereby: that after all it was an irregularity which cannot vitiate the trial. The point is now brought forward that the statement should not have been taken after the assessors had given their opinions and it is argued that the language in S. 342 that the Court may at any stage of any enquiry or trial put the questions to the accused to enable him to explain any circumstances appearing in the evidence against him would not cover the action of the trial Court. I do not express an opinion on this point but we consider that the accused cannot have been prejudiced in the present case because for one thing all the assessors had brought in a finding of not guilty and for another thing the appellate Court has specifically stated that it did not take this statement into consideration. The accused cannot therefore in any way have been prejudiced by the procedure if the procedure did in fact amount to any irregularity. An objection was taken that the chemical examiner's report was not placed before the trial Court but was taken on record by the appellate Court. This allegation however is incorrect because the record shows that the report of the chemical examiner was placed on the record by the Magistrate and has remained on the record ever since. Some objection was then taken that the Magistrate had not placed a certificate on the evidence of the medical witness. Presumably he did not do so, because he was not the Magistrate who committed the accused for trial to the Court of session. Therefore it was not necessary to do so. This defect was cured by calling the Magistrate as a witness under S. 428 to the appellate Court. In no way was the accused prejudiced by this procedure. No other point was raised in this criminal revision. The sentence and conviction appear to be correct.

Sulaiman, C. J.—I agree. The first question is whether the omission to administer oath to the child made his statement legally inadmissible and accordingly the trial is vitiated. There is certainly a distinction between a person not understanding questions put to him or prevented from giving rational answers to questions by reason of his tender years and a person not realising the significance of an oath and his obligation to state the truth and liability for speaking falsehood. So far as the Indian Acts are concerned, S. 5 of the Oaths Act makes it obligatory upon all persons who may be lawfully examined or may give evidence to take the oath or solemn affirmation; and S. 118, Evidence Act, makes only such persons competent to testify who are not prevented from understanding questions put to them and from giving rational answers to those questions by reason of tender years, etc. Now even though a child may be sufficiently grown up so as to be able to understand questions put to him and to give rational answers to such questions, although he is of tender years, he may nevertheless be so young as not to be capable of realising the significance of the oath and his liability for it. As a matter of fact a child under 7 years of age would not be liable criminally even if he spoke an untruth. It would therefore seem to follow that in India even children must be made to take oath. If they are unable to understand the questions put to them, or to give rational answers to questions, then there would be no point in questioning them at all and taking their statements. On the other hand, if they are competent to do this, then it is obligatory on Courts to administer oaths to them.

The question whether S. 13 would cure the defect in every case is not free from difficulty. The preponderance of authority now is certainly in favour of the view that even an intentional omission to take oath or make affirmation would be cured by this section. The word "omission" is certainly wide enough to include a case where the witness has not taken the oath either due to any accidental omission which may be unintentional or even where the omission is intentional; but I should like to guard myself against being understood to hold that even in an extreme case, which is not likely to happen, where a Court defies the law and knowing that the law requires that an oath should be given and that it is his duty to ad-

minister oath or to make an adult witness affirm it, deliberately omits to ask him to do so or prevents the witness from taking oath the defect is cured and a record of his verbal statement is legal evidence. In such a case it may be difficult to say that the act was a mere omission wi- that the meaning of S. 13 and was not something more than a mere omission. Again there may be a case where parties in a civil suit agree to abide by the statement on oath of a referee or a witness, in which case it could hardly be contended that an omission to administer oath to the referee would be cured by S. 13, Oaths Act. But where the Court acting in good faith and possibly under some error of law considers that the oath in the circumstances is not necessary, I agree that there would be an omission within the meaning of S. 13.

In the present case the Court in not administering oath to the child took great care to note on the document on which his statement was recorded that the child was of such tender years that in the opinion of the Court he was not capable of realising the significance of an oath and it was on that ground only that the Court considered it useless and futile to ask him to take an oath.

Even where oath has not been administered to a child and his testimony cannot be legal evidence, there may be cases where the fact that he identified the accused consistently from the time soon after the occurrence till his appearance in Court may perhaps be some corroborative evidence and admissible on that ground.

As to the other question, S. 423, Criminal P. C., as worded undoubtedly allows both courses to be adopted by a Court of appeal. In an appeal from a conviction. the appellate Court not only may reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court but may also "order him to be committed for trial." The words "order him to be" must necessarily be construed to be understood before the words "committed for trial." It is clear that the section does not require that the appellate Court should "order the Magistrate to commit the accused for trial" but what it requires is that it should "order the accused to be committed for trial." The section is silent as to the Court which should commit the accused. It should therefore follow that it is open to the appellate Court either to commit the accused for trial to the Sessions Court itself or to order a Magistrate to commit him for trial. S. 437 which deals with cases exclusively triable by the Court of session also contains the same words and empowers a Sessions Judge or a District Magistrate, instead of directing a fresh enquiry, to "order the accused to be committed for trial." Although cases triable exclusively by the sessions are different in some respects, there is no doubt that under S. 437, it would be open to a District Magistrate to commit the accused for trial to the Sessions Court direct without reference to a Magistrate from whose order he was hearing the appeal. The same words occur in S. 423 and must therefore have the same meaning.

There are some difficulties no doubt caused by the language of some of the sections in Ch. 23, for example, Ss. 287 288, 291, etc., where the words "committing Magistrate" are used. In cases where the Sessions Judge commits the accused for trial direct we would have to substitute the words "Sessions Judge" in place of a "Committing Magistrate" in many sections of Ch. 23, which would certainly create a certain amount of awkwardness. But as has been pointed out by my learned brother, before 1923 there was a provision in S. 477, Criminal P. C., under which a Sessions Judge could commit an accused person for trial direct without reference to any subordinate Magistrate and the same difficulties had to be got over even under the unamended Code.

The contention urged on behalf of the accused that in cases where the Sessions Judge directs a Magistrate to commit the accused to trial, the proceedings before the Magistrate are governed by Ch. 18 of the Code and that accordingly it is obligatory on the Magistrate to follow the provisions of all the sections in that chapter, has in my opinion no force. Where in the case of an appeal the appellate Court is of the opinion that the accused should not be acquitted straight off and is also of the opinion that the case was a fit one to be tried by a Sessions Court so that a more adequate sentence may be passed on the accused, it is empowered to commit the accused for trial. When such an order is passed, the Sessions Judge has already considered that there are sufficient grounds for committing the ac-

cused for trial. It may be that the Magistrate who first tried him was of a different opinion, but his opinion must be deemed to have been superseded by the appellate Court, and therefore the opinion of the latter Court must prevail. It follows that it should no longer be open to the Magistrate to go back upon this order and decide for himself whether the accused should or should not be committed for trial. I do not think that it could ever have been the intention of the legislature that even where an appellate Court has ordered that the accused should be committed for trial, it would still be open to the Magistrate to overrule the appellate Court and discharge the accused. It therefore follows necessarily that when an order by the appellate Court has been passed, the only course open to the Magistrate is to proceed under S. 210 to frame the charge and under S. 211 to take the list of witnesses and even take witnesses for the accused under S. 212, but not to discharge the accused but only to commit him for trial by the Court of session under S. 213. The rest of the procedure relating to the issue of summonses for the witnesses for defence, for demanding bonds by complainants and witnesses, the detention in custody of the complainant or witnesses in case of refusal to execute the bond, notifications, etc., have to be followed as laid down in the sections following S. 213. This undoubtedly would be a more practicable and convenient course and would in most cases save the time of the Sessions Court, which would otherwise have to be spent unnecessarily if the commitment were made by the Sessions Judge to the Court of the Sessions direct.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 586

BENNET, J.

(*Firm*) *Ram Sahai Ram Ratan* — Plaintiff—Appellant.

v.

Imami—Defendant—Respondent.

Second Appeal No. 122 of 1933, Decided on 6th March 1935, from decision of Second Addl. Sub-Judge, Allahabad, D/- 27th October 1932.

Civil P. C. (1908), S. 100— Finding as to what was meant by witness by use of particular word is one of fact.

It is a question of fact as to what was meant by the witnesses by the use of a particular word and it is not for a Court of second appeal to reverse the finding on the meaning of this word of the lower appellate Court. [P 588 C 1]

K. N. Katju, B. Malik and *Mahbub Alam*—for Appellant.

F. Owen O'Neill, Shiva Prasad Sinha and *Zamirul Haq*—for Respondent.

Judgment.—This is a second appeal by a plaintiff against a decree of the appellate Court dismissing the suit of the plaintiff. The plaintiff brought a fuit setting out that the plaintiff was thekadar of an enclosure No. 66 known as Mandi Qaziganj together with a house in the enclosure, that Imami defendant was occupying a Kothri in the said enclosure on a rent of Re. 1-4-0 per mensem, that there was a quarrel between the parties and on 5th June 1929, the plaintiff sent a notice by registered post to defendant to vacate the Kothri by the end of June 1929 and to pay the rent which was due from March 1929, that in reply to the notice defendant wrote stating that he was not a tenant of the said Kothri but that he was a tenant of the land and the owner of the Kothri and that the rent was due year by year for the land. The plaintiff asked for possession of the Kothri and Rs. 5 arrears of rent and Rs. 5 damages. The written statement set out that plaintiff was not the owner of the house, that contesting defendant was the owner of the house, and that the predecessors of the plaintiff were the owners of the site only and plaintiff had only got a right to realise the rent of the site which the contesting defendant had never refused, that the house had been constructed by some predecessors-in-title of the defendant and that the proprietors of the Mandi had no concern with the construction of the house and that the predecessors-in-title of the defendant had been for a long time in occupation of the house.

The first issue framed was whether the plaintiff was the owner of the Kothri in suit, and the second was whether the defendant was the tenant of the disputed Kothri. The Munsif held that the plaintiff was the owner of the land and that a sale by one Alopi to Bhawani, uncle of the present defendant, was a sale of the materials of the house only and not of the house. The Munsif granted a decree to the plaintiff for possession of the Kothri allowing the defendant to remove the materials. The defendant appealed and the lower appellate Court set out that the point for determination was whether the defendant purchased only building materials or also the right of

residence, and whether the suit was barred by estoppel. The Court found that although the sale-deed was missing the statement of the plaintiff's witness Nathu Teli proved that this witness admitted that formerly Alopi lived in that room and then Bhawani came some 30 or 35 years ago, and for the purpose of the present discussion the possession of Bhawani over the house is proved for over 30 years, that the Munsif had decided that the payment of rent was ground rent and no objection had been taken to that finding, that under a deed of gift of 3rd November 1890 by Bechu in favour of Bisheshar, predecessors of the defendant, there was a gift of the house and not of the land on which it stood, that the right to reside in the house was the subject of the gift so long as the donee paid the ground rent. Then follows a sentence to which objection has been taken:

"There is no doubt that there is no registered lease but the fact that the house has been allowed to stand on the land for such a long time shows the permanency of the tenancy, also the fact that so long the rent has not been increased."

Learned counsel has assumed in grounds Nos. 1 and 2 of the second appeal that this is a finding that there was a perpetual lease and objection is taken that a perpetual lease was not pleaded or put in issue and should have been created by a registered instrument under the Transfer of Property Act of 1882 and the Registration Act. I do not consider that the finding is intended to be that there was a perpetual lease. The words used are "the permanency of the tenancy" as opposed to a tenancy for a short period of month to month or year to year. What the Court has found is contained in the last sentence of the judgment before the order which is:

"The plaintiff's case that he was the owner of the shop and land has been proved to be false and in my opinion he is only entitled to realize the ground rent so long as the house stands and the present defendant has a right of residence in it."

This is not a finding that there was a perpetual lease because in the case of a perpetual lease the lessee would have a right to remain in possession even though the house had ceased to stand; but the finding is that defendant is entitled to remain in possession "so long as the house stands." In other words the lower Court has found that the defendant owns a house and a right to retain the site as long as it stands. This is the usual term which the Courts hold applies to the rights between the owners of sites and the owners of houses in a city, such as in the present case the city of Allahabad. Objection has been taken by learned counsel that the Transfer of Property Act and the Registration Act would apply. I may note that this objection is only taken in the memorandum of second appeal to the existence of a perpetual lease and it is not taken to the existence of the tenure which has been found by the lower Court as a tenure to occupy the site so long as the house stands. Even if we extend the argument in grounds Nos. 1 and 2 of the memorandum of second appeal to cover the actual tenure found, there are certain difficulties in the way of the appellant. These difficulties are that in the plaint the appellant did not set out that the house had been built subsequent to the Transfer of Property Act of 1882 and the first Registration Act. Learned Counsel argued that it would be for the defendant to plead that the house had come into existence prior to those Acts. I consider that the allegation that the house had been built subsequent to those Acts should be made in the plaint. Secondly there was no plea in the plaint that there should have been a registered agreement for the creation of the tenure in question. Thirdly by accepting rent for the site from the defendant for so many years and by agreeing to the transfer from Alopi to Bhawani many years ago, the plaintiff and his predecessors are in my opinion estopped from raising the question now that the original transfer was not made in a legal form. This question of estoppel forms the subject of the third ground of appeal.

The fourth ground is that the Court below misconstrued the evidence of defendant which was that Alopi sold the "amla" and that the word "amla" could only mean the materials of the house. The finding of fact is that the house was owned by the defendant and his predecessors and that only the site was owned by the plaintiff and his predecessors. When Alopi made a sale-deed he would naturally transfer all the right which he possessed. The sale-deed is not before us and there is only an oral account by a witness for the plaintiff, Nathu Teli, of what was sold. The deed of gift has been produced and it shows that the house was transferred. In regard to the use of the word "amla" there is a difficulty

experienced by Indian witnesses in distinguishing between a house and the site on which the house stands and they frequently use the word "amla", which no doubt literally means materials, to indicate the house as it stands as contrasted with the site. The lower appellate Court was entitled to construe the evidence before it to mean that the house as it stood with the right of occupation was transferred by Alopi to Bhawani. This is a finding of fact and I do not consider that the matter can be raised in second appeal. It was a question of fact as to what was meant by the witnesses by the use of this particular word "amla" and it is not for a Court of second appeal to reverse the finding on the meaning of this word of the lower appellate Court. For these reasons I consider that no case has been made out for second appeal and I therefore dismiss this second appeal with costs. As points of law have been raised I grant permission for a Letters Patent appeal.

K.S. *Appeal dismissed.*

A. I. R 1935 Allahabad 588

SULAIMAN, C. J. AND BENNET, J.

Sukhdeo—Appellant.

v.

Donger and *others*—Respondents.

Letters Patent Appeal No 22 of 1934, Decided on 4th February 1935

(a) Agra Tenancy Act (1926), S. 23—Objection that property was part of occupancy holding summarily rejected and property sold and sale confirmed—No appeal filed from order of execution Court nor sale set aside—Such objection cannot be raised even by way of defence in a separate suit—Civil P. C., S. 47.

Under S. 47, Civil P. C., all questions arising between the partes or their representatives and relating to execution shall be determined by the execution Court and not by a separate suit. A defendant is barred just as much as a plaintiff, and the execution Court has the exclusive jurisdiction to decide such matters, and they cannot be questioned in a separate suit, Hence where an objection that property is part of occupancy holding is summarily rejected and the property is sold and is subsequently confirmed but the judgment-debtor has not filed any appeal from orders of execution Court nor got the sale set aside, he cannot raise such objection even by way of defence in a separate suit: 1915 *All* 57; 1918 *All* 305, *Rel. on*, and 1921 *All* 118, *Ref.* [P 589 C 1,2]

(b) Civil P. C. (1908), S. 100—Whether certain land is part of occupancy holding is mixed question of law and fact—Occupancy Right.

The question whether certain land is occupancy holding or not is to some extent a mixed question of law and fact,and not a pure question of law. [P 589 C 1]

G. Agarwala—for Appellant.

Sulaiman, C. J.—This is a plaintiff's appeal arising out of a suit for damages and for a perpetual injunction restraining the first two defendants from irrigating their fields from the well in dispute. The plaintiff himself is the decree-holder who held a simple money decree against Dongar and others, but not against defendant 2, Narain Lal. In execution of that decree he attached the well in question and put it up for sale and it was purchased by Bhupal. Objections raised by the judgment-debtors that the well was a part of their occupancy holding had been in a summary way overruled by the execution Court. The present plaintiff has not purchased the well from Bhupal. He has brought the suit against the judgment-debtor, Donger, as well as defendant 2, Narain Lal. making Dhupal a proforma defendant. His case is that his predecessor Bhupal acquired this well under the auction-purchase, and the defendants were wrongly interfering with his possession and using water from it. Defendant 1 pleaded that the well was a part of his occupancy holding and its sale was void under the Agra Tenancy Act. The other defendant Narain Lal does not appear to have made any appearance at the trial. But both the Courts have dismissed the suit on the ground that the well being a part of the occupancy holding of defendant 1 was not saleable. The lower appellate Court has held that the well is no doubt a part and parcel of the occupancy holding. This finding is a finding of fact and cannot be challenged in second appeal, unless it is vitiated by some error of law.

So far as the effect of this finding upon the plaintiff as against the defendant Narain Lal is concerned, the counsel for the appellant cannot urge that it is binding on him. Narain Lal was not a party to the previous execution proceeding and no order passed in that proceeding can, in any way, stand in his way. He is entitled to say that the property was not saleable and that therefore no interest passed to Bhupal and none has devolved on the present plaintiff. The plaintiff's claim as against Narain Lal must therefore stand dismissed.

A difficulty has been created so far as Dongar's case is concerned by the circumstance that the execution Court, without going into the matter

thoroughly, summarily. rejected his objection that the well was a part of the occupancy holding and ordered it to be sold and it was actually sold at auction and the sale was confirmed. Dongar did not choose to appeal from the order passed by the execution Court, nor did he get the auction sale set aside.

The question that arises in this case is whether it is now open to Dongar to go behind the execution proceedings and ask the Court to hold that the sale was a nullity and therefore the plaintiff's claim should fail. The question is not free from difficulty and there is certainly much to be said on both sides.

Under S. 47, Civil P. C., all questions arising between the parties or their representatives and relating to execution shall be determined by the execution Court and not by a separate suit. It was at one time considered that a defendant in a separate suit was not debarred from re-agitating the question. But the preponderance of authorities is now in favour of the view that a defendant is barred just as much as a plaintiff, and that the execution Court has the exclusive jurisdiction to decide such matters and they cannot be questioned in a separate suit.

But the difficulty does not end here. Under S. 23, Agra Tenancy Act, the interest of an occupancy tenant is not transferable either in execution of a decree made by civil or revenue Court or otherwise except in accordance with the provisions of this Act, and there can be no question that a well can be a part of an occupancy holding, as it comes within the scope of the word "improvement" as defined in S. 3, Sub-S. (2). The execution Court has therefore no authority or jurisdiction to sell an occupancy holding, and such a sale is void. It is well settled that the principle of res judicata or the principle of estoppel cannot be pleaded against a statute, and therefore if the matter were clear and were a pure question of law, the plaintiff cannot succeed on the mere ground that the defendant is barred by the principle of res judicata or estoppel. But the difficulty arises because the question whether it was an occupancy holding or not was to some extent a mixed question of law and fact, and not a pure question of law. Its decision depended on evidence that might have been produced in the execution Court which apparently the then objectors did not produce. The Court ordered the property to be sold and would certainly not have ordered it to be sold, if it had been satisfied that the property was an occupancy holding.

There is authority for the view that where the question is such a mixed question that part of the finding which is a finding of fact must be deemed to have been decided adversely against the judgment-debtor before the auction sale was held, he should not be allowed to raise that question of fact afresh in a separate suit.

We may refer to the cases of 1915 All 57 (1), 1918 All 278 (2) and 1918 All 305 (3). In two of these cases the judgment-debtor was not allowed to question the validity of an auction sale which had taken place in spite of his objection. The Full Bench in 1921 All 118 (4) distinguished these cases on the ground that in them the question was whether after a sale in execution of a decree, it was open to the judgment-debtor to dispute the title of the auction purchaser, and did not over-rule them. Under S. 23, Tenancy Act, an occupancy holding is not privately transferable, nor is it saleable in execution of a decree. It is therefore quite clear that even if it has been mortgaged and a decree for sale has been obtained, the objection can still be raised in the execution department that the property is not saleable in execution of the decree, and the execution Court would be bound to decline to sell it. This aspect of the provision explains the decision of the Full Bench. But where a sale has already taken place, and has been confirmed there is no longer any duty to inquire into the nature of the property. The sale must have taken place after the objections if any raised by the judgment-debtor had been overruled. It must therefore be implied that the Court either expressly or by implication decided that the character of the property was not such as to make it non-saleable. Although the point is certainly doubtful, as it may have the effect of nullifying the provisions of S. 23, we see no reason for differing from the view taken in the previous cases, particularly as there would not necessarily be a great

1. Rang Lal v. Kishori Lal, 1915 All 57=28 I C 278=37 All 278.
2. Deodatt Singh v. Ramcharrittar Jati, 1918 All 278=43 I C 897.
3. Lala Ram v. Thakur Prasad, 1918 All 305=47 I C 947=40 All 680.
4. Katwari v. Sita Ram, 1921 All 118=63 I C 264=43 All 547.

hardship as the zamindars would not ordinarily be bound by such sales. We must therefore hold that so far as Dongar is concerned, the question that the property was not in occupancy holding was barred by the principle of res judicata and the lower appellate Court should not have gone into the question as against him.

But there is a difficulty in decreeing the plaintiff's claim. So far as the claim for damages against the two defendants is concerned, the plaintiff has not attempted to show how much damage has been suffered by him on account of the act of defendant 1 and how much on account of the act of defendant 2. The claim as against Dongar also must therefore fail.

As regards the injunction, it is a discretionary relief. Both the defendants have been treated in the plaint as forming one party, and Narain Lal is undoubtedly entitled to irrigate the field from this well. We therefore think that it would be utterly futile to issue an injunction against the defendant Dongar restraining him from irrigating the field from this well, when his co-tenant Narain Lal, will not be so prevented. On this last ground the appeal is dismissed.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 590

KENDALL, J.

Hari Har—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1001 of 1934, Decided on 12th February 1935.

Penal Code (1860), S. 376—Charge of rape — Girl, her mother and eyewitnesses deposing in favour of prosecution — Absence of hymen and absence of injuries on medical examination—Blood stains found in dhoti of accused and cloth of girl — Held conviction was proper.

In a charge of rape the girl, her mother and three disinterested eyewitnesses deposed for the prosecution. The cloth of the girl and the dhoti of accused were found to be blood stained. The girl was aged only 14 and on medical examination after four or five days, no hymen was found nor any injuries :

Held : that the direct evidence of the rape was so strong that it was impossible to discard it. The absence of the hymen and the absence of injuries were not sufficient to dispose of the statements of the girl, her mother and three eyewitnesses and hence the conviction was proper. [P 592 C 1,2]

T. A. Bradley—for Appellant.

L. M. Roy for *Government Pleader* — for the Crown.

Judgment. — The present appellant Harihar alias Paji has been convicted by the learned Sessions Judge of Mirzapur, of an offence under S. 376, Penal Code, and sentenced to two years rigorous imprisonment and ten stripes. The complaint Mt. Sumeria is a girl, who according to the Civil Surgeon's evidence, is between 12 or 14 years of age and is probably 13. The evidence as to age is not very definite. The Civil Surgeon has given no reasons for holding that she is likely to be either over or under 14, and the Judge has said that he does not think the evidence on the record can be held to be sufficient to establish that the girl is under 14. There is, however no suggestion whatever that the sexual intercourse, which has been proved if the direct evidence of the prosecution witnesses is accepted was with the consent of the girl, so that the question of her exact age is not of vital importance.

Her story is as follows: She had been to a big resorvoir to water her cattle and having done so she washed some clothes and spread them on the ground. One cow went down a "bandh" and she followed in order to bring it back. On the way back the appellant, who is a young man of about 23 years caught her dhoti from behind and after a struggle in which the dhoti was torn threw her down on the ground and raped her. The girl struggled and cried out, and three witnesses, namely Sambhal, Mira and Jaimangal came up over the Bandh and called out. By this time the accused had left the girl and run away. Mt. Sumeria says that her dhoti was stained with blood, and that there was blood on the ground where she was lying. She was taken to her mother's house and told her what had happened. Her mother washed the dhoti and then took her to the police station about a mile away where a report was entered about noon on 10th June. The report mentions that the child's mother had washed away the blood from the dhoti but that it still had some stains. This story is supported by the three witnesses who have been named. The appellant was arrested the same day, and some of his clothes together with those of the girl were sent for examination to the Chemical Examiner. His report shows that of the three garments belonging to the accused the dhoti was stained with blood but the stains on the other two garments could not be indentified. A dhoti and a piece of cloth, which are said to belong to Mt. Sumeria, were also sent for examina-

tion and were found to have blood stains on them as were some pieces of leaves and part of a sirsa fruit which the sub-inspector discovered on the spot.

Such was the evidence for the prosecution, and the statement of the appellant was a denial of the offence and a suggestion that there was a quarrel, the details of which he did not specify. He claimed that there were no blood stains on his clothes when they were taken by the police, and that the witnesses for the prosecution including Mt. Sumeria had given evidence against him through the influence of the police, and also because there were some disputes about a demand for money which had been advanced by his father to these witnesses. None of the orall evidence for the defence made any impression on the Court, but it may be mentioned that of the three men who claimed to be eye-witnesses of the rape, Mira has been shown possibly to have some slight cause for a quarrel with the appellant's father over a matter of evidence. Nothing has been shown against the other witnesses for the prosecution.

The points that Mr. Baradley has made on behalf of the appellant relate rather to the circumstantial evidence. The girl was examined when she went to the police station in the first place by a women called Mt. Gulshan, who is said to be a servant of the sub-Inspector. She stated that she had found blood flowing from the private parts of the girl (at the time of the report it was noted that Mt. Gulshan had found some "fluid" coming out of the private parts of the girl), but that she did not see any mark of injury on the private parts of the girl. The Civil Surgeon examined the girl on 15th June, that is to say, five days after the alleged rape. He found that there were marks of injuries on her elbows and one knee. There were, however no injuries external or internal to the vagina and the hymen was absent, though there were not any signs of recent injury. When he was questioned closely in regard to the possibility of a rape having been committed without an injury being caused to the vagina, his replies were not very definite. When he was asked whether a girl of 14 who cohabited for the first time with a man would certainly have injuries which remain on her person for four or five days, he replied no; but it was probable. If a girl had been used to sexual intercourse before and was then raped, it would not be necessary that there should be some visible injuries after four or five days. No injuries were found on the appellant by the Civil Surgeon, but the Sub-inspector testifies to examining him and to finding some slight marks on the penis.

The absence of the hymen in the girl without any marks of injury is a remarkable feature of the case. The Judge has suggested that it may have disappeared either through previous cohabitation or monthly courses and, no doubt, it is possible that the girl never had a hymen at all, though such cases are very rare. Previous cohabitation is not likely in the case of a girl of this age, and there is no evidence of it; but even if it could be accepted as the only possible explanation of the absence of the hymen, it would help the appellant very little in face of the direct evidence against him. As it is proved by the medical evidence that the girl's hymen was not ruptured by the appellant, it is difficult to account for the presence of blood on the clothes of the girl and of the appellant, and on the ground. If there were only very slight injuries caused to the girl, which disappeared before her examination by the Civil Surgeon, one would not expect to find blood in so many places. It has been suggested on behalf of the defence that the blood was not due to injuries but was due to the girl having a menstrual discharge, and the first statement which was apparently made by Mt. Gulshan is somewhat in favour of this theory. There is another curious bit of evidence on which the counsel for the appellant has relied. A piece of cloth stained with blood was said to have been discovered on the scene of the occurrence by the police, and was sent to the Chemical Examiner with the other garments. This cloth is supposed to have been torn from the girl's dhoti by the appellant when he caught hold of her. The Chemical Examiner reported that the piece of cloth was stained with blood and it was produced in the committing Magistrate's Court and identified by the girl as part of her dhoti and by the police as the cloth which had been picked up on the spot and found to be stained with blood. This was marked Ex. 2. In the Sessions Court however it was discovered that Ex. 2 was made of an entirely different material from the dhoti, and an attempt was made to explain on the part of the police that the original piece of cloth, which had been picked up on

the spot and had been certified by the Chemical Examiner to have been stained with blood, had been eaten by white ants, and that another piece had been substituted for it. This part of the evidence is most unsatisfactory and is most discreditable to the police.

I have been asked to make a number of inferences from the fact that it is admitted by the prosecuting authority that Ex. 2 has been changed. One thing that is certain at this stage is that it is not part of Mt. Sumeria's dhoti and it might be inferred therefore that the piece of cloth, which was sent to the Chemical Examiner and which was found to have stains of blood upon it, was not part of Mt. Sumeria's dhoti and had nothing whatever to do with the case, and that it must have been a piece of evidence manufactured by the police. If this is so, it might further be inferred that all the evidence has been manufactured by the police, that is to say, all the evidence connected with blood stains on the cloth. I do not think that it would be right to make such a large inference as this. It may be as suggested by Mr. Bradley, that the present Ex. 2 is identical with the piece of cloth produced in the Magistrate's Court, and that the story about its having been substituted was invented when discovery was made that the material differed from that of the girl's "dhoti". But it is equally possible that this piece of cloth was stained with blood and was found on the spot, although it is not a part of the complainant's dhoti. It is much more likely however that it is a bit of false evidence that has been added in the course of the inquiry in order to make the evidence more complete. The learned Judge has however believed that the original piece of cloth was produced in the committing Magistrate's Court but was subsequently changed. In any case it is not necessary for the prosecution to prove the genuineness of this bit of cloth, and the only effect of producing it in evidence is to throw suspicion on a minor part of the prosecution case.

The direct evidence of the rape is so strong that it is impossible to discard it unless the circumstances to which I have referred in discussing the defence are absolutely incompatible with the commission of rape. In my opinion they are not incompatible. Mt. Sumeria may never have had a hymen or it may have been destroyed in one of the manners suggested by the Judge. There may have been slight injuries all signs of which disappeared before the examination by the Civil Surgeon. Whether the blood which has been proved to have been found on the clothes was due to such injuries or to a menstrual discharge, it was found on the "dhoti" of the appellant as well as on the clothes of the girl, and there is no explanation of this very significant circumstance except in the evidence for the prosecution. The absence of the hymen and the absence of injuries are not sufficient to dispose of the statements of the girl her mother and three eye-witnesses, only one of whom is shown to have had the very slightest reason for bringing a false case against the appellants. I am, convinced that the order of the Sessions Judge must be upheld, and as the sentence is in the circumstances by no means too severe, I dismiss the appeal.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 592

KENDALL, J.

Bhagwat and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 42 of 1935, Decided on 25th March 1935, from order of Sess, J. Gorakhpur, D/- 24th December 1934.

Criminal Trial — Identification parade—Merely because some persons identified have distinguishing marks, identification parade cannot be held to be conducted improperly—But if prosecution story is open to grave suspicion identification may be open to suspicion.

It is not always justifiable to infer that identification parades have not been conducted improperly because some of the persons who have been identified have very distinguishing marks. But where grave suspicion has been thrown on the prosecution, it is impossible to avoid the further suspicion that advantage has been taken of such distinguishing marks in order to prepare the witnesses. [P 594 C 1]

N. C. Vaish—for Appellants.

Govt. Pleader—for the Crown.

Judgment. — The three appellants, Bhagwat, Ram Lal and Chhangur, have been convicted by the learned Sessions Judge of Gorakhpur of an offence under S. 395 Penal Code and sentenced to five years' rigorous imprisonment each. The story for the prosecution is that on the night between 13th and 14th April 1934 some 15 or 16 dacoits armed with lathis broke into the house of Sarju and his brother Mahant, and plundered the house and beat the occupants as well as some of the neighbours. Kumar Sukhai and Sundar, who

came to their help. Subsequently the dacoits made their escape, and a report was made at the thana 14 miles away by Mahant on the following day at 4 p. m. This report does not mention the names of any decoits who had been recognised, though Mahant stated that he could identify them if he were to see them. He added a list of property stolen, which is very insignificant, and when the investigating officer went to the village the same evening a list giving details of some more property was handed to him. An investigation followed, but none of the property said to have been stolen was recovered. The police however found out that Sarju had been threatened by Bhagwat with whom he had had a wrestling match, and after some further enquiry Bhagwat was arrested and made a confession on 2nd April. This confession is to the effect that Bhagwat had had a quarrel with Sarju over a wrestling match, and that the dacoity was planned in order to revenge Bhagwat on Sarju. Bhagwat named himself and several others, some of whom were put on their trial in this case, as having taken part in the dacoity. The learned Judge has relied on the confession and has convicted the appellants because there was, in his opinion, sufficient evidence to corroborate the confession of Bhagwat. The rest of those who were named by Bhagwat were put on their trial, but those against whom the corroborating evidence was considered to be insufficient were acquitted.

Dr. Vaish, who has argued this appeal on behalf of the appellants, has pointed out that in the report which was made at the thana by Mahant no mention is made of the quarrel over a wrestling match, and although it is stated that the dacoits could be identified Bhagwat is not named, though he was undoubtedly known very well both to Sarju and to Mahant. It is true that when he made a statement in the Sessions Court Mahant was not asked to explain why he did not mention the name of Bhagwat when he made the report at the thana. When Sarju made his statement however this difficulty about the prosecution case did occur to counsel who was cross-examining and Sarju made the following statement:

"I saw the dacoits entering the house and coming out of it. I saw the faces of all the dacoits. Bhagwat broke my teeth in the dacoity. I did not say that to the Sub Inspector. I did not see Bhagwat in the dacoity for he did not happen to come near me."

I have compared the statement as recorded in English with the vernacular, and there can be no doubt that Sarju did say, in the first place, that he saw the faces of all the dacoits and that Bhagwat broke his teeth, and that he then went to say after he had been reminded that he had not mentioned this to the sub-inspector, that he did not see Bhagwat in the dacoity because he did not happen to come near him. Now it is not absolutely impossible that Bhagwat should have taken part in the dacoity and yet not have been recognised by Sarju and his brother, in spite of the fact that they did recognise some of the other dacoits. But it would be very remarkable, and the statement made by Sarju in Court must arouse grave suspicion. The theory for the defence of course is that although there was a dacoity, no one was recognised and the police not being able to find the real dacoits, built up a case out of the quarrel between Bhagwat and Sarju, of which they heard in the course of the investigation. There is a very remarkable circumstance that throws additional suspicion on the case for the prosecution, and that is that two other persons, Sheopujan and Jabubans, both of whom are named by Bhagwat in the dacoity, made "confessions" which on the face of them appear to be as voluntary and as reliable as that of Bhagwat. Neither Sheopujan nor Jadubans has been prosecuted in this case and although it appears that their names were included in the list of prosecution witnesses, they did not give evidence. If these two men made voluntary confessions implicating themselves and others and yet were not prosecuted, it can only have been because the prosecuting authorities had not sufficient confidence in their confessions. Yet they appear to have been made in the same circumstance as that of Bhagwat and are similar.

There is no doubt about the evidence of eye-witnesses who claim to have identified the three appellants among the dacoits. In the case of Bhagwat there are no less than 7. In the case of Ram Lal there are 5 and in the case of Chhangur no less than eight. The learned Sessions Judge has not made any remarks about the character of these identifying witnesses as such, and there is nothing in the report of the Magistrate who conducted the identification parade to show whether any of them made any mistakes. If they are assumed to be good witnesses, it must be admitted that there is a consider-

able volume of evidence to support the prosecution. Each of these three appellants however had a special mark by which his identity could be described to a witness who had not seen him and who would not therefore be able to identify him in good faith. Bhagwat himself was suffering from "small pox" probably chicken pox, but at any rate the rash on his face was evidently a distinguishing mark, because the attention of the witnesses was drawn to it and they said that he had not these marks when he was seen at the dacoity. Ram Lal had a deformed ear and Chhangur had six fingers in his left hand and his left eye was small. It is true that Chhangur's hand might not be visible, at the identification parade, but Sundar at any rate admitted in cross-examination that he identified Chhangur because of his small left eye and six fingers in his left hand. It appears likely therefore that these features were shown to some of the witnesses at the time of the identification and it is highly probable that they were shown to all of them, from which it follows that they may have identified him because they had been told beforehand that he had a small left eye and six fingers on his left hand, and Bhagwat similarly may have been identified because he had small pox and Ram Lal because he had a deformed left ear.

It is not of course always justifiable to infer that identification parades have not been conducted improperly because some of the persons who have been identified have very distinguishing marks. But where grave suspicion has been thrown on the prosecution, it is impossible to avoid the further suspicion that advantage has been taken of such distinguishing marks in order to prepare the witnesses. The learned Sessions Judge's judgment is concise and clear so far as it goes, but it does not deal with these difficulties He said:

"The confession which was retracted on the alleged ground of maltreatmen: by the police contains details which Bhagwat alone could supply and seems to be a true statement of facts volunteered by Bhagwat himself."

The details which Bhagwat alone could supply were the facts that he and Sarju had had a quarrel about the wrestling match, which was the allegation made by Sarju himself, and that Bhagwat kept in the background during the dacoity, which it was necessary or at any rate very useful for the prosecution to prove in order to account for the omission of Bhagwat in the original report and in the statements recorded by the police during the first few days of the investigation. Bhagwat had to be represented as keeping in the background in order to explain why he was not named by any of the witnesses who knew him by sight and by name, such as Sarju and Mahant. But it is curious that if he did keep in the background, he was nevertheless identified by such a large number of witnesses who did not know him by name. In short, I have not been able to persuade myself that the confession of Bhagwat is a voluntary one. There is no evidence of any maltreatment by the police nor is it necessary to assume that there was any; but it is possible that it was represented to Bhagwat that he would obtain a pardon if he made a confession. For all these reasons I think it is necessary to give the appellants the benefit of the doubt in this case, and I therefore allow the appeal, set aside the order of conviction and sentence and direct that the appellants be acquitted and released.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 594

THOM AND IQBAL AHMAD, JJ.

Sukhdeo and *another*—Defendants—Appellants.

v.

Basdeo and *others* — Plaintiff and Defendants—Respondents.

First Appeal No. 86 of 1931, Decided on 20th February 1935, from decision of Addl. Sub-Judge, Jaunpur, D/- 23rd January 1931.

(a) Agra Tenancy Act (1926), Ss. 230 and 121—Suit for declaration that plaintiff is sole tenant or joint tenant is cognizable only by Revenue Court.

The provisions of S. 230 are mandatory and the jurisdiction of the Civil Court from taking cognizance of suits or application specified in the fourth schedule of the Act or based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application is absolutely barred. Hence a suit by a plaintiff for a declaration that he is either the sole tenant or joint tenant with the defendant of a holding is within the exclusive jurisdiction of the revenue Court: 1929 *All* 571, 1931 *All* 735 and 1932 *All* 693 *Rel on.* [P 596 C 1, 2]

(b) Agra Tenancy Act (1926), Ss. 230 and 121—Suit based on cause of action with respect to which relief can be granted by Civil Court—Merely because one of reliefs prayed is cognizable exclusively by Revenue Court

does not oust jurisdiction of Civil Court—Jurisdiction.

A suit that is bassed on a cause of action with respect to which adequate reliefs can only be granted by tho Civil Court is cognizable by that Court notwithstanding the fact that one of the reliefs prayed for by the plaintiff is for the declaration of his right to a tenancy holding which is cognizable only by a Revenue Court. [P 597 C 1]

(c) Hindu Law — Partition — Co-parcener seeking partition is not entitled to call upon manager to account for past dealings.

In the absence of proof of misappropriation or fraudulent or improper conversion by the manager of a joint family a co-parcener seeking partition is not entitled to call upon the manager to account for his past dealing with the family property. The coparcener is entitled only to an account of the joint family property as it exists on the date he demands partition. [P 597 C 2]

Shiva Prasad Sinha—for Appellants.

S. B. L. Gaur and *K. L. Misra* - for Respondents.

Judgment.—This is a defendants' appeal and arises out of a suit for: (1) partition of the plaintiffs' moiety share in the property given at the foot of the plaint; (2) a declaration of the plaintiffs' title to a moiety share respecting the property not capable of partition by the Civil Court; and (3) rendition of accounts of the profits of the joint family property and business and a decree for a moiety share in the same.

The properties in dispute in the suit were immovable properties including zamindari, tenancy holdings and house property. We are not concerned in the present appeal with the movables and other properties in dispute in the suit. One Shankar Tewari died leaving two sons Sukhdeo and Basdeo. Basdeo and his sons were the plaintiffs in the suit and **Sukhdeo** and his descendants were the principal defendants to the suit. The plaintiffs' case was that Basdeo and Sukhdeo and their descendants continued to live as members of a joint Hindu family till the date of the suit and that Sukhdeo was the manager of the family. The plaintiffs alleged that all the properties detailed at the foot of the plaint were joint family properties and the share of the plaintiffs in the same was to the extent of half. They charged Sukhdeo with misappropriation of the profits and assets of the joint family and maintained that he was liable to account with respect to the family assets.

The defendants resisted the suit mainly on the allegation that separation between the plaintiffs and the defendants took place about 10 years before the date of the suit and that after separation Basdeo and Sukhdeo acquired properties separately, and the allegation of the plaintiffs that all the properties mentioned in the plaint were joint family properties was untrue. They denied the allegation of the plaintiffs that Sukhdeo was the manager of the alleged joint family and maintained that after the death of Shankar Tewari Basdeo plaintiff continued to be the manager of the family till the partition took place between the branches of Basdeo and Sukhdeo. They repudiated the charge of misapprogriation levelled by the plaintiffs against Sukhdeo and contended that, even if the family be found to be joint and Sukhdeo be held to be the manager, he is not legally liable to be called upon to render accounts. The defendants further contended that the plaintiffs' claim for partition of the fixed rate holdings, occupancy holdings, etc., was not cognizable by the Civil Court and most of the argument addressed in this appeal has centred round this plea.

The trial Court held that the family of the parties was joint till the date of the suit and all the properties out of the properties detailed in the plaint which were proved to be in existence were joint family properties. It further held that as the family was joint the plaintiffs were not entitled to a decree for rendition of accounts against Sukhdeo. At the trial the plaintiffs abandoned their claim for partition of the fixed rate and occupancy holdings and prayed only for declaration that those holdings were the property of the joint family and the plaintiffs' share in the same was to the extent of half, and the Court below held that it had jurisdiction to grant that relief to the plaintiffs. In view of the findings noted above the Court below, while dismissing the plaintiffs' suit for rendition of accounts, passed a decree in the plaintiffs' favour declaring that the plaintiffs' share in the immovable properties including the holdings was to the extent of half and directed partition of the moveables, debts etc.

In appeal before us no exception has been taken to the findings on the questions of fact recorded by the Court below and the sole point raised on behalf of the defendant-appellants is that the Court below had no jurisdiction to grant a decree for the declaration of the plaintiffs' right in the fixed rate and occupancy holdings. In support of this contention reliance has been placed on Ss. 121 and 230, Agra Tenancy Act (3 of 1926), and the

decisions of this Court in 1929 All 571 (1), 1931 All 735 (2) and 1932 All 693 (3). It is provided by S. 121 that at any time during the continuance of a tenancy the tenant of a holding may sue the landholder, or any person claiming to hold through the landholder, whether as tenant or rent free grantee or otherwise, for a declaration of his right as tenant, and by S. 230 all Courts other than revenue Courts are precluded, except by way of appeal or revision, from taking cognizance of all suits and applications of the nature specified in the fourth schedule of the Act:

"or of any suit or application based on a cause of action in respect of which adequate relief could be obtained by means of such suit or application."

The provisions of S. 230 are mandatory and the jurisdiction of the Civil Court from taking cognizance of suits or applications specified in the fourth schedule of the Act or based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application is absolutely barred. A suit for a declaration of plaintiff's right as tenant under S. 121 of the Act, is specified at serial No. 14 of group B of the fourth schedule of the Act. It is clear therefore that since the passing of the Agra Tenancy Act (3 of 1926), such a suit cannot be entertained by the Civil Court. Prior to the passing of the present Tenancy Act, suits between rival claimants to a tenancy were, according to the rulings of this Court, cognizable by the Civil Court, but the legislature has, by the clearest possible provisions in the present Act, ousted the jurisdiction of the Civil Court with respect to such suits, and the Revenue Court, and the Revenue Court alone is competent to entertain and try such suits. This is the view that has been taken in the three decisions of this Court noted above and it has been held in the Full Bench decision in 1929 All 571 (1), that a person who claims to be a tenant must be deemed to be "claiming to hold through the landholder" within the meaning of S. 121 of the Act, irrespective of the fact that he does not set up a case of a special grant or a special contract with the landholder as the basis of his claim. It must therefore be taken as settled law so far as this case is concerned that a suit by a plaintiff for a declaration that he is either the sole tenant or joint tenant with the defendant of of a holding is within the exclusive jurisdiction of the Revenue Courts.

The question however remains whether the Civil Court has jurisdiction to entertain a suit which is based on a cause of action that entitles the plaintiff not only to a mere declaration of his right to certain tenancy holdings but also to other reliefs which cannot be granted by the revenue Courts, and if the Civil Court has jurisdiction to take cognizance of such a suit, is that Court competent, while granting to the plaintiff the other reliefs, to grant him a decree for the declaration of his right to the holdings.

It cannot be disputed that Civil Courts have exclusive jurisdiction to try all suits of civil nature unless their cognizance is either expressly or impliedly barred (vide S. 9, Civil P. C.). It is also clear that a suit is of a civil nature if the principal question in the suit relates to a civil right. The reason for the rule that Civil Courts are ordinarily to decide disputes concerning civil rights is not far to seek. The determination of disputed questions of right involves adjudication of complicated questions of fact and law and it is inexpedient to leave the decision of such questions in the hands of Courts presided over by officers who have had no legal training or practice. S. 121 read with section 230, Agra Tenancy Act, no doubt bars the jurisdiction of the Civil Court as regards "suit by a tenant for declaration of his right" to a holding, but the suit contemplated by S. 121 is suit for declaration of right, to a holding pure and simple, and not a suit in which the cause of action on which the suit is based entitles the plaintiff, apart from a declaration of his right to tenancy holdings, to other reliefs as well. There is no provision in the Tenancy Act that expressly ousts the jurisdiction of the Civil Court with respect to such suits. The only question that remains for consideration therefore is whether the jurisdiction of Civil Courts with respect to such suits is impliedly barred by that Act. In our judgment the answer to the question must be in the negative.

The scheme and the provisions of the Agra Tenancy Act clearly indicate that the legislature intended to vest revenue Courts alone with jurisdiction

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1. Sahdeo v. Budhai, 1929 All 571=117 I C 337=51 All 853 (S B).
2. Bunni Pandey v. Brahmdeo Pandey, 1931 All 735=133 I C 911.
3. Bhagwan Sahai v. Ram Chander, 1932 All 693 =142 I C 851.

to decide all disputes concerning tenancy holdings, but there is nothing in the Act to imply that if some of the reliefs prayed for in a suit can only be granted by the Civil Court, the jurisdiction of the Civil Court is ousted by the mere fact that the reliefs for a declaration of right to a certain holding is coupled with the other reliefs. Nor is there anything in the Act to show that if the cause of action entitles the plaintiff, over and above to a declaration of his right to a holding. to certain other reliefs, for instance, declaration of his right to zamindari property, the plaintiff must split his cause of action in two parts and sue for a declaration of his right to the holding in the revenue Court, and claim redress with respect to the zamindari property from the Civil Court. To hold otherwise would be to ignore the words:

"based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application,"

used in S. 230 of the Act.

That the legislature could not have contemplated the splitting of a cause of action. and the institution of two separate suits, one in the civil and one in the revenue Court, by a plaintiff when the reliefs prayed for in the two suits are based on identical set of facts, is demonstrated by the fact that such a course would be highly inconvenient and might lead to anomalous results. The institution of two such suits would involve both the plaintiff and the defendant in the unnecessary expenditure of adducing the same evidence in two different Courts and would manifestly lead to waste of public time. Apart from this there would be the risk of contradictory decisions on the same set of facts being arrived at by the civil and the revenue Courts. In the absence of a specific provision in the statute countenancing such a deplorable state of affairs a Court is not justified in crediting the legislature with such an intention. We therefore hold that a suit that is based on a cause of action with respect to which adequate relief can be granted by the Civil Court is cognizable by that Court notwithstanding the fact that one of the reliefs prayed for by the plaintiff is for the declaration of his right to a tenancy holding. It is needless to observe that if a plaintiff simply with a view to oust the jurisdiction of the revenue Court prays for reliefs other than a relief for a declaration of his right to a holding, and it is found that he is not entitled to the other reliefs. his suit will fail on the ground that the only relief to which he was entitled could be granted to him by the revenue Court.

In the suit before us the plaintiffs alleged and proved that they were members of a joint Hindu family with the defendants and were as such entitled to a declaration of their right as to zamindari properties and tenancy holdings owned by the family, and for partition of the moveables and cash belonging to the family. The cause of action on which the suit was based was therefore one with respect to which adequate relief could not be granted by the revenue Court and the suit was rightly entertained by the Court below. The appeal must therefore be dismissed.

A cross-objection has been filed by the plaintiffs as regards the refusal by the Court below to order Sukhdeo to render account of his dealings with the family property. It is settled law that in the absence of proof of misapproriation or fraudulent or impromer conversion by the manager of a joint family a coparcener seeking partition is not entitled to call upon the manager to account for his part dealings with the family property. The coparcener is entitled only to an account of the joint family property as it exists on the date he demands partition. In the present case there was no reliable evidence to prove the charge of misappropriation of fraudulent conversion of the family property by Sukhdeo. The Court below was therefore right in dismissing the claim for rendition of accounts. The cross-objection must also fail. The result is that we dismiss both the appeal and the cross-objection with costs.

K.S. *Appeal & Cross-objection. dismissed.*

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KENDALL, J.

Sheonandan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln No. 1069 of 1935, Decided on 11th February 1935, from order of Addl. Sess. Judge, Ghazipur, D/- 23rd November 1934.

U. P. Excise Act (1910), S. 60 (a)—Conviction for being in possession of liquor in excess of quantity allowed by law set aside on revision on ground of want of evidence to prove excess—Prosecution cannot try to support conviction on ground that accused had

not proved that bottle of liquor in his possession had been obtained lawfully—Criminal trial.

Where the accused was convicted for being in possession of liquor in excess over quantity allowed by law but the conviction was set aside by the High Court on revision on ground that the possession of such excess was not proved, but the prosecution sought to support the conviction on ground that accused had not proved that certain bottle of liquor in his possession was obtained lawfully:

Held: that the accused could not be convicted of an offence with which he has not been charged and which was clearly of a different nature from the one with which he had been charged. [P 598 C 2]

K. D. Malaviya and *K. N. Gupta*—for Applicant.

Asst. Govt. Advocate—for the Crown.

Order. — This application is made against a conviction under S. 60 (a), U. P. Excise Act of 1910. The circumstances of the case are somewhat peculiar. A raiding party went to the house of the applicant and searched it and found that he had in his possession one bottle of liquor. There was also a small quantity of liquor in a tin and it is said that the applicant himself smelt of liquor. He was therefore prosecuted under the Act, and was charged by the Magistrate in the following words:

"That you on or about August 11, 1934 . . . in your house were found in possession of country liquor seven bottles (1 gallon plus one bottle) in contravention of R. 39 (a) of the Excise Act."

Evidence was brought by the prosecution to prove that the applicant had purchased from Namdeo that day liquor amounting to one gallon in a tin, and it was also in evidence that a tin was found in his house which appeared to contain the remains of some liquor. The case for the prosecution, as it appears from the judgment of the Magistrate as well as from the charge, was that the applicant, although at the time of the raid he was only actually in possession of one bottle of liquor, had recently been in possession of a much larger quantity. The Courts found him guilty on the ground that he was in possession of a quantity larger than he was allowed by law. R. 39 of the rules framed by the excise authorities and contained in the Excise Manual prescribed the limits of the amounts allowed to be kept for retail sale of various kinds of excisable commodities, and as regards country liquor, prescribes the limit of two bottles or one seer or 4 seers or 1 gallon according to circumstances. Ordinarily plain country spirit can only be sold by retail up to a quantity of one seer, and country fermented liquor up to a quantity of four seers. There is nothing to show what the liquor was of which the applicant was in possession when the raid took place, and which he was suspected of having thrown away. So far as the evidence in this case goes, it may have been country spirit or it may have been country fermented liquor, and in that case it would have been necessary for the prosecution to prove that he had been in possession of more than four seers. But even if it can be said that circumstances point very strongly to the conclusion that the applicant had swallowed or had thrown away a certain amount of liquor, there is nothing to show what amount was so disposed of and if it was country fermented liquor, there is nothing to show that the total quantity in his possession had amounted to more than four seers.

It has been pointed out by Dr. Wali Ullah on behalf of the Crown that under R. 436 it is not only the possession of country liquor in excess of the quantity prescribed in R. 39 that is punishable, but also the possession of country liquor which has not been lawfully obtained, and it is therefore argued that the applicant has been rightly convicted because he was in possession of a bottle of country liquor which he has not proved that he obtained lawfully. The fact is that the applicant was never asked any questions about that particular bottle. His defence was that he only had one bottle in his possession, and he said that he had not purchased it from Namdeo. If he had purchased it from Namdeo in the manner suggested on behalf of the prosecution, his possession would have been unlawful, because Namdeo had no licence to sell liquor on the Ghazipur side of the Ganges. The prosecution witnesses however did not prove that the applicant had purchased liquor from Namdeo in the manner that has been set up. They were suspected of having been won over; but the Courts did not find this part of the case proved, nor would they have convicted the applicant, unless they had believed that he had been in possession of more liquor than he was allowed to possess under the provisions of R. 436 read with R. 39 (a). I am of opinion that the application must be allowed on the ground that the applicant cannot be convicted of an offence with which he has not been charged and which is clearly of a different nature from the one with which he has been charged. I therefore set aside the order of conviction and direct

that the applicant be acquitted and the fine, if paid, be refunded.

K.S. *Order set aside.*

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Full Bench

SULAIMAN, C. J., NIAMATULLAH AND RACHHPAL SINGH, JJ.

Mukand Lal—Applicant.

v.

Gaya Prasad and *others* — Opposite Parties.

Appln. No. 168 of 1934, Decided on 6th March 1935.

(a) Civil P. C. (1908), S. 151—S. 151 merely preserves inherent power of Court.

Section 151 does not in terms confer any inherent jurisdiction on the Courts, but merely preserves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. [P 599 C 2]

(b) Civil P. C. (1908), Ss. 151 and 115—High Court cannot under inherent power dictate to subordinate Court how to decide particular point — It cannot exercise revisional power under S. 151.

A superior Court cannot in the exercise of its inherent power, dictate to a subordinate Court how to decide a particular power arising in a case. The power referred to in S. 151 would not include a power similar to power of revision under S. 115, Civil P. C., even to cases to which that section is not applicable. The Legislature has thought fit to restrict the revisional power of the High Court under S. 115, Civil P. C.; and it could not have been intended that that section could be ignored and the High Court could exercise its inherent power and rectify errors of law or errors of fact committed by Courts below in cases decided judicially: *Case Law Ref.* [P 600 C 1, 2]

*** (c) Civil P. C. (1908), S. 151—Refusal of lower Court to allow certain question to witness cannot be interfered with—Government of India Act, S. 107.**

The High Court cannot interfere with the rafusal of the Court below to allow certain questions to be put to the witness on the ground that the Court has erred in law in disallowing such questions: *Case Law Ref.* [P 600 C 2]

S. N. Seth—for Applicant.

P. L. Banerji and *S. G. Pathak*—for Opposite Parties.

Sulaiman, C. J.—This case has been referred to a Full Bench on account of a divergence in the opinions expressed in two cases of this Court and that expressed in the Bombay High Court. The applicants applied to this Court praying that a certain witness, who was being examined in the Court below, should be allowed to be cross-examined by them on all the issues that arose in two connected suits. These two suits were being tried together, but the Court had perhaps passed some orders previously that evidence should be led by the plaintiffs in one suit on the issues arising in that suit or issues which were common to both the suits. When the witness, Bhagwan Das, was being cross-examined, the applicants' counsel tried to put questions to him relating to issues which arose exclusively in the other suit, and the Court disallowed such questions.

The application in the High Court did not profess to have been filed under any specific provision of the law; but the learned counsel admitted that it was not an application for revision under S. 115, Civil P. C., but should be treated as an application under S. 151, Civil P. C., or S. 107, Government of India Act. The learned Judge, who referred the case first to a Division Bench, expressed the opinion, which cannot be questioned, that S. 115 would not be applicable to such a matter, as no case had yet been decided, the Court below having merely disallowed certain questions that had been put to the witness.

Section 151, Civil P. C., does not in terms confer any inherent jurisdiction on the Courts, but merely preserves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Ordinarily as pointed out by the learned Judge who referred the case first, the preservation of the inherent power would not enable Courts to extend the scope of powers specifically conferred upon them by other provisions of the Civil Procedure Code, and that S. 151 should not be utilised so as to make it supplementary to S. 115, Civil P. C. The inherent powers, which can be exercised by a superior Court, are ordinarily such powers as are necessary to exercise in relation to proceedings pending before it. The Calcutta High Court and the Lahore High Court have exercised the power of staying proceedings in a subordinate Court professing to act under S. 151. No other case has been cited before us showing that such a power had prior to 1906 been exercised in any other way in relation to proceedings pending in subordinate Courts.

An opinion was expressed in 1926 All 212 (1) that the inherent power preserved by S. 151 would extend to orders to subordinate Courts. That

1. Harnandan Lal v. Chaturbhuj, 1926 All 212=93 I C 285=48 All 356.

however was a case where the subordinate Court had refused to stay proceedings and the High Court ordered that the proceedings be stayed until proceedings in lunacy, which were going on in the Court of the District Judge, had been determined. At a later stage the same case, reported in 1928 All 108 (2) was brought up before the High Court, because the Court below had declined to appoint a guardian for the defendant, accepting the finding of the District Judge in the lunacy proceedings that he was not a lunatic. As the case was still pending, the learned Judges felt inclined to hold that even S. 115, Civil P. C., might be applicable to such a case, but preferred to base their decision on S. 151, Civil P. C., and held that they could direct the Court below to enquire into the question of lunacy itself. Certain observations in the judgment suggested that the powers reserved to Courts under S. 151 are very wide and that any order can be passed which would be for the ends of justice and to prevent an abuse of the process of subordinate Courts.

On the other hand, the Bombay High Court in 1918 Bom 157 (3) and 1921 Bom 228 (4) has taken the view that the power referred to in S. 151 does not include power to dictate to a subordinate Court and interfere with its proceedings. In a later case decided by another Bench of this Court in 1934 All 585 (5), it was laid down that ordinarily the inherent power, referred to in S. 151, would be limited to its jurisdiction to deal with proceedings pending before it and would not include a wide jurisdiction over inferior Courts, otherwise it would be conferring power on the High Court even far in excess of that conferred by S. 115, Civil P. C. The learned Judges in Harnandan Lal's case (1) had relied on two earlier cases of this Court in 1924 All 446 (6) and 1924 All 818 (7) in support of their opinion; but these cases are no authority for the proposition that a superior Court can, in the exercise of its inherent power, dictate to a subordinate Court how to decide a particular point arising in a case. They were all cases where inherent power was exercised in relation to proceedings which had taken place in the High Court itself. We are of opinion that the power referred to in S. 151 would not include a power similar to power of revision under S. 115, Civil P. C., even to cases to which that section is not applicable. The legislature has thought fit to restrict the revisional power of the High Court under S. 115, Civil P. C., and it could not have been intended that that section could be ignored and the High Court could exercise its inherent power and rectify errors of law or errors of fact committed by Courts below in cases decided judicially. We are therefore of opinion that S. 151, Civil P. C., can have no application to the case before us.

It is next contended that the power of superintendence, conferred on High Courts under S. 107, Government of India Act, is much wider in its scope and empowers this High Court to interfere in the present case. The language of S. 107 is similar to that used in Cl. 15, Charter Act, (24 and 25 Victoria, C. 104). While that Act was in force, the question came up for consideration before a Full Bench in 1 All 101 (8), and it was the unanimous opinion of all the four learned Judges that the clause conferred on the High Court no revisional power, no power to interfere with or set aside judicial proceedings of a subordinate Court, though it conferred on the High Court administrative authority, and not judicial powers, and that it would be competent for the High Court in the exercise of its powers of superintendence to direct a subordinate Court to do its duty or abstain from taking action in matters of which it has no cognizance; but the High Court is not competent in the exercise of this authority to interfere and set right the orders of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact. The learned Judges pointed out that this interpretation of the statute was in accord with the practice which had prevailed in this Court. Although in a later Full Bench case

2. Chaturbhuj v. Harnandan, 1928 All 108=108 I C 141=50 All 335.
3. Bhausingh v. Changaniram Hurchand, 1918 Bom 157=45 I C 552=42 Bom 363.
4. Ramchandra Govind v. Jayanta, 1921 Bom 228=59 I C 715=45 Bom 503.
5. Atma Ram v. Beni Prasad, 1934 All 585=150 I C 446.
6. Joshi Shib Prakash v. Jhinguria, 1924 All 446 =78 I C 416=46 All 144.
7. Balgobind v. Sheo Kumar, 1924 All 818=82 I C 184=46 All 864.
8. Tej Ram v. Harsukh, (1875-78) 1 All 101 (F B).

9 All 104 (9) it was conceded that the power conferred on High Courts under S. 15, Charter Act, was not confined to administrative superintendence only but included powers of a judicial or quasi judicial character, it was agreed that the High Court is not competent, in the exercise of its authority, to interfere with and set right the orders of subordinate Court on the ground that the order of the subordinate Court has proceeded on "an error of law or an error of fact." This opinion was, of course, followed by a Division Bench later in the case of 1924 All 561 (10) which arose under S. 107 Government of India Act. The learned Judges pointed out that the power of superintendence vested in this Court, as embodied in S. 107, Government of India Act, was not intended to authorise this Court, in the exercise of the authority so given, to interfere with or set right the order of a subordinate Court on the ground that such order had proceeded on an error of law or an error of fact.

In view of these authorities, it is quite clear that it is impossible to interfere with the refusal of the Court below to allow certain questions to be put to the witness on the ground that the Court has erred in law in disallowing such questions. There are, no doubt, some cases arising under Act 18 of 1879 (Legal Practitioners' Act) arising out of cases in which certain persons had been included in lists of touts maintained by District Judges and prevented from coming within the precincts of the court-compound, e. g. 21 All 181 (11) and in 1924 All 69 (12); but these were not really judicial cases adjudicating upon the rights of two contending parties but were orders of an administrative character which the District Judge had passed. The High Court considered that the case came within the purview of S. 15, Charter Act, or S. 107, Government of India Act.

Our attention has also been drawn to the case of 1935 All 519 (13), in which the power conferred on the High Court under S. 107, Government of India Act, was invoked. In that case the Honorary Munsif had omitted to carry out the order of the High Court directing him to decide certain objections and proceed in accordance with law. The Munsif, in spite of the order, did not decide the objections and did not proceed in accordance with law. The learned Judge felt some difficulty in applying S. 115, Civil P. C., as the matter was still pending before the Munsif, but interfered under S. 107, Government of India Act. That case was of a peculiar nature, and it is not necessary to consider in this case whether it was rightly decided, particularly as the learned Judge was bound to follow the previous Division Bench rulings.

In view of the decisions of the Full Benches of this Court and the practice which has prevaied so far, it is impossible for us to interfere under S. 107, Government of India Act. The application is dismissed with costs.

K.S. *Application dismissed.*

9. Mohammad Suleman Khan v. Fatima, (1887) 9 All 104=1887 A W N 309.
10. Adya Saran Singh v. Jagannath, 1924 All 561 =78 I C 391=46 All 323.
11. In the matter of Madho Ram, (1899) 21 All 181=1899 A W N 15.
12. Kashi Nath v. Emperor, 1924 All 69=79 I C 693=45 All 676.
13. Sant Lal v. Kidar Nath, 1935 All 519=154 I C 310.

A. I. R. 1935 Allahabad 601

SULAIMAN, C. J. AND BENNET, J.

Secy. of State—Defendant—Appellant.

v.

Simla Footwear Company — Plaintiff —Respondent.

Second Appeal No. 385 of 1932, Decided on 3rd January 1935, from decision of Sub-Judge, Agra, D/- 4th February 1932.

(a) Railways Act (1890), Ss. 55, 56 and 77 —Goods not actually lost but in possession of Railway company in lost property office —Sold by public auction against express direction of plaintiff—Suit for damages—No notice under S. 77 is necessary — Suit is governed by Art. 48 and not by Art. 31, Lim. Act—Limitation Act (1908), Arts. 31 and 48.

Where goods had reached their destination and had never been lost from the possession of the railway company but were in the lost property office and were sold by public auction against the express direction of plaintiff:

Held: that in a suit for damages against the Railway Company, S. 77 did not apply and that no notice under it was necessary.

Held further: that the suit was not governed by Art. 31. Lim. Act, as the cause of action was not nondelivery but that it was governed by Art. 48. *Case Law Ref.* [P 603 C 1, 2]

(b) Railways Act (1890), Ss. 56 and 55— Terms of S. 55 as to 15 days are not to be rigidly applied; 14 days notice held sufficient.

The words 'as nearly as may be' in S. 56 imply that the terms of S. 55 are not to be rigidly applied in a sale under S. 56,

Held, that the notice of fourteen days was a sufficient notice for a sale under S. 56.

[P 604 C 2

(c) Railways Act (1890), S. 55 (2)—'Local, means paper of place where sale is held.

The word 'local' in S. 55 (2) means papers of place where the sale is to be held, and the provision is intended to give notice of the sale to persons of the locality who are likely to attend to purchase. [P 604 C 2]

Mnhammad Ismail—for Appellant.

Shah Zamir Alam—for Respondent.

Bennet, J.—This is a second appeal by a defendant against whom the lower Courts have passed a decree for Rs. 600 damages. The appellant is the Secretary of State for India-in-council representing the North-Western Railway and the G. I. P. Railway. The facts are simple. The plaint sets out that the plaintiff, a firm in Agra, sent certain boxes of shoes from Agra Fort to Amritsar. The date of despatch was 26th January 1929, and the consignment arrived on 7th February 1929. Delivery was not taken at Amritsar and on 20th April 1929 the railway company sent a registered notice to the plaintiff stating that the goods had been sent to the lost property office and that proceedings would be taken under Ss. 55 and 56, Railways Act. On 24th April 1929 the plaintiff sent a very indefinite letter to the railways company asking the railway company to retain the goods and stating that delivery would be taken about 1st May. The railway company sent no reply to this letter and the plaintiff took no further action in the matter. On 1st September 1929 the railway company put up the consignment for sale along with other goods at a general sale and the consignment was sold for Rs. 400. After this the plaintiff states that in the first week of October 1929 he was informed that the goods had been sent to the lost property office in Lahore, and on 22nd October 1929 he was informed that the consignment had been sold by public auction. The railway company offered to the plaintiff the proceeds Rs. 400 less Rs. 28-2-0, that is, Rupees 371-14-0 which the plaintiff did not accept. The plaintiff has brought a suit for the cost price of the goods Rupees 759-12-0 and various other sums amounting in all to Rs. 1,035-11-0. The lower Courts have awarded Rs. 600 as damages.

The first point which was argued in second appeal was that the lower appellate Court erred in holding that no notice under S. 77, Railways Act, was necessary. This section states:

"A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway."

The appellant claims that the present suit is one which would come under this section. The section refers to a suit for compensation for loss, destruction or deterioration of goods. The argument is that in the present case loss has been caused to the plaintiff by the sale of the goods by the railway company or the non-delivery of the goods to the plaintiff by the railway company, therefore the notice is required under this section, and the notice should have been given within six months from the date of delivery of the goods, i. e., within six months from 26th January 1929. The notice therefore, according to the appellants, should have been given by 26th July 1929. It is obvious that the notice according to this theory should have been given before the goods were sold. It is difficult to see on what grounds it could have been alleged on 26th July 1929 that the goods had been lost. On that date the goods were in the lost property office of the railway and the railway had made no refusal to deliver them to the plaintiff. On the contrary the railway had issued a notice to the plaintiff on 20th April 1929 asking the plaintiff to take the goods. It is clear therefore that it could not be said that the goods were in any sense lost on 26th July 1929. Therefore if the contention of the appellant were correct it would be impossible to bring this case at all. Learned counsel for the appellant referred to a large number of cases which he contended established or tended to establish his point. The earliest of these cases is 33 All 544 (1). That was a case where the goods had actually been lost as they had not actually reached their destination. The case was therefore different from the present case where the goods had reached their destination and had never been lost from the possession of the railway company until sold. The next case is 19 I C 370 (2). In that case the railway company retained the goods on the lien under S. 55. 1923

1. G. I. P. Ry. Co. v. Ganpat Rai, (1911) 33 All 544=10 I C 122.
2. E. I. Ry. Co. v. Sheo Ratan Das, (1913) 19 I C 370.

All 426 (3) is a case where it was held that the word "loss" in S. 77, Railways Act, means the actual loss to the company and not a loss to the plaintiff in the sense that he does not receive the value of the goods. This was also held in 1924 All 7 (4), and 1923 All 605 (5). In 1925 All 144 (6) it was held that a notice under S. 77 was only necessary where there was an actual loss of the goods by the railway company, and this ruling specifically dissented from certain rulings of Patna and Madras which held to the contrary. In 1925 All 273 (7) there was a case where the goods were actually lost and it was held that there was no distinction between a suit which was brought for damages for non-delivery and a suit which was brought for the loss of the goods. The expression "damages for non-delivery" was not intended in that ruling to apply to a case like the present. In 1926 All 686 (8) there was again a case where goods were actually lost by the railway company and it was held that a notice was necessary for a suit even though the suit was expressed as a suit for non-delivery. In the same volume on p. 698, 1926 All (9), there was a similar ruling in the case where there was a shortage found in the goods and it was held that notice was needed. In none of these cases were the facts similar to the present where the goods have all along been in the possession of the railway company until the railway company sold the goods. These rulings therefore are no authority for the proposition advanced by learned counsel for the appellant. We may point out that S. 77 comes in Chapter 7, Railways Act, which is headed "Responsibility of Railway Administrations as Carriers." That chapter begins with S. 72 which lays down the responsibility of the railway administration for the loss, destruction or deterioration of animals or goods, and it is stated that the responsibility is that a bailee under Ss. 151, 152 and 161, Contract Act. Those sections do not refer to the action of a bailee in selling the goods as in the present case, nor is a bailee entitled to do so. The right of a railway company as distinct from an ordinary bailee to sell goods depends on the statutory provisions in Ss. 55 and 56, Ch. 6, Railways Act. Any claim which would arise from a railway company failing to act under those sections, although it purported to act under them, would not come under Ch. 7. Accordingly the notice provided by S. 77, Ch. 7. clearly does not apply to the present case. Learned counsel for appellant then argued that the suit was one to which Art. 31, Sch. 1, Limitation Act applied, that the period for that article was one year from the time when the goods ought to have been delivered, which was on arrival on 7th February 1929, that the period of one year expired on 7th February 1930, that the present suit was brought on 4th October 1930 and was therefore time-barred. Art. 31 is for a suit "against a carrier for compensation for non-delivery of, or delay in delivering, goods."

Learned counsel argues that the present plaint could have been based on the non-delivery to the plaintiff as the cause of auction, and that therefore the suit might come under this Art. 31. But the cause of action is not stated in the plaint to be non-delivery. Para. 11 of the plaint states that the cause of action was the sale by public auction against the express direction of the plaintiff. This cause of action is more than mere non-delivery, and the cause of action will come under Art. 48:

"For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfull taking or detaining the same."

The plaint alleges that the railway company acted without justification in taking the goods of the plaintiff and selling them by auction, and that the plaintiff is entitled to compensation for this wrongful act. The period of limitation for Art. 48 is three years from the time when the person having the right to the possession of the property first learns in whose possession it is. Consequently the present suit is within time under this article, whether we take the starting point for limitation as 20th May 1929 when the goods were sent to the lost property office at Lahore, or 1st September 1929, the date of auction sale.

3. Secy. of State v. Jivan, 1923 All 426=71 I C 609=45 All 380.
4. E. I. Ry. Co. v. Tirkha Mal, 1924 All 7=73 I C 986=45 All 530.
5. E. I. Ry. Co. v. Makhan Lal, Bindeshri Prasad, 1923 All 605=74 I C 814=45 All 575.
6. Badri Prasad v. G. I. P. R., 1925 All 144=80 I C 725.
7. E. I. Ry. Co. v. Fazal Ilahi, 1925 All 273=85 I C 474=47 All 136.
8. Thakurdas Manrakhan Lal v. E. I. Ry. Co., 1926 All 686=96 I C 604.
9. Sheo Dayal Niranjan Lal v. G. I. P. Ry. Co., 1926 All 698=97 I C 474.

The third ground sets out that under the circumstances of the case the sale was regular, justified, and according to law. The facts are that the plaintiff sent the goods on 26th January 1929 the goods arrived at Amritsar on 7th February 1929, consigned to self, but his customer did not want the goods, and para. 2 of the plaint admits that plaintiff asked the railway company to keep the goods till the plaintiff was in a position to take delivery of them. Para. 3 shows that the plaintiff wanted the railway to store his goods till he would be able to sell them at Amritsar. It is no part of the business of a railway to act as a storage company and the request was unreasonable. On 20th April 1929 the railway sent a registered notice to the plaintiff in clear terms telling him to take delivery of his goods or the railway would deal with the goods under Ss. 55 and 56, Railways Act. The plaintiff did not take delivery and took no steps in the matter other than to send on 24th April 1929 a maundering letter on the back of one of his advertisements, asking the railway to keep the goods and that he would be responsible for the charges and would arrange for someone to take delivery about 1st May 1929. No reply was given by the railway and the railway was not bound to accept the request of the plaintiff to act as his storekeeper. No person was sent by the plaintiff to take delivery about 1st May.

The railway with great patience waited till 10th August 1929 when it sent a notice to five newspapers of a sale of property on 1st September 1929. The railway was entitled to take this action in regard to the goods both under S. 55 (2), Railways Act, as the plaintiff had failed to pay on demand and the railway rate for the goods entered in the railway receipt, and under S. 56 as the plaintiff had failed to claim the goods (that is, to take delivery of the goods) and notice had been served on him on 20th April 1929 and he had failed to comply with the requisition in the notice. Up to this point the action of the railway was strictly according to statute. The plaintiff is able to show that at this stage there was a very minor irregularity. Although the notices were of 10th August, the various papers made some delay in publishing the notices, and the earliest notice to appear was in the edition of the Civil and Military Gazette bearing date Monday 19th August 1929, which is delivered to the public on 18th August. From 18th to 31st August is 14 days, and thus there was 14 days notice before the sale of 1st September, S. 55 (2), Railways Act, says that the auction should be "on the expiration of at least fifteen days notice of the intended auction." The notice was therefore short by one day. We consider therefore that the auction was not strictly justified under S. 55 (2), and therefore the railway cannot deduct the amount of Rupees 28-2-0 from the auction price, as the right to realise charges comes under this section. But the railway was also proceeding under S. 56, which gives a right of sale "as nearly as may be under the provisions of the last foregoing section." We lay stress on the words "as nearly as may be" and we consider that these words imply that the terms of S. 55 are not to be rigidly applied in a sale under S. 56. We consider that the notice of fourteen days was a sufficient notice for a sale under S. 56. The sale was a general one as the terms of the published notice shows, and there would be a number of bidders at such a sale. Mere postponement of the sale of this lot of goods to 2nd September would not be likely to produce more bidders. The plaintiff was unaware of the date of sale and he would have taken no action in the matter. No evidence has been called to show that any higher price would have resulted from sale on a later date. The point therefore is merely technical and not a point of substance.

One further point was urged and finds place in the judgment of the lower appellate Court that the papers should be "local" papers as laid down in S. 55 (2) and that local means the papers of the place where plaintiff resides. We consider that the word "local" in S. 55 (2) means papers of the place where the sale is to be held, and that the provision is intended to give notice of the sale to persons of the locality who are likely to attend the purchase. The owner of the goods is provided for in S. 56 (1) which directs that notice to remove the goods should be sent to him.

We hold that the sale under S. 56 was a good sale and that the railway was fully justified in selling the goods to dispose of them when plaintiff failed to comply with the notice to remove them. But the company is not entitled to make any deduction

from the sale price of Rs. 400. Accordingly we allow this appeal to this extent that we set aside the decrees of the Courts below and we substitute a decree in favour of the plaintiff for Rs. 400 with interest at 6 per cent. per annum from the date of suit till the date of realisation, and we direct that the parties should pay their own costs throughout.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 605

Full Bench

THOM, NIAMATULLAH AND BAJPAI, JJ.

Nageshar Misir — Plaintiff — Applicant.

v.

Mt. Batuka Kunwari — Defendant— Opposite Party.

Civil Revn. No. 173 of 1934, Decided on 11th March 1935, against order of Small Cause Court Judge, Ballia, D/- 23rd January 1934.

Limitation Act (1908), S. 20 — Sarkhat— No mention of interest payable—Subsequent endorsements— These too not mentioning about interest— Agreement to pay interest not proved— Held payments referred to in endorsement were not payments made towards interest as such— But they were payment of principal and new period began to run from such date but plaintiff was not entitled to get interest.

Where there was no mention of interest in the sarkhat itself and there was no reference to interest in the two endorsements which appeared upon the back of the sarkhat and the plaintiff failed to prove an agreement to pay interest.

Held : that the payments could not deemed to be made towards payment of interest but that the payments referred to in the endorsements on the back of the sarkhat must be regarded as payments of the principal. Such payments towards redemption of the principal sum under S. 20, Lim. Act, interrupt the period of limitation, and a fresh period commenced from the date of payment.

Held further: that as the plaintiff had failed to prove an agreement to pay interest he was not entitled to interest under the sarkhat.

[P 606 C 1]

Janaki Prasad—for Applicant.

A. P. Pandey—for Opposite Party.

Thom, J.—This application in civil revision arises out of a suit filed in the Small Cause Court, Ballia, on the basis of a "sarkhat." The "sarkhat" was executed by one Nand Kishore on 26th January 1909 for a sum of Rs. 400. There is no mention of interest payable by the debtor in the "sarkhat."

There are two endorsements upon the back of the "sarkhat" relating to payments to account made by the debtor. One endorsement is dated 17th April 1931. The payment, acknowledged by the debtor upon this date is for Rs. 51. There is no indication in the endorsement as to whether this payment is towards principal or towards interest. The second endorsement is dated 14th January 1932. The amount acknowledged as paid by the debtor is Rs. 128: and in this case also there is no indication in the endorsement as to whether the payment is made towards principal or towards interest. In the year 1932, after the payment referred to in the second endorsement, Nand Kishore died. The present suit was filed upon 14th October 1933. The sum claimed by the plaintiff was Rs. 499-2-3. It was made up as follows:

		Rs.	a.	p.	Rs.	a.	p
Principal	...	400	0	0			
Interest thereon at 1-4-0 per cent per mensem	...	282	8	0			
		682	8	0			
Deduct							
Amount paid on 17th April 1931	...	51	0	0			
Interest on above	...	1	9	0			
Amount paid on 14th January 1932	...	128	0	0			
Interest on above	...	2	12	9	183	5	9
The sum sned for	...				499	2	3

The defendant pleaded that the "sarkhat" was not executed by Nand Kishore, and that in any case there was no consideration. Upon these issues the Court has found for the plaintiff, but has dismissed the suit on the ground that it is barred by limitation. The argument for the defendant was that under S. 20, Limitation Act, payments made by the debtor which have the effect of interrupting the running of the period of limitation must be payments by the debtor towards the redemption of the principal or towards interest "as such." It was contended, and this view found favour in the Court below that, inasmuch as there was no reference in the endorsement on the back of the "sarkhat" to interest, the payments made by Nand Kishore could not be regarded as payments of interest "as such" within the meaning of S. 20, Limitation Act. The plaintiff however admitted in evidence that he had appropriated the payments made by Nand Kishore to interest. It was argued therefore that the payment in effect, because of the action of appropriation on the part of the creditor, was a payment to-

wards interest; but inasmuch as there was no indication in the endorsement that the payment was made towards interest by the debtor, it was not a payment of interest "as such" within the meaning of S. 30, and therefore the period of limitation was not interrupted.

We consider it unnecessary, in view of the special circumstances of this case. to decide the general question which was decided by the Court below, namely. where a creditor appropriates payment by the debtor towards interest, the period of limitation is interrupted or not. In the present instance, as already observed, there is no mention of interest in the "sarkhat" itself. Further, there is no reference to interest in the two endorsements which appeared upon the back of the "sarkhat." In these circumstances the onus lay heavily on the plaintiff to prove that interest was payable under the "sarkhat." He has himself stated in the witness box that there was an agreement between the parties that the debtor should pay at the rate of Rs. 1-4 per cent. per mensem; but in view of the fact that there is no mention of interest either in the "sarkhat" or in the endorsement, we consider that the plaintiff has not discharged the onus which rested upon him, and has not proved an agreement to pay interest. In these circumstances, it follows that the payments referred to in the endorsements on the back of the "sarkhat" must be regarded as payments of principal. Such payments towards redemption of the principal sum under S. 20, Limitation Act, interrupt the period of limitation. and a fresh period commences from the date of payment. In the present case therefore since in our judgment the payments of Rs. 51 and Rs. 128 must be regarded as payments towards the redemption of principal, a new period of limitation began to run from 14th January 1932. The suit therefore in our judgment was within time.

As we have indicated above, the plaintiff has failed to prove an agreement to pay interest. He is not therefore entitled to interest under the "sarkhat." He is only entitled to recover from the defendant the sum of Rupees 400, less the amounts of Rs. 51 and Rs. 128; which payments to account were made by Nand Kishore before his death, that is, he is entitled to the sum of Rs. 221 only.

We therefore allow this application in civil revision and grant decree in favour of the plaintiff for a sum of Rs. 221. Costs will be in proportion to success and failure here and in the Court below. Interest will be payable by the defendant upon this sum at the rate of 6 per cent. per annum from the date of the suit till the date of realization. The decree shall be against the assets of the deceased.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 606

NIAMATULLAH AND ALLSOP, JJ.

Bahal Singh—Judgment-Debtor—Appellant.

v.

Mt. Chameli—Decree-holder—Respondent.

Ex. Second Appeal No. 634 of 1933, Decided on 12th December 1934, from a decision of Dist. Judge, Meerut, D/- 1st March 1933.

Civil P. C. (1908), O. 34, R. 4—Preliminary decree—Appeal thereon dismissed with costs—Application for amendment of final decree so as to include costs allowed — Application for execution of final decree — Time should be construed from date of order allowing amendment application— Decree — Limitation Act (1908), Art. 181.

Where an appeal from a preliminary decree is dismissed with costs and an application is made to amend the final decree passed so as to include the costs allowed and the final decree is amended accordingly the mortgagees application asking for amendment and the order of the Court making use of the same word amount, in substance respectively to an application and an order for preparation of a fresh final decree. The order which is inter partes is conclusive and the final decree prepared in pursuance of it is equally so. The only decree capable of execution is the amended final decree and hence limitation for execution of final decree starts only from date of order allowing amendment. [P 607 C 2]

B. Mukerji—for Appellant.

H. P. Sen for *P. L. Banerji*—for Respondent.

Judgment.—This is a judgment-debtor's appeal from an order passed by the learned District Judge, Meerut, disallowing his objection to an application for execution made by the respondent decree-holder. The only plea on which the application was resisted by the appellant was that it was barred by limitation. The learned District Judge over-ruled the plea. Hence this appeal.

The respondent obtained a preliminary decree on foot of a mortgage on 12th September 1923. The appellant preferred an appeal to the Additional Judge, Meerut, who dismissed it on 7th January 1924. A final decree was

prepared on 4th November 1924 on the basis of the decree passed by the Court of appeal. The appellant preferred a second appeal to this Court, which was dismissed on 7th July 1926. After the decree passed by the High Court in appeal from the preliminary decree an application was made by the respondent that the final decree previously prepared be amended, as after the preparation thereof the High Court has upheld the preliminary decree and further costs had been incurred by the respondent and allowed to her by the decree of the High Court. The trial Court, allowed it and directed the amendment of the final decree as prayed. The final decree was amended so as to be in conformity with the decree of the High Court as regards costs. It is not suggested that the so-called amendment of the decree proceedings were taken behind the back of the appellant or that he had no opportunity of resisting the application for amendment, We must take it that those proceedings were taken between the parties and the order of the Court, if otherwise valid and binding, is conclusive between the parties. The order allowing the amendment was passed on 14th January 1929.

The respondent applied on 23rd December 1929, for execution of the final decree, computing the period of limitation from the order directing the amendment of the final decree. The judgment-debtor pleaded that the application for execution was barred by limitation, as it had been made more than three years after the date of the final decree as originally prepared, i. e., 4th November 1924. It is conceded that, unless the limitation is taken to run from the order of amendment of the final decree, the application is barred. The learned District Judge, who over-ruled the plea of limitation, held that:

"After a preliminary decree passed under O. 34, R. 4, has been confirmed in appeal, the decree-holder again has a right to obtain a final decree in the terms of the preliminary decree on appeal. This is what really happened, though instead of saying that a final decree in the terms of the preliminary decree on appeal be prepared it was said that the final decree already passed be amended by addition of the costs awarded by the appellate Court."

The learned advocate for the appellant has strenuously contended that the final decree, dated 4th November 1924. had already become barred by limitation when the respondent applied for amendment thereof and when the Court ordered its amendment. and that consequently the decree could not be revived by amendment. He has quoted a number of decided cases which, he claims, support his contention.

It is not necessary to examine the authorities on which the learned advocate relies, because the view taken by the lower Court, if correct, proceeds on a totally different ground, which is not affected by the contention put forward before us. The learned District Judge construed the action of the Court ordering amendment of the final decree of 4th November 1924, as one tantamount to passing a fresh final decree, taking the High Court's decree as the only subsisting preliminary decree in a mortgage suit. It is clear that the final decree of 4th November 1924, could not have been "amended" under any rule of law. The application was not one under Ss. 151 152 or O. 47, Civil P. C. Nor can the so-called order of amendment be considered to be one under any of those provisions. To take the order literally would imply that the Court passed an order which it had had no power to pass. If it is possible to construe the action of the Court as legal, such construction should be adopted. In our opinion the learned District Judge has taken a correct view of the order amending the decee. It was, in substance, an order directing the preparation of a fresh final decree on the supposition that the final decree previously prepared on foot of a preliminary decree passed by the trial Court had become vacated by the subsequent preliminary decree passed by the High Court, in which the decrees of Subordinate Courts had merged. The Court should be deemed to have proceeded on the view that the only subsisting preliminary decree was the decree of the High Court and that a fresh final decree based on that decree should be prepared. The mortgagee's application asking for amendment and the order of the Court making use of the same word amount, in substance, respectively to an application and an order for preparation of a fresh final decree. The order which is inter partes is conclusive and the final decree prepared in pursuance of it is equally so. In this view, the only decree which was capable of execution on the date on which the present application for execution was made was the decree prepared in January 1929, which was less than three years before the ap-

plication for execution. The order appealed from is right in every respect. This appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 608 (1)

KENDALL, J.

Ibn Ali—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Applu No. 997 of 1934, Decided on 2nd January 1935, from order of Sess. Judge, Moradabad, D/- 29th October 1934.

Criminal P. C. (1898), S. 476—Order after enquiry that complaint should be made—Court not expressing that prosecution should follow—Order is not rendered illegal.

Where after making an enquiry the Court ordered that a complaint should be made against the applicant but the Court did not in so many words express the opinion that it was expedient that a prosecution should follow.

Held: that this did not render the order illegal. [P 608 C 2]

A. M. Khwaja—for Applicant.

Asst. Govt Advocate—for the Crown.

Order.—This is an application for the revision of an order of the learned Sessions Judge of Moradabad dismissing an appeal against an order passed by the Magistrate under S. 476, Criminal P. C., by which it was ordered that a complaint should be made against the applicant under S. 193, Penal Code.

The facts are perfectly simple. The applicant is the editor of a paper in Moradabad, and he prosecuted the editor of another paper for defamation. His case was dismissed. The other editor was accused by him of defaming him by saying that the applicant had persuaded the other editor to write against the Nawab of Rampur and the administration of that State, and the applicant in his evidence stated on oath that he had never persuaded the accused to write against the Rampur State. The accused however was able to bring a number of witnesses to testify to hearing the applicant giving instructions to the other editor to write articles against the Rampur State. The witnesses were believed by the Court, which dismissed the applicant's case, and in the present proceedings the Magistrate and, after him, the Sessions Judge have found that this evidence, if it is believed, will be sufficient to convict the applicant of perjury, and for this reason his prosecution has been ordered.

Mr. Khwaja has drawn my attention to the provisions of S. 476, Criminal P. C., and has asked me to hold that the Courts have not really formed an opinion that "it is expedient in the interests of justice that an inquiry should be made." An inquiry has already been made, and although the Courts have not in so many words expressed the opinion that it is expedient that a prosecution should follow, there can be no doubt that this was the meaning of both, Magistrate and Judge, and in fact the circumstances show clearly that on the face of it the evidence proved that the applicant had told a lie with the object of misleading the Court for purposes of the case that he was prosecuting, so that there can be no question, but that the prosecution for perjury is a perfectly proper proceeding. I do not wish to express any opinion as to the value of the evidence on either side, as that is a matter for the Criminal Court to decide. But I cannot hold that the Courts below have acted in a manner that is illegal or improper or incorrect, and that there is any justification for interfering in revision. It has been pointed out that the applicant is an old man of over 50 years and that he has been editing his paper in Moradabad for some 50 years. These are circumstances that may justify lenient treatment of the applicant, if he has erred, but they could not justify the Magistrate in staying his hand on the ground that a prosecution is not expedient in the interests of justice. The application therefore fails and is dismissed.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 608 (2)

SULAIMAN, C. J. AND BENNET, J.

Baqridi Mian and *others*—Defendants—Appellants.

v.

Bhagwan Din and *others*—Plaintiff and Defendants—Respondents.

Letters Patent Appeal No. 35 of 1934, Decided on 14th February 1935, from decision of Kendall, J. D/- 7th December 1933, Reported in 1934 *All* 834.

(a) Agra Tenancy Act (1926), S. 196—Grant for planting trees and grove—No distinction.

No distinction can be drawn between a grant of land for planting trees on it and a grant of land for planting a grove. [P 609 C 1]

(b) Agra Tenancy (1926), Ss. 84 and 196—Ejectment of groveholder means ejectment from all interests.

By ejectment of a grove holder is meant the ejectment of a groveholder from all the interest which he possesses as groveholder and not mere-

ly from the interest which he possesses in the groveland. [P 611 C 1]

(c) Agra Tenancy Act (1926), Ss. 196 and 116—Grove holder is holder of grove and also of grove land — Compensation for improvement on ejectment can be given.

A groveholder is the holder of the grove and also the holder of the grove land and his holding comprises both the grove and the grove land. Hence either in the case of the groveholder to whom land is let for the purpose of planting a grove, or in the case of a groveholder who obtains permission to plant a grove on his existing holding, both of which cases are govered by S 196; compensation for improvement on ejectment can be given under S. 116. [P 611 C 1, 2]

(d) Agra Tenancy Act (1926), S. 3 (11) (a)—Land let for planting of trees — Planting amounts to improvement.

Where the land is let for the planting of trees the planting of trees is obviously consistent with the purpose for which the land was let and therefore the planting amounts to an improvement. [P 612 C 1]

(e) Agra Tenancy Act (1926), Ss. 84 and 96—Decree for ejectment against groveholder—S. 96 prevents him from removing trees before delivery of possession.

In the case of a decree for ejectment under S. 84 of the Act passed against a groveholder S. 96 would operate to prevent the groveholder from removing any trees before delivery of possession is made and when delivery of possession is made, what would be delivered would be not merely the possession of the groveland but the possession also of the grove. [P 612 C 1]

(f) Agra Tenancy Act (1926), Ss. 99 and 230—Granting of compensation by Revenue Court for trees from which tenant has been dispossessed is adequate relief.

The granting of compensation by the Revenue Court for trees from which the tenant has been dispossessed is an adequate relief in place of the relief for the possession of the specific timber standing on the land. The explanation to S. 230 provides that where adequate relief might be granted by the revenue Court, it is immaterial that the relief asked from the Civil Courts may not be identical with that which the Revenne Court could have granted. Hence compensation for the trees can be given by the revenue Court. A suit for the recovery of the actual timber is not cognizable by the Civil Courts because adequate relief can be granted by the Revenue Court to the tenant who has been dispossessed. [P 614 C 1]

Mushtaq Ahmad—for Appellants.

S. N. Seth—for Respondents.

Bennet, J.—This is a Letters Patent appeal by defendants against a judgment of a learned Single Judge of this Court by which the suit of the plaintiff has been decreed with costs in all Courts. The lower appellate Court had directed that the plaint should be returned to the plaintiff for presentation to the proper Court on the finding that the suit lay in the Revenue Court. The plaint set out that in 1915 Mt. Aulia Bibi, who was then the zamindar and lambardar, gave permission to the plaintiff to plant trees on the plot No. 598, having taken Rupees 50 as nazrana. I may note that actually it has been held by the lower appellate Court that this plot was a grove of the zamindars formerly and in 1915 a mere written permission was given to the plaintiff to plant the trees and there were only three old trees left on it at the time. The plaint set out that the plaintiff planted the trees and was recorded in the khasra for the grove as in possession although it was entered still as grove of the zamindars. In 1336 F. the name of the plaintiff was expunged from being in possession and the plaintiff made an application to the Revenue Court for rectification of the papers which was refused and the appeals of the plaintiff to the Collector and Commissioner were refused. The plaint sets out that after this decision of the Revenue Court the defendants obstructed the planting of trees by the plaintiff, and that the defendants are the zamindars. The plaintiff claims in para. 10 that he is still in possession of the trees planted by him as owner and that he is entitled to plant new trees on the plot aforesaid and to appropriate the produce of the trees planted by him, that the cause of action arose in October 1930, the date of the decision of the Commissioner against the plaintiff. The plaintiff originally asked for a declaration that the plaintiff was the absolute owner of the trees except three mango trees standing on the land aforesaid and that he was entitled to plant trees on the said land. The last portion that "the plaintiff was entitled to plant trees on the said land" was struck off on 11th January 1932, nine months after the plaint was filed. The second relief asked for was that a perpetual injunction should be issued to the defendants restraining them from offering obstruction to the planting of trees by the plaintiff on the land aforesaid and to the appropriating of the produce of the trees planted by the plaintiff. This relief was also amended by cancelling the words "to the planting of trees by the plaintiff on the land aforesaid." In the written statement the defence was taken that Mt. Aulia Bibi was formerly a cosharer and that there had been a partition and that after that partition the general attorney of Mt. Aulia Bibi, one Abdul Abbas, had executed a fictitious lease in favour of the

plaintiff, and that after the decision of the Revenue Court the plaintiff's claim was not maintainable. An issue was framed (No. 4): Whether the suit was cognizable by the civil Court? The first Court held that the suit was cognizable but dismissed the suit on the ground that the general attorney had no authority to give the plaintiff permission to plant the trees, and held that it was not proved that Mt. Aulia Bibi had given any such permission. The lower appellate Court reversed the finding on this point and held that Mt. Aulia Bibi had a right in 1915 to grant the permission and that a permission to the plaintiff was granted by the lambardar to plant the trees in 1915. The Court further found:

I therefore hold that the plaintiff planted the trees and he remained fn possession till he was dispossessed by the defendants two years ago as has been stated by the patwari."

Further that the plaintiff had not sued for possession as a grove-holder and that he only wanted possession of the trees, and that he could not oust the jurisdiction of the Revenue Court by merely asking for possession of stray trees. The learned Single Judge of this Court stated:

"It does not appear that the land was let or granted to the plaintiff for the purpose of planting a grove ..... he was merely granted permission to plant trees on the payment of nazrana to the lambardar, and he does not claim any interest in the land under the trees. There is nothing to show that the lambardar intended to have a grove planted in that plot....."

The learned Single Judge considered that this was not a case to which Ch. 12. Agra Tenancy Act, Act 3 of 1926, in regard to grove-holders would apply, and that it was a case of permission to plant trees and not to plant a grove. Accordingly he considered that the civil Court had jurisdiction. I do not consider that the learned Single Judge has correctly quoted the finding of fact of the lower appellate Court. The lower appellate Court found as a fact that the plaintiff was a grove-holder. The written theka is on the record and it clearly says that the plot in question was formerly the zamindar's grove and that permission was given to the plaintiff to plant trees on it. I do not think that any distinction can be drawn between a grant of land for planting trees on it and a grant of land for planting a grove, S. 196, Agra Tenancy Act, states as follows:

"A groveholder is a person to whom land has been let or granted by a landlord or a permanent tenureholder for the purpose of planting a grove, or who has, in accordance with local custom entitling him to do so or with the written permission of the landlord or the permanent tenureholder, planted a grove on land held by him as tenant (not being a permanent tenureholder, a fixed rate tenant or a subtenant) or as a rent free grantee, not being a grantee to whom the previsions of S. 185 or S. 186 apply, of such landlord or permanent tenureholder, as the case may be. Provided that where the permission was granted prior to the commencement of this Act, the permission need not have been in writing and may have been either express or implied."

I consider that the case comes under the first four lines of this section and that the plaintiff was a grove-holder to whom the land had been let by the landlord for the purpose of planting a grove. A distinction has however been put forward by learned counsel for the plaintiff between groveland and a grove, and the argument of learned counsel is that the Agra Tenancy Act deals only with groveland and that a suit in regard to the trees on such land which constitute a grove is a suit within the jurisdiction of the civil Court. Learned counsel relies on the definition in S. 3 (15) which is as follows:

"Groveland means any specific piece of land in a mahal having trees planted thereon in such numbers so that when full grown they will preclude the land or any considerable portion thereof being used primarily for any other purpose, and the trees on such land constitute a grove."

He further points out that in S. 3 (2):

"Land means land which is let or held for agricultural purposes or as groveland or for pasturage."

He argues that the remedy in the Revenue Court under S. 99, Tenancy Act is confined to dispossession from a holding and he argues that the holding is the holding of the groveland and that the holding does not embrace the trees. He states that the trees have been planted by the plaintiff and that the rights in the trees are apart from the holding and that the question in regard to those rights is one solely for the civil Courts. It appears to me that on this view of the Tenancy Act the position would be very anomalous. Ch. 12 deals with grove-holders and according to the theory of learned counsel the chapter regulates only the rights of grove-holders in the groveland. I am unable to agree with that view for the following reasons: In S. 197 there is detailed provision for the rights of groveholders. In Sub-S. (b) it is provided that the interest of a groveholder shall be transferable by voluntary transfer or in execution of a decree of a civil or Re-

venue Court or otherwise. The words used are "the interest of a groveholder." If the view of learned counsel were correct I should expect to find words such as "the interest of a groveholder in the groveland." This sub-section therefore appears to me to deal with the whole interest of a groveholder as a groveholder, not merely an interest in the groveland but also an interest in the trees of the grove. Similarly in Sub-S. (c) it is provided that the interest of a groveholder shall devolve as if it were land. I understand that this is a provision for the whole interest of the groveholder not only in the groveland but also in the trees which constitute the grove. In Sub-S. (e) there is a provision:

"a groveholder shall not be liable to ejectment by his landholder except under S. 84 or on the ground that he holds under a lease the term of which has expired etc."

Now learned counsel relied on the terms of S. 84, Sub-S. (1):

"A tenant, not being a permanent tenureholder or a fixed rate tenant, shall be liable to ejectment from his holding on the suit of the landholder etc."

On the other hand it appears to me that the person who is ejected is the tenant, and in S. 3, Sub-S. (6) "tenant" is defined as including a groveholder. The person therefore who is ejected in the case of a groveholder is the groveholder and I understand that by ejectment of a groveholder is meant the ejectment of a groveholder from all the interest which he possesses as groveholder and not merely from the interest which he possesses in the groveland. I understand that the Act contemplates the ejectment of a groveholder under S. 84 from all his interest as groveholder in regard to his land and in the trees constituting the grove. There is further provision made in S. 116 for compensation in case of ejectment of a tenant who has made an improvement. Now "improvement" is defined in S. 3, Sub-S. (11) of the Act as including the planting of trees. and in Ch. 7 after referring to certain classes of tenants, there is a provision in S. 112 that no other tenant shall make any improvement except with the written consent of the land-holder. Under S. 112 and S. 3 (11) (c) a tenant who has planted trees on his holding with the written consent of the landholder is a tenant who has made an improvement and one who is entitled to compensation for that improvement under S. 116 in case of his ejectment under S. 84. I consider that either in the case of the groveholder to whom land was let for the purpose of planting a grove, or in the case of a groveholder who obtained permission to plant a grove on his existing holding, both of which cases are covered by S. 196, compensation for improvement on ejectment could be given under S. 116. Now when we come to the case of the remedy open to the plaintiff it appears to me that under S. 99 he may obtain possession of the holding and also in case any injury has accrued to the trees during the period of his dispossession he may obtain compensation for wrongful dispossession under S. 99 (1) (11). And in case for any reason he could not get a decree for possession under S. 99 (2), he may get compensation for the improvement under Sub-S. (1) (3). These provisions in S. 99 appear to me to give the plaintiff an ample remedy in the Revenue Court. On the other hand if the plaintiff claims that he is still in possession he has sufficient remedy in a declaration under S. 121. Further it appears to me that under S. 230, Explanation the plaintiff cannot come to the civil Court merely by altering his plaint if the relief which the Revenue Court could have granted him was adequate.

The argument of learned counsel for the plaintiff involves the proposition that a groveholder is not the holder of a grove but only the holder of the land on which a grove exists. I consider that a groveholder is the holder of the grove and also the holder of the groveland and that his holding comprises both the grove and the groveland. A "holding" is defined in 3 (8) as a parcel or parcels of land held under one tenure, or one lease, engagement or grant. The scheme of the Tenancy Act is that the grove should go with the land and be subject to the same incidents of tenure. This scheme is in accordance with the Transfer of Property Act, which provides in S. 8:

"unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. Such incidents include, where the property is land, ... all things attached to the earth."

This expression "attached to the earth" is defined in S. 3, T. P. Act, as meaning "(a) rooted in the earth, as in the case of trees and shrubs."

Trees therefore follow the land in the case of a transfer of property un-

der the Transfer of Property Act. I am of opinion that the same scheme is intended in Ch. 12, Agra Tenancy Act and that in S. 197 (b) and (c) the interest of the groveholder when transferred or when it devolves by succession comprises the interest not only in the land of the grove but also the interest in the grove itself. I consider that in this S. 197, Sub-S. (e) also relates to the whole interest of the groveholder in the grove and in the groveland, and that in the case of a transfer by ejectment an ejectment under S. 84 is in regard to the groveland and also in regard to the grove. I consider that in this interpretation the Agra Tenancy Act is in harmony with the Transfer of Property Act. In my view a holding must include the improvements which are executed on the holding. In S. 3 (11) (c) it is stated that the planting of trees is an improvement on a holding if it is consistent with the purpose for which it was let. In the present case where the land is let for the planting of trees the planting of trees is obviously consistent with the purpose for which the land was let, and therefore the planting amounts to an improvement. I do not consider that when planted the trees can be separated from the holding. In S. 94 there is a period fixed for the delivery of possession under a decree of ejectment. the period being not before 1st April and not after the 3rd June. In S. 96 there is a provision as follows:

"A tenant against whom a decree or order for ejectment has been passed shall not sell, cut or remove any tree upon his holding unless there is a contract or local custom entitling him to do so."

This section shows that it is intended by a decree of ejectment from a holding that the possession of the trees should also go with the delivery of possession of the holding, and accordingly for the time between the passing of the decree and delivery of possession there is the proviso that the tenant may not remove the trees. I think therefore that in the case of a decree for ejectment under S. 84 of the Act passed against a groveholder this S. 96 would operate to prevent the groveholder from removing any trees before delivery of possession is made and when delivery of possession is made, what would be delivered would be not merely the possession of the groveland but the possession also of the grove.

Reference was made to a ruling reported in 1931 All 553 (1), and it was argued that under S. 268 the appeal lay in any case to the District Judge and therefore the District Judge should have disposed of the suit. But if the present suit had been filed in the Revenue Court there is no reason to suppose that any plea of jurisdiction would have been raised or that any question of proprietary right would have been raised as there is no question of proprietary right raised in the plaint. Accordingly it cannot be said that S. 268 gave the District Judge jurisdiction to decide the second appeal. My view therefore is that the decision of the lower appellate Court was correct, and I would allow this appeal with costs and restore the judgment of the lower appellate Court and return the plaint to the plaintiff for presentation to the proper Court.

Sulaiman, C. J.—I concur in the actual order proposed, because even under the amended reliefs as they stand, the plaintiff is seeking to maintain his right to appropriate the produce of the trees, which is tantamount to claiming a title in the grove as it stands. I also agree that as it is not clear that if a suit had been filed in the Revenue Court, an appeal would lain to the District Judge. S. 268 is therefore inapplicable. But I am inclined to the view that in the Agra Tenancy Act there is a clear distinction drawn between what is defined as a "groveland" and what is defined as a "grove." The word "tenant" as used in the Tenancy Act, is certainly very wide and includes groveholders and thekadars as well but the word "holding" in S. 3 (8) is used in a very narrow sense, and it only means a parcel or parcels of "land," and also includes the interest of a thekadar. Now the word "land" has been especially defined in S. 3 (2) as meaning land which is let or held for agricultural purposes, or as groveland or for pasturage. Therefore the holding may be a parcel or parcels of land let or held as a "groveland." In S. 3 (15) "groveland" itself is defined as meaning any specific piece of land having trees planted thereon, etc., and then it is laid down that the trees on such land constitute a "grove." Then in the very sub-section two words "groveland" and "grove" have been used, and the legislature has made it clear that the specific piece of land having trees planted thereon is groveland and the

1. Bahadur v. Prabhu Narain Singh, 1931 All 553=132 I C 805=53 All 636.

trees on such land constitute a grove. It follows therefore that there is a distinction between these two words. Groveland means the land on which the trees stand and which would therefore according to the definition of "holding" be a holding, whereas the grove, namely, the trees which stand on it, would not be a holding. S. 196 defines a groveholder as a person to whom land has been let or granted by a landlord for the purpose of planting a grove, or who has planted such a grove. It is obvious that the definition of a "grove-holder" is not identical with the words "holder of a grove," for the latter words would mean the person who owns a grove which exists, whereas a groveholder may be a person who possesses the rights of a grove-holder, although no grove has yet come into existence. He is a groveholder if the land has been let or granted to him by the landlord for the purpose of planting a grove, even though he has not yet planted such a grove. S. 197 (b) and (c) no doubt lays down that the interest of a groveholder shall be transferable and heritable as land. It is not necessary in these sub-sections to make a separate provision for trees because they are transferable and heritable as property. Similarly S. 197 (e) provides that a groveholder shall not be liable to ejectment by his landholder except under S. 84 etc. It does not expressly say liable to ejectment from what. That has to be gathered from the provisions of S. 84 under which alone a landholder can be ejected. S. 84 provides for the ejectment of a tenant from his "holding." The use of the word "holding" therefore in S. 84 restricts the scope of that section to cases of ejectment from a holding, and a "holding," as pointed out above, means "groveland." As the definition of "grove" stands, a grove would not be a holding because it is comprised of the trees standing on the land and is not the specific piece of land itself.

Again S. 197 (h) refers to a person who has become a groveholder in respect of land of which he is a tenant or grantee, and lays down that he shall hold such land as groveholder in supersession of all subsisting rights, etc. The Transfer of Property Act, of course, has no application to this case because it is not a case of transfer of any property in which event there may be a presumption that things attached to the earth are also transferred with the property, but S. 3, T. P. Act, points out that immovable property does not include standing timber, growing crops or grass, that is to say, the standing timber is something distinct and separate from the immovable property itself. It would therefore seem to follow that the land which has been let to a person for the purpose of planting a grove or on which he has planted a grove is groveland which is a holding from which the groveholder can be ejected, but the trees when they come into existence constitute a grove in the groveland. The site belongs to the zamindar and has been let to the groveholder, of which he is a tenant. The grove has been planted by the tenant and he should have proprietary interest in the trees that stand on the land.

There is however S. 116, Agra Tenancy Act, under which a tenant who has been wrongfully dispossessed by his landholder is entitled to bring a suit for compensation for the dispossession. I agree that having regard to the definition of "improvement" in S. 3 (11), "improvement" includes the planting of trees. It must therefore be conceded that a suit for compensation brought by a groveholder in respect of the trees standing on his grove-land from which he has been dispossessed, can be brought under S. 116, Agra Tenancy Act, or to be more accurate, the compensation can be claimed when a suit under S. 99 is brought. Now so far as the claim for the recovery of compensation for the trees which constituted the grove is concerned, there being a specific provision for such a suit in S. 99 (b) (2), a suit in the civil Court would be barred under S. 230, Agra Tenancy Act.

The learned counsel for the plaintiff contended before us that a suit for the recovery of the specific timber is not covered by S. 99, Agra Tenancy Act, and is therefore not barred by the provisions of the Tenancy Act. No doubt before the new Tenancy Act a suit for the recovery of possession of a grove as well as for compensation for the trees cut away by the landholder, or for the rights to remove the timber, would have lain in the civil Court. Under the Agra Tenancy Act a suit for recovery of groves and for compensation is exclusively cognisable by the Revenue Courts. The question is whether the cognizance of the suit for recovery of

specific timber also has been taken away.

I quite agree that it would be very anomalous to hold that while a tenant can sue in a Revenue Court for the recovery of possession of the grove and for compensation of the trees cut away, he is bound to sue in the civil Court if he were to claim or remove the timber from the land. In order to avoid such an anomaly I am prepared to put a more liberal construction on S. 230 of the Act and hold that the granting of compensation by the Revenue Court for the trees from which the tenant has been dispossessed is an adequate relief in place of the relief for the possession of the specific timber standing on the land. The explanation to S. 230 provides that where adequate relief might be granted by the Revenue Court, it is immaterial that the relief asked from the civil Courts may not be identical with that which the Revenue Court could have granted. It would therefore follow that compensation for the trees can be given by the Revenue Court. A suit for the recovery of the actual timber is not cognizable by the civil Courts because adequate relief can be granted by the Revenue Court to the tenant who has been dispossessed. On this narrow ground, I agree that the order of the the lower appellate Court was right.

K.S. *Appeal allowed.*

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KENDALL, J.

Mullu—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 46 of 1935, Decided on 27th March 1935, from order of Assistant Sess. Judge, Budaun, D/- 11th January 1935.

Penal Code (1860), Ss. 307 and 325—Accused taking boy away and performing act of magic and attacking him in a very savage manner—But subsequently attending to him carefully and bandaging injuries—Held accused was only guilty under S. 325.

Accused took a boy away and by practising magic on him caused several injuries on his body the most serious of which was an incised wound on back of neck. But subsequently he bound the injuries and took him back.

Held: that though there were good reasons for believing that accused intended actually to kill the boy yet as he subsequentlly changed his mind, he was entitled to benefit of doubt and that the conviction should be altered from one of attempted murder to the less serious offence of causing grievous hurt, which he undoubtedly committed. [P 616 C 1]

N. Upadhiya and *L. W. Clarke*—for Appellant.

Govt. Pleader—for the Crown.

Judgment.—Mullu banya has been convicted by the learned Assistant Sessions Judge of Benares, of an offence under S. 307, Penal Code, and sentenced to seven years' rigorous imprisonment. The story for the prosecution, which is an unusual one, has been told by the complainant, Chamroo teli, a boy of about 17 years of age. The date of the occurrence is 11th May 1934, and Chamroo made statements on various occasions as follows. On the 14th May, he made a report at the thana, and on the same day he made a statement to a Magistrate in hospital at a time apparently when it was believed that he might die. More than three months later he made a complaint to a Magistrate on the 28th August, and subsequently he made a statement in the Court of Session. The long delay between the report at the thana and the complaint has been cating his case, but as a matter of believed that the police were investicating his case, but as a matter of fact they did not take it up. These various statements of Chamroo differ in certain details, but the main story is to the following effect.

Mullu had been acquainted with him for sometime and he told him that he wished to make "a magic worship" with him. A few days before the report Mullu made a definite appointment, telling Chamroo to meet him on the following Sunday at noon on the pretext of going to a marriage party. The two accordingly met at noon on the day fixed, and Mullu brought a tin box with him. They proceeded for a considerable distance to a guava grove near Koilaha village, which they reached about 5 p. m. Here Mullu produced some pan from the box, and gave it to Chamroo after muttering some charms over it, and he also gave him liquor to drink which he produced from the same box. Chamroo became partially intoxicated either as a result of the pan or the liquor, and Mullu proceeded to perform certain operations on him with a dagger. The injuries that were actually caused to Chamroo have been enumerated in the evidence of the Civil Surgeon, and they were mostly skin deep, but one of them is an incised would two inches deep down to the spine running across the base of the back of the neck from one side of the spine to the other. Chamroo, who was not entirely unconscious,

struggled and received some injuries from the dagger in his hand. He said that when he asked Mullu what he was doing, Mullu replied "I am performing basi karan, keep quiet." Whether Mullu actually succeeded in what he was trying to do is not quite clear. There are discrepancies in the various statements made by Chamroo, and according to the first report, Mullu appears to have been discouraged at his resistance and desisted, and afterwards accompanied him home, apologised for what he had done. gave him Sharbat, bound the wounded neck, etc. etc. This too appears to be what Chamroo told the Magistrate the same day in hospital. In the complaint made several months later several details were added. For instance, Chamroo spoke about the flash of a falling star by which he saw two or three men coming to the guava grove, on which Mullu fled away. According to this statement, Mullu did not come back and Chamroo had to make his way home alone. In Court Chamroo stated that a meteor appeared in the sky, and that two or three men also appeared in the guava grove, on seeing whom Mullu fled, but that Mullu afterwards returned and apologised bound up Chamroo's neck, gave him sharbat and took him most of the way home on an ekka.

According to the earlier statements made by Chamroo nobody else met either him or Mullu, but as these statements are rather short and sketchy, it is of course quite possible that a number of details have been left out. In the Court of Sessions some witnesses were produced whose statements, if true go some way to support Chamroo's evidence. There is a tailor named Gobardhan, who testified that Chamroo and Mullu came to his shop in order to get a shirt for Chamroo. According to Chamroo, the shirt was wanted for the wedding, but as it appears that the wedding was merely a pretext and that both Chamroo and Mullu knew that the real object of their journey was to perform the mantras, it is not clear why a special shirt was necessary for the occasion. However that may be, the trial Court has believed Gobardhan's evidence, and it does show that Mullu and Chamroo went off together on that day. Khushi Ram, another witness who has been believed by the Court, states that he met Chamroo and Mullu as they were leaving the city in an ekka. Bechan, the ekkawala, stated that he drove the two on his ekka, that he saw blood on Chamroo's shirt and that he heard Mullu apologising to Chamroo and saw him giving him a watch. This ekkawala has also been believed by the Court, but it seems to me very unlikely that he would have been allowed to overhear this very confidential conversation, and as it was shown in cross-examination that he is not a licensed ekkawala, I do not think that much reliance can be placed upon his statement. All these witnesses are open to the objection that they were not named in the first report or in the statement made to the Magistrate shortly afterwards. and although Chamroo's explanation that he had left everything to the police may account for the fact that the witnesses were not named until a very late date, it does undoubtedly detract from the value of their evidence.

It does not appear, that it is necessary to depend on their evidence at all. The statement made by Chamroo himself is not one that could have been invented by a boy of his age and indeed it is not one that is likely to have been invented by any one. The injuries that have been testified to by the Civil Surgeon correspond with those which Chamroo says were caused by Mullu with his dagger. A report was made two or three days after the incident, and seeing that Chamroo was very severely injured, it is hardly to be expected that he would have been able to make a report much earlier than this. The Civil Surgeon said that the first injury namely the incised wound across the back of the neck, would have caused Chamroo's death if it had been a little deeper, and he was as a matter of fact kept in hospital as a petient for about three weeks.

The defence of Mullu was that the whole story of Chamroo was a concoction and that he must have received his injuries in some fight about a woman. He further said that the complaint had been made against him because of some enmity, but as the learned Judge has pointed out, there is no real foundation for the story of enmity. The defence therefore does not really amount to more than the usual defence where a person has been named by the victim of a serious assault. Such a person is expected to name the right assailant. and therefore the defence is that the victim was really attacked in circumstances which he is ashamed to disclose. I have no doubt therefore that the Court was perfectly justified

in believing the evidence of Chamroo in the main.

The question of whether the offence was one under S. 307, Penal Code, is open to doubt. It appears to be quite likely that Mullu intended to kill Chamroo or at any rate knew that he was likely to cause his death. The very nature of the first injury is an indication of this. Chamroo further has said that Mullu intended to kill him, and the Judge has remarked that it is a well-known proverb in Urdu that magic acts well on the skull of a teli. As it has been proved that the object of Mullu in taking Chamroo away was to perform some act of magic and as Chamroo is a teli and he was attacked in a very savage manner, it appears therefore that there are some good reasons for believing that Mullu intended actually to kill Chamroo. On the other hand, it is not by any means clear why if such were his intention, he did not carry it out. Apparently there was nothing to prevent him from doing so. Yet we find that he brought Chamroo home and attended to him carefully, and in short did all in his power to make reparation for the injuries that he had caused. Either therefore he had fulfilled his purpose without killing Chamroo, or else he had lost his nerve or fallen under the influence of a sudden fit of remorse before he carried his intention further. Whichever of these explanations may be the correct one, I think it is necessary to give him the benefit of the doubt on this point at any rate, and to alter the conviction from one of attempted murder to the less serious offence of causing grievous hurt, which he undoubtedly committed and which in the circumstances calls for a somewhat reduced sentence. I alter the conviction to one under S. 325, Penal Code, and reduce the sentence from seven years rigorous imprisonment to five years' rigorous imprisonment. As the appellant is on bail, he will surrender to his surety.

K.S. *Conviction Altered.*

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THOM AND IQBAL AHMAD, JJ.

Baqa Ullah Khan and *others*—Plaintiffs—Appellants.

v.

Ghulam Siddique Khan and *others* —Defendants—Respondents.

First Appeal No. 16 of 1931, Decided on 6th February 1935, from decision of Sub-Judge, Aligarh, D/- 24th October 1930.

(a) Deed—Construction — Document must be read and construed as a whole.

A document must be read and construed as a whole and due and legitimate effect must be given to each and every one of its provisions. [P 618 C 1,2]

(b) Mussalman Wakf Validating Act (1913), S. 3—For validity of wakf, reservation of ultimate benefit for purposes mentioned in S. 3 is necessary—Such reservation may be express or implied — Held on facts there was implied reservation.

It is essential for the validity of a wakf for the maintenance and support of the family, children for descendants of the wakif or for the maintenance of wakif during his life time, or for the payment of his debts out of the rents and profits of the dedicated property, that the ultimate benefit should be reserved for the purpose mentioned in S. 3. The reservation of the ultimate benefit contemplated by the proviso to S. 3, Wakf Validating Act, can either be made expressly or impliedly. The answer to the question whether the reservation of the ultimate benefit for those purposes has been made by a deed of wakf must depend on the intention of the wakif as disclosed by the deed. Where the words "wakf fi sabilillah" have been used and wakf has been created in perpetuity, and there is provision for the appointment of the mutwallis for all time to come and a portion of the usufruct of the wakf property has been reserved for pious and charitable purposes, and the wakif had in contemplation the possible extinction of the line of his descendants who were to be the principal recipients of the profits of the wakf property, the irresistible conclusion is that the wakif intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso. [P 618 C 1,2; P 619 C 1]

A. M. Khwaja—for Appellants.

S. C. Das, Janaki Prasad and *K. N. Jha*—for Respondents.

Judgment.—One Wilayat Husain Khan executed a deed of wakf on 28th April 1925, and the sole question for consideration in the present appeal is whether by that deed a valid wakf was created in accordance with the provisions of the Mussalman Wakf Validating Act (Act 6 of 1913), and on the answer to that question depends the decision of this appeal. After the execution of the deed of wakf Wilayat Husain on 10th August 1925, filed a suit for the revocation and cancellation of the deed and in the alternative for the rectification of the same. The suit was based mainly on the allegation that the execution of the deed was brought about by the exercise of undue influence on Wilayat Husain by Ghulam Siddique Khan, one of the defendants-respondents, and that as there was no ultimate dedication by the deed in favour of the poor or for some pious, religious or charitable purpose, as enjoined by the proviso to S. 3, Wakf Validating Act, the wakf was

invalid. It was further stated in the plaint that Wilayat Husain intended to make provision by the deed for the maintenance, amongst others, of his nephew Imdad Husain and his descendants and that, in the event of the Court refusing to cancel the deed, provision for the maintenance of Imdad Husain and his descendants be also made in the deed by rectification of the same. The defendants to the suit were Mt. Taslimunnisa, the wife, and Kaniz Fatma, the daughter of Wilayat Husain and Ghulam Siddique, the husband of Kaniz Fatma, and these very persons were the principal beneficiaries under the deed of wakf. The suit was contested by the defendants and the learned Subordinate Judge directed Wilayat Husain to appear in person on the date fixed for striking issues. "For his examination for elucidation of material facts" Wilayat Husain did not attend in person on the date fixed and the Court on 12th October 1925, passed an order dismissing the suit for default with costs to the answering defendants.

Wilayat Husain died on 13th January 1930, and the suit giving rise to the present appeal was filed on 20th March 1930, by the plaintiff-appellants, who are the sons of Imdad Husain and the grand-nephews of Wilayat Husain. In the plaint the validity of the deed of gift was assailed on the very grounds on which Wilayat Husain had prayed for the cancellation of the wakf in the suit filed by him. The plaintiffs alleged that the execution of the deed of wakf was brought about by the exercise of undue influence on Wilayat Husain and that as there was no ultimate dedication in favour of the poor or for some religious, pious or charitable purpose, the wakf was invalid.

Kaniz Fatma had died in the lifetime of Wilayat Husain and the defendants to the present suit were Ghulam Siddique and Mt. Taslimunnisa. Both the defendants contested the suit. They denied the allegation of the plaintiffs about the exercise of undue influence and maintained that the wakf was valid. They also pleaded that the order of the Subordinate Judge dated 12th October 1925, dismissing the suit filed by Wilayat Husain operated as res judicata and was a bar to the present suit in view of the provisions of O. 9, R. 9, Civil P. C.

The learned Subordinate Judge upheld the contention of the defendants that O. 9, R. 9, Civil P. C., was a bar to the suit. He however held that "the ultimate benefit" was not, by the deed, expressly or impliedly reserved for the poor or for any other purpose recognised by the Mohamedan Law as religious, pious or charitable purpose of a permanent character, and, as such, the wakf was invalid. But, in view of his finding that the dismissal of the former suit was a bar to the present suit, he dismissed the suit. In appeal before us the learned counsel for the plaintiffs-appellants has contended that the learned Subordinate Judge was wrong in holding that O. 9, R. 9, Civil P. C., was a bar to the suit. There is a considerable force in this contention but, as we are of the opinion that the wakf created by the deed was valid and the plaintiff's suit must fail on the merits, we refrain from expressing an opinion on the point.

The deed of wakf is couched in plain and simple language and is mostly free from legal technicalities. It begins with a recital of the fact that Wilayat Husain, the wakif, is the owner of the properties covered by the deed. It is then stated that the wakif has a daughter Kaniz Fatma and a wife Taslimunnisa and that he is anxious to make a wakf of his entire property in the name of God (Fi-Sabi-Lillah) for the sake of maintenance of himself, his wife and daughter and also with a view to obtaining the blessings of the next world so that he may be receiving blessings after his death. The deed then goes on to provide that the wakf had made a wakf alal-alad and a wakf fi-sabi-liallah in perpetuity and for ever and that he had no proprietary rights left in the property and that he had removed his proprietary possession and entered in possession of the same in the capacity of a mutwalli. Then follows the provision as to the line of mutwallis. The wakif was to be the first mutwalli and he reserved to himself the right of appointing any person as mutwalli in his lifetime in his place. After the wakif's death Kaniz Fatma was to be the mutwalli of the dedicated property and after her death the male and the female issues of Kaniz Fatma were to be the mutwallis in succession. Power was however reserved to Kaniz Fatma to appoint in her lifetime any of her descendants as mutwalli. In the event of the extinction of the line of Kaniz Fatma, Ghulam Siddique Khan or his descendants or his nearest relations were to

A. I. R. 1935 Allahabad 620 (1)

KENDALL, J.

Kunwar Sen—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 132 of 1935, Decided on 4th April 1935, from order of Sess. Judge, Farrukhabad, D/- 19th November 1934.

(a) U. P. District Boards Act, (1922), S. 126 (2)—Person called upon to answer questions orally put, not answering them truthfully—Held he was not guilty under Penal Code (1860), S. 179.

Where a person is called upon to answer certain questions under S. 126, District Boards Act, put to him orally, he is not legally bound to answer the questions truthfully and he cannot be convicted under S. 179, I. P. C., on ground that he did not answer the questions truthfully. [P 620 C 2]

(b) U. P. District Boards Act, (1922)—Penal clauses should be strictly interpreted.

It is necessary to interpret the penal clauses of the District Board Act very strictly and not to allow any latitude to the prosecution. [P 620 C 2]

Panna Lal, Vishwa Mitra and *Babu Ram Avasthi*—for Applicant.

M. Waliullah—for the Crown.

Order.—The present applicant was convicted by a Magistrate of an offence under Sub-S. (2), S. 126, District Boards Act, and fined Rs. 55. When he appealed to the Sessions Judge it was held that S. 126 of the Act did not strictly apply, but that the applicant had committed an offence under S. 179, Penal Code. The circumstances are given sufficiently fully in the order of the learned Sessions Judge. It has been argued in appeal that S. 179, Penal Code, does not apply because the applicant was not "legally bound to state the truth." The only legal obligation that has been suggested to this Court is that referred to in S. 126, District Boards Act, under which:

"The Board may by written communication call upon any person specified . . . . . to furnish such information as may be neeessary in order to ascertain

"(a) whether such person is liable to pay taxes on his land or property;

"(b) on what amount he should be assessed;

"(c) the actual value building or land which he occupies and the name of addrees of the owner."

The learned Judge has found that the applicant was not called upon by a written communication to give information under this provision, and for this reason he held that he could not be punished under Sub-S. (2). What he did find was that the applicant refused to answer "certain questions put to him by the assessing officer orally." The learned Judge has not explained why the applicant was "legally bound to answer these questions truthfully." No doubt there was a moral obligation, and the assessing officer was justified by practice in asking the questions. But this is not enough to show that the applicant was legally bound to answer the questions truthfully. It is necessary to interpret the penal clauses of the District Boards Act very strictly and not to allow any latitude to the prosecution and I find that there is a distinct gap in the case for the prosecution which has not been filled up. The conviction should not be allowed to stand. I allow the application, set aside the order of the lower appellate Court, and direct that the applicant be acquitted and that the fine, if paid, be refunded.

K.S. *Application allowed.*

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* A. I. R. 1935 Allahabad 620 (2)

(Full Bench)

SULAIMAN, C. J., NIAMATULLAH AND RACHHPAL SINGH, JJ.

Mt. Shahzadi Begam—Appellant.

v.

Alakh Nath and *others*—Respondents.

Letters Patent Appeal No. 14 of 1933, Decided on 7th March 1935, from judgment of Kendall, J., Allahabad, D/- 13th February 1933, as reported in 1933 *All.* 308.

(a) Letters Patent (All.), Cl. 10—Order by single Judge under S. 5, Lim. Act, refusing to extend time for filing appeal is not judgment—Limitation Act (1908), S. 5.

The order of a single Judge dismissing an application under S. 5, Lim. Act, and refusing to extend time is not a judgment within the meaning of Cl. 10, Letters Patent, and accordingly no appeal lies from that order : *Case law referred.* [P 624 C 1]

(b) High Court — Single Judge can decline to receive appeal insufficiently stamped — But where it has been received, he cannot subsequently reject it on ground of insufficiency of court-fee—Civil P.C. (1908), S. 149.

It is open to a single Judge to decline to receive the document which is insufficiently stamped on the ground that he cannot receive it. But where the document has been received and has been accepted as having been properly presented, a single Judge should not reject the document later on, on the ground of insufficiency

of court-fees, unless the matter were within the jurisdiction of a single Judge. If a Division Bench alone can reject the appeal on the ground of insufficiency of court-fees then the matter should be laid before such a Division Bench. [P 625 C 1,2]

(c) High Court — Value of appeal beyond jurisdiction of single Judge—He cannot dismiss application for leave to appeal — Civil P. C. (1908), O. 44, R. 1.

A single Judge has no jurisdiction to dismiss an application for leave to appeal on the ground that it is barred by limitation, if the valuation of the appeal is such that it is beyond his pecuniary jurisdiction. [P 626 C 1]

*** (d) Civil P. C. (1908), O. 44, R. 1 — Application for leave without copies of decree and judgment — If application is rejected, there is no longer any appeal pending.**

Where copies of the decree and the judgment are not filed it is impossible to regard the memorandum of appeal as constituting a complete appeal in itself. In such an event no appeal has really been preferred, but only an application for leave to appeal has been made. If that application is granted, then there are no further requisites, and the applicant would not be called upon to furnish copies of the decree and the judgment. But if an application is rejected, the whole matter falls through, and there is no longer any appeal pending before the Court. An appeal can only be preferred from a decree, and when the decree is not filed, no appeal can be considered to be pending. The memorandum of appeal in such a case must be considered as a mere appendix to the application and the rejection of the application puts an end to the whole proceeding. [P 626 C 1]

S. B. L. Gaur—for Appellant.

G. S. Pathak—for Respondent.

Sulaiman, C. J. — Three questions have been referred to this Full Bench. for an expression of opinion by a Division Bench before which a Letters Patent appeal from an order of a Single Judge of this Court dismissing an application under S. 5, Limitation Act, came up for hearing. On 2nd May 1932. the appellant filed an application in this Court before a Single Judge for leave to appeal in forma pauperis and that application, as required by O. 44, R. 1 was accompanied by a memorandum of appeal containing the grounds of objections and also a prayer for the appeal being allowed. No court-fee was, of course, at that time paid on the memorandum of appeal. Both the application and the memorandum of appeal were received by the learned Judge and registered as a Miscellaneous Case, and were later on put up again before him on 9th May 1932 with an office report that the application was beyond time. On that date the applicant was not present in the Court room and her application for leave to appeal was rejected. No separate order was passed on the memorandum of appeal treating it as being in itself a separate appeal. On 23rd May 1932, an application was filed on her behalf by a counsel purporting to be under S. 5, Limitation Act, accompanied by an affidavit and praying that the delay in the filing of the "appeal" be condoned. This application was dismissed by the learned Judge on 13th February 1933, after notice to the opposite party had been given. The learned Judge came to the conclusion that at that time there was properly speaking no appeal before the Court at all, and that therefore he could not extend the time. It is from this order that a Letters Patent appeal has been preferred.

The learned counsel for the applicant states that the application for extension of time was really for extension of time for leave to appeal and not for extension of time for the filing of the appeal, although inadvertently the word "appeal" instead of "application" was used in it. The first question which has been referred to us by the Division Bench is as to whether an appeal lies under Cl. 10, Letters Patent, from the order passed by a Single Judge under S. 5, Limitation Act, refusing to extend the time for filing an appeal.

An appeal would lie if the order in question were "judgment" within the meaning of Cl. 10, Letters Patent. It has been held in numerous cases that as the Letters Patent were drafted long before even the earlier Code of 1882 was passed, the word "judgment" used therein does not mean the judgment as defined in the existing Code of Civil Procedure. At the same time the word "judgment" does not include every possible order, final, preliminary or interlocutory passed by a Judge of the High Court. In several cases the word has been given a narrower and more restrictive meaning. In 1 All 31 (1), it was held that an order remitting issues to a Subordinate Court was not a judgment. In the case of 11 All 375 (2), it was laid down that an order refusing leave to appeal in forma pauperis was not a judgment and was not appealable under the Letters Patent. It was incidentally remarked in that case that an order which is not made appealable if passed by a lower Court would not

1. Ghasi Ram v. Mt. Nuraj Begam, (1875-78) 1 All 31 (FB).
2. Banoo Bibi v. Mehdi Husain, (1889) 11 All 375=1889 A W N 70.

be a judgment within the meaning of the Letters Patent. But that was a rough rule of interpretation and cannot be considered to be an exact definition of judgment. In the case of 14 All 226 (3), it was laid down that an order directing the amendment of a decree passed by a learned Judge of this Court was not a judgment which would be appealable under the Letters Patent. Similarly in the case of 15 All 359 (4), it was held that an order dismissing an appeal for default of appearance was not a judgment and could not be appealed against.

In the case of 17 All 438 (5) it was held that no appeal under the Letters Patent would lie from an order of a Single Judge refusing an application under the Companies Act, for extension of time for serving notice of an appeal under that Act, inasmuch as such an order would not be a judgment within the meaning of Cl. 10. In that case several cases were referred to showing that the word "judgment" had been interpreted in a narrower sense. In the case of 1917 All 325 (6), it was held that no appeal lay from an order refusing to set aside a sale under O. 21 R. 90. On the other hand, in the case of 28 All 414 (7), an appeal against order refusing to extend time under S. 5, Limitation Act, was actually entertained, but the judgment does not appear that any objection was taken on behalf of the respondent that the appeal did not lie, for there is certainly no reference to any such point in the judgment. It also does not appear that the earlier case of 17 All 438 (5), was before the Bench or considered. There therefore is no clear authority for the proposition that an appeal lies. The Bench only decided the point that the appellant bona fide accepted the advice of counsel as to the proper Court to adopt in the course of appeal was misled by that advice and that was sufficient cause for the delay.

In the case of 1923 All 44 (8), it was held that no Letters Patent appeal would lie from an order of a Single Judge rejecting an application to set aside the abatement of an appeal. In that case one respondent had died on 13th June 1920, and an application was made on 4th January 1921, to set aside the abatement. The Bench took it for granted that the appeal abated six months after the date of the death of the respondent and that the application for setting aside the abatement was made within the time prescribed by law for such an application. Proceeding on these assumptions, it considered that an appeal lay, because the order refusing to set aside the abatement was a judgment within the meaning of Cl. 10, Letters Patent. In the course of the judgment the Bench relied on the case of 35 Mad 1 (9), and quoted with approval the remark of the learned Chief Justice of the Madras High Court that the:

"test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

The Amending Limitation Act, under which the period for the application for setting aside the abatement was reduced to three months had come into force on 1st January 1921, but this circumstance was apparently overlooked at the time. Therefore that case is distinguishable as the Bench had proceeded on the assumption that the application for the setting aside of the abatement was in time, and it is therefore not necessary for us to examine the correctness of that decision. We would like to point out that the test laid down by the learned Chief Justice of the Madras High Court is put in too wide a language and cannot be accepted as laying down the correct criterion. This is now particularly so, as their Lordships of the Privy Council in a later case of 23 A L J 555 (10), at p. 558, referring to the Letters Patent of the Bombay High Court remarked:

"The term judgment in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

Of course, their Lordships did not mean to lay down that no appeal would

3. M[illegible] Khan v. Ihsanullah [illegible]=1892 A W N 14.
4. Ma[illegible] [illegible]=18[illegible] Chand, (1893) 15 All 359
5. R. W[illegible] 1895 All [illegible] Ward, (1895) 17 All 438=
6. Piare Lal [illegible] 460=39 A[illegible] Allahabad, 1917 All 325=39 I C
7. Kura Mal v[illegible] A L J 218=[illegible] Nath, (1906) 28 All 414=3 W N 67.
8. Sadiq Ali v[illegible] Nasar Ali, 1923 All 44=70 I C 804=45 All 60[illegible]

9. Tuljaram Row v. Alagappa Chettiar, (1912) 35 Mad 1=8 I C 340.
10. Sevak Jeranchod Bhogi Lal v. Dakore Temple Committee, 1925 P C 155=87 I C 313=23 A L J 555 (PC).

lie under Cl. 39, Bombay High Court Letters Patent, from a decree or final order. That has been made clear by a Full Bench of this Court in the case of 1933 All 262 (11), but their Lordships certainly intended to make it clear that the word "judgment" used in the Letters Patent is not to be taken in its widest scope. No doubt the Bombay High Court in the case of 1917 Bom 14 (12), followed in 1924 Bom 399 (13), has taken a view in favour of the appellant, but a contrary view was expressed earlier by a Full Bench of the Calcutta High Court in the case of 33 Cal 1323 (14), from which the Bombay High Court dissented. That Full Bench decision although to some extent doubted in the case of 1929 Cal 214 (15), has not been overruled by that High Court.

It seems to us that when an appeal is filed, which is prima facie beyond time and along with it an application is made for extension of time under S. 5, Limitation Act, there are two matters before the Court. The appeal on the face of it is barred by time and would have to be dismissed unless time were extended. The application has to be considered on its merits and has to be allowed or disallowed. The application must therefore be considered in the first instance, and if it is allowed, the delay is condoned and the detect of limitation which would otherwise be in the appeal is cured. The appeal would then be admitted by a separate order. If, on the other hand, the time is not extended, then the result is that the application for extension of time under S. 5 is dismissed, but that does not involve an automatic dismissal of the appeal itself although undoubtedly the appeal would in the long run have also to be dismissed by a separate order. It may be that an application for extension of time under S. 5 is in some cases cognizable by a Single Judge, while an appeal, although barred by time is cognizable by a Division Bench, in which event the Single Judge would merely dismiss the application for extension of time leaving the appeal to be dismissed formally by a Bench of two Judges. The two matters therefore are undoubtedly distinct and separate. and it is impossible to say that the order passed on one application necessarily involves the dismissal of the appeal itself.

The present case however has arisen out of an application for leave to appeal which was barred by time. The learned counsel for the respondent urges before us that there was, in fact, no appeal filed at all, but only an application, and the memorandum of appeal which accompanied it was an appendix or an annexure to it and was not any separate document which could be entertained independently of the application and that accordingly since the application itself was dismissed, this second document fell through and no document which can be treated as an appeal is now in existence. This is the view which appears to have appealed to the learned Judge of this Court who dismissed the application on 13th February 1933.

There is a distinction drawn between the institution of a suit by a pauper and the filing of an appeal by a person who is unable to pay the fee required for the memorandum of appeal. In O. 33 there is only one application which is required to be filed: that application is allowed, then R. 8, it is to be numbered and registered and has to be deemed the plaint in the suit and the suit is then to proceed in all other respects as if instituted in the ordinary manner. On the other hand, if the application by the plaintiff is dismissed, there is no other document left before the Court which can be proceeded with. On the other hand in O. [illegible] a provision that a person desiring to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal may present [illegible] tion accompanied by [illegible] appeal and may be allowed to sue as a pauper, etc. Thus [illegible] have to be filed: one [illegible] for leave to appeal and [illegible] the other is the memorandum of appeal itself. But O. [illegible] require that the appellant should file copies of the decree and judgment, which are necessary [illegible] peals under O. 41, R. 1 [illegible] appellant, as in the present case may file them also.

It is noteworthy that O. 22, R. 9 which deals with the procedure for setting aside abatements provides that if

11. Sital Din v. Anant Ram, 1933 All 262=142 I C 331=55 All 326 (FB).
12. Ramchandra Gangadhar v. Mahadev Moreshwar, 1917 Bom 14=44 I C 913=42 Bom 260.
13. Nagindas Moti Lal v. Nilaji, 1924 Bom 399=80 I C 862=48 Bom 442.
14. Gobinda Lal Das v. Shiba Das Chatterjee, (1906) 33 Cal 1323=3 C L J 545=10 C W N 986.
15. Brojo Gopal Roy v. Amar Chandra, 1929 Cal 214=114 I C 88=56 Cal 135 (FB).

it is proved that the person claiming to be the legal representative was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement and dismissal upon such terms as to costs or otherwise as it thinks fit, and it is provided that provisions of S. 5, Limitation Act, would apply to applications for the setting aside of the abatement. On the other hand, S. 5, Limitation Act, provides that an application may be admitted after the period of limitation prescribed therefor, when the applicant satisfies the Court that he had sufficient cause for not preferring the appeal within the period fixed. Thus there is a distinction in S. 5 and even where sufficient cause is shown, the Court has a discretion in not allowing the application to be filed beyond time, although, of course, such discretion has to be exercised judicially and reasonably. But the extension of time is a matter of concession or the indulgence to the applicant who has come late and cannot be claimed as of a right. The reason obviously seems to be that in a case of limitation the person ought to be knowing the period prescribed by law for prefering an appeal and he should take sufficient care and precaution to see that through no accident that period expires; whereas in cases of abatements, a person may be entirely unaware of the death of his opponent, in which case if he proves to the satisfaction of the Court that he was prevented by sufficient cause from continuing the suit, the Court has no discretion, but to set aside the abatement or dismissal.

It follows accordingly that where the Court has some discretion in the matter and allows an appeal or application to be filed beyond time as a matter of concession on being satisfied that there is sufficient cause for the delay, it is not really deciding the rights of the parties for adjudicating upon their rights and liabilities. The order is in the form of an interlocutory order in a pending matter and the disposal of this matter does automatically put an end to the appeal itself, which is to be dismissed accordingly. If we were to accept the application urged on behalf of the appellant that every order passed by a Judge which puts an end to or disposes the proceeding or which has the application the necessary effect result in such a termination is a judgment, the result would be that appeals would be permissible from dismissal for default, dismissal for want of prosecution, dismissal on non-payment of costs of printing, translation, etc., or on failure to furnish security. To hold this would be going against several decisions of this Court. We are therefore of opinion that the order of the learned Single Judge dismissing an application under S. 5, Limitation Act, and refusing to extend time is not a judgment within the meaning of Cl. 10, Letters Patent, and accordingly no appeal lies from that order.

The second question referred to us is whether in spite of an order rejecting the application for leave to appeal in forma pauperis, an appeal is deemed to be still pending so long as it is not rejected for being insufficiently stamped or is dismissed on the ground of limitation. In the present case it so happened that the applicant filed not only the memorandum of appeal along with his application for leave to appeal, but also filed certified copies of the decree and the judgment. It was therefore possible to treat his memorandum of appeal as an appeal preferred, but without payment of proper court-fees.

Before 1908, the view which prevailed in this Court as a result of the Full Bench decision in the case of 12 All 129 (16), was that when a document which is insufficiently stamped is filed, it is a wholly invalid document, which cannot be treated as an appeal at all, and accordingly as the court-fee had not been paid, it is not any memorandum of appeal which can be considered. On the other hand, some of the other High Courts took a contrary view and held that it was open to the Court to rectify the defect. Accordingly in the new Code S. 149 was added under which express provision has now been made conferring power on a Court where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, to exercise its discretion at any stage, and allow the person, by whom such fee is payable to pay the whole or part as the case may be of such court-fee, and upon such payment the document in respect of which such fee is payable is to have the same force and effect as if such fee had been paid in the first instance. This enactment undoubtedly has the effect of superseding the view expresed in the Full Bench case of this Court. The document therefore

16. Bal Karan Rai v. Gobind Nath Tiwari,(1890) 12 All 129=1890 A W N 39 (FB).

which does not bear the full court-fee, is not necessarily a mere nullity and waste paper, which cannot be looked at and dealt with at all. Thus although the document is defective, its defect can be cured if the Court exercises its discretion in favour of the person from whom fee is payable; and once the fee has been allowed to be paid, the document has the same effect as if the fee had been paid at the time when the document was filed. In view of this addition in the Code, a Bench of this Court in 1918 All 194 (17), laid down that the rejection of an application under O. 44, R. 1, Civil P. C., for leave to appeal as a pauper is not the rejection of the appeal itself and it is therefore no ground for rejecting a subsequent application for permission to pay the full court-fee on the appeal. This case has not so far been dissented from by any other Division Bench, and we are of the opinion that it laid down the correct law, if it be assumed that in that case the appellant had filed copies of the decree and the judgment along with the memorandum of appeal. If however copies of decree and judgment are not filed at all, then the position is different and will be discussed under the next head.

So far as the deficiency in the amount of court-fee paid is concerned, the position seems to be this. The learned Judge before whom it is sought to be presented may decline to receive the appeal altogether on the ground that it is insufficiently stamped. He would be perfectly justified in doing so in view of the provisions of S. 6, Court-fees Act, under which no document of any kind chargeable in the first or second schedule of the Court-fees Act, shall be filed, accepted or recorded in any Court of Justice or shall be received or furnished by any public officer unless in respect of such document the court-fee has been paid in full. It is therefore open to a Single Judge to decline to receive the document which is insufficiently stamped on the ground that he cannot receive it. But where the document has been received and has been accepted as having been properly presented, a Single Judge should not reject the document later on, on the ground of insufficiency of court-fees, unless the matter were within the jurisdiction of a Single Judge. If a Division Bench alone can reject the appeal on the ground of insufficiency of court-fees, then the matter should be laid before such a Division Bench.

The third question is whether a Single Judge has jurisdiction to reject a memorandum of appeal on the ground of deficiency in the amount of court-fees paid, or dismiss it on the ground of limitation, when the memorandum of appeal is not separately filed, but merely accompanies the application for leave to appeal in forma pauperis. The answer in the first instance depends on an interpretation of the words "a motion for the admission of an application" in Chap. 1, R. 1, sub-R. (12) of the Rules of this Court. The learned advocate for the respondent relies on these words and contends that a motion to admit an application is distinct from the application itself and that inasmuch as such a motion is cognizable by a Single Judge, the latter has jurisdiction to disallow the motion which means that he has jurisdiction to dismiss the application itself at the very outset. On the other hand, the learned counsel for the appellant relies on sub-R. (10), R. 1 and urges that an application under O. 44, R. 1, Civil P. C., for permission to appeal in forma pauperis can be entertained by a Single Judge, only when the appeal would be within his jurisdiction and not otherwise, and that, therefore the learned Judge should not have dismissed this application.

There is no doubt that there is a distinction between the two expressions "motion to admit an application" and "an application" in R. 1 of our Court. What the rule intends is that even though the application itself may be cognizable by two Judges and that therefore it could not be dismissed unless it was put up and considered by a Bench of two Judges, it may be admitted by a Single Judge sitting alone. A motion to admit such an application can be made before a Single Judge and he can admit it; but this does not imply that he can also reject the application. If he is of opinion that the applicant has made out a prima facie case, and the application is fit to be admitted, he may admit it. But if on the other hand, he is doubtful and does not consider that the application should be admitted, he has no power to reject it, but should order it to be put up before a Bench of two Judges, which would then finally consider whether the application should be admitted or rejected. Sub-R. 10 restricts the jurisdiction of a Single

17. Muhammad Farzand Ali v Rahat Ali, 1918 All 194=45 I C 29=40 All 381.

Judge to dispose of an application under O. 44, R. 1, Civil P. C., for permission to appeal in forma pauperis, to only such cases in which the appeal itself would be within his jurisdiction and does not authorise a Single Judge to dismiss an application for leave to appeal in forma pauperis, for instance, first appeal, which can be heard and disposed of by a Bench of two Judges only. We are therefore of the opinion that the present matter was one which was exclusively cognizable by a Division Bench, and the application for leave to appeal in forma pauperis could not have been dismissed by a Single Judge sitting alone, although it could have been admitted by him. We are therefore of opinion that a Single Judge would have no jurisdiction to dismiss an application for leave to appeal on the ground that it is barred by limitation, if the valuation of the appeal is such that is is beyond his pecuniary jurisdiction.

Where however copies of the decree and the judgment are not filed, it is impossible to regard the memorandum of appeal as constituting a complete appeal in itself. In such an event no appeal has really been preferred, but only an application for leave to appeal has been made. If that application is granted, then there are no further requisities, and the applicant would not be called upon to furnish copies of the decere and the judgment. But if the application is rejected, the whole matter falls through, and there is no longer any appeal pending before the Court. An appeal can only be perferred from a decree, and when the decree is not filed, no appeal can be considered to be pending. The memorandum of appeal in such a case must be considered as a mere appendix to the application and the rejection of the application puts an end to the whole proceeding. These are our answers to the three questions referred to us.

K.S. *Question answered.*

A. I. R. 1935 Allahabad 626

GANGA NATH, J.

Mt. Bashiran—Plaintiff—Appellant.

v.

Mohammad Abrar—Defendant—Respondent.

Second Appeal No. 259 of 1933, Decided on 7th March 1935, from decision of Addl Sub-Judge, Moradabad, D/- 16th November 1932.

Legal Practitioner — Counsel's power to make admission in or refer to arbitration or compromise suits explained.

A counsel's powers to make admissions in or refer to arbitration or compromise suits in which he is instructed are as follows: (1) A counsel has authority to make admissions in Court on behalf of his client on matter of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client. (2) A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so is for his client's advantage or benefit even though he has no express authority from his client. (3) A Counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject matter of the suit in which he is instructed. (4) Where in the course of a suit a counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not a subject matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client. (5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court on a consideration of the probabilities and the circumstances of the case can find that the counsel acted on instructions even though there is no direct evidence on the point. (6) A counsel has no power to make an admission in, or compromise or refer to arbitration, a suit if he is instructed not to do so, without express authority from his client: 1927 *Mad* 852, *Foll.*

[P 627 C 1, 2]

Mukhtar Ahmad—for Appellant.

Mushtaq Ahmad—for Respondent.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by her against the defendant-respondent for the cancellation of the compromise and the decree dated 24th March 1930, passed thereon and for the hearing of suit No. 433 of 1929, from the stage in which it was on 24th March 1930. The plaintiff's case was that she had instituted a suit (No. 433 of 1929), against the defendant for an injunction restraining the defendant from flowing water, in the Court of the Munsif of Moradabad, on 4th September 1929. 24th March 1930 was fixed for final disposal. The plaintiff alleged that she was a pardanashin lady and her son Naqiuddin was looking after the case under her instructions. On 24th March 1930, in the absence of the plaintiff, the compromise in suit was filed in the case without her knowledge and information. On the basis of the compromise her suit was struck off and a decree passed. The defendant contended that the compromise was entered into with the knowledge, information and consent of

the plaintiff. The compromise has been signed by the plaintiff's counsel on her behalf. It does not bear the plaintiff's signature.

The only point for consideration is whether the compromise is valid and binding on the plaintiff. The compromise relates to certain matters which are outside the scope of the subject-matter of the suit (suit No. 433 of 1929), in which it was made. There are numerous cases, English and Indian on the question of a counsel's powers to make admissions in or refer to arbitration or compromise suits in which he is instructed. The following propositions are deducible from them: see 1927 Mad 852 (1): (1) A counsel has authority to make admissions in Court, on behalf of his client on matters of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client. (2) A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so is for his client's advantage or benefit even though he has no express authority from his client. (3) A counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject-matter of the suit in which he is instructed. (4) Where in the course of a suit a counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client. (5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court on a consideration of the probabilities and the circumstances of the case can find that the counsel acted on instructions even though there is no direct evidence on the point. (6) A counsel has no power to make an admission in, or compromise or refer to arbitration, a suit if he is instructed not to do so, without express authority from his client.

In this case, the compromise relates to certain matters which were not involved in the suit. The question therefore is whether the compromise was made with the authority of the plaintiff. As stated above, it is a question of fact. Both the Courts below have on evidence come to a definite finding that the compromise was read out and explained to the plaintiff by the plaintiff's own son Naqiuddin, who, according to plaintiff's own admission, was looking after her suit under her instructions. She gave her consent to the compromise after it had been read out and it was after her consent that the compromise was filed in Court. The learned Additional Subordinate Judge has observed:

"Abdul Rahman and Mohammad Husain who are related to the parties have been produced as witnesses by the defendant and support his case, that the plaintiff Knew and had given her consent to the compromise. The trial Court has believed this evidence and I think from the record it is borne out that the plaintiff knew about the compromise. It is not plaintiff's case that she was unable to understand any of its terms or that there was any misunderstanding about the terms of the compromise. Her case is total want of all knowledge about the compromise. Mohammad Naqi has not been produced by the appellant. I agree with the trial Court that the plaintiff knew about the compromise which was filed with her permission."

In 1930 P C 158 (2), a pardanashin lady was kept fully informed throughout of all various stages of the negotiations of compromise and was fully and intelligently aware that the advocate engaged was clothed with authority to compromise the suit on her behalf and was, in fact, exercising his authority. It was held that it could not be said that the lady had not been proved to have authorized the agreement.

In the face of the concurrent findings of both the lower Courts that the compromise was made with plaintiff's express consent the plaintiff has no case. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal dismissed.*

1. Muthiah Chettiar v. Muthu K. R. A. R. Karuppan Chetti, 1927 Mad 852=105 I C 5=50 Mad 786.

2. Sourendra Nath v. Tarubala Dasi, 1930 P C 158=123 I C 545=57 I A 133=57 Cal 1311 (P C).

A. I. R. 1935 Allahabad 627

KENDALL, J.

Deep Chand and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 1031 of 1934, Decided on 6th February 1935, from order of Sess. Judge, Saharanpur, D/- 12th November 1934.

(a) Criminal P. C. (1898), S. 256—Charge framed—Prosecution witness summoned to appear for cross-examination—All accused represented by different counsel — One of them leading cross-examination and others helping him by suggesting questions to be asked—If no question is asked on behalf of one of accused who is present inference is that he did not want to do so

After framing of charge the prosecution witnesses were summoned to appear for cross-examination. The accused were represented by several different lawyers. One of these lawyers led the cross-examination and the others helped him in suggesting questions to be asked.

Held: that if no questions were asked on behalf of some of them, the only conclusion that can reasonably be drawn from the circumstances would be that they did not want to ask them questions. [P 628 C 2]

(b) Criminal P. C. (1898), S. 537—Irregularity in charge sheet—No prejudice caused—Irregularity is cured.

Where charge-sheet simply charges the accused with rioting and voluntarily causing simple hurt without explaining what rioting means but such irregularity has not prejudiced the accused who are represented by lawyers, the irregularity is cured. [P 629 C 1]

K. D. Malaviya—for Applicants.

Saila Nath Mukerji and *Mushtaq Ahmad*—for Oppsite Party.

Asst. Govt. Advocate—for the Crown.

Order.—These two references have been made by the learned Sessions Judge of Saharanpur, for the purpose of having the conviction of five persons set aside, and a retrial ordered, on the ground that the order of the Magistrate is not maintainable because of certain illegalities. The facts are briefly given in the order of reference.

It is said in the first place that two of the accused persons, Dip Chand and Hulas Chand, were not given an opportunity to cross-examine the prosecution witnesses, and that the Court did not therefore observe the provisions of S. 256, Criminal P. C. The record shows that the accused were charged on 7th July 1934, that the prosecution witnesses were recalled for cross-examination including the complainant and that the complainant was examined and cross-examined on the 13th and 14th and the rest of the prosecution witnesses on the 20th July. The accused were represented by several different lawyers, and the explanation of the Magistrate shows that one of these lawyers led the cross-examination and the others helped him in suggesting questions to be asked. The judge however has found that as these two accused persons filed an affidavit to show that they did not get an opportunity to cross-examine several of the prosecution witnesses, the explanation must be that

"inadvertently these accused were not asked to cross-examine the prosecution witnesses and neither any cross-examination on their behalf was done nor their statement that they did not want to cross-examine the prosecution witnesses was recorded."

The occasion when the Court is obliged to ask the accused whether he wishes to cross-examine any and if so, which of the witnesses for the prosecution, is after the charge has been drawn, and there is no doubt that in the present case the accused were asked and the witnesses were summoned to appear in Court for the purpose of cross-examination. It is also clear that they were cross-examined during several days at considerable length. The two accused, Dip Chand and Hulas Chand, were no doubt present during the whole of these proceedings and so was their lawyer. If no questions were asked on their behalf the only conclusion that can reasonably be drawn from the circumstances which I have described above is that they did not want to ask those questions. There is certainly nothing to show that they requested the Court to be allowed to ask questions and that the Court refused to allow them to do so. They must have been present when the questions which were asked by the other counsel had been answered and the cross-examination had been finished; and if they still wished to ask further questions. I have no reason whatever to suppose that the Court would have prevented them from doing so. It has been suggested that the Magistrate had no right to discharge the witnesses until he had definitely asked each of the accused and each of the counsel for the accused whether they had any further questions to ask. It is possible that the Magistrate did not specifically ask the question in this way, and though it is usual for the Court to do so; I cannot find that at this stage the Court is under any obligation to do so. It has been pointed out that on the 23rd July, an application was made on behalf of these two accused saying that they had not had an opportunity to cross-examine several of the prosecution witnesses. If this was intended to be an application under S. 257 Criminal P. C. for compelling the atendance of these witnesses again. the Court was not bound to compel the attendance of the witnesses unless satisfied that it was necessary for the pur-

poses of justice. and as the Magistrate knew that the witnesses had been most thoroughly cross-examined on behalf of the accused and that these particular two accused had had an opportunity of asking any questions that they wished to put on their behalf, he was evidently satisfied that it was unnecessary to trouble the witnesses again.

The matter was a very petty one, and the accused were all apparently acting in the same interests, namely the interests of the temple on which the complainant is supposed to have trespassed. The second objection that has been taken to the Magistrate's proceedings is that the charge sheet has not been properly drawn up, in that it does not mention that the accused formed an unlawful assembly. This is true. The charge sheet simply charges the accused with rioting and voluntarily causing simple hurt without explaining what rioting means. The irregularity in the charge sheet however is certainly cured in the present case by the provisions of S. 535 or 537 of the Code. There was no prejudice to the accused, all of whom were represented by counsel, and if these half dozen counsel did not know themselves what rioting meant, it was at any rate easy to them to find out by examining the provisions of the Penal Code. The more serious objection is that the Court has not come to a definite finding that the accused formed an unlawful assembly. An examination of the judgment of the Magistrate however shows that there was no real doubt on this point although he has not stated in so many words that there was an unlawful assembly and that violence was used by it. It would make no difference to the sentence if the conviction under S. 147 were to be quashed. But in the circumstances, I do not think that it is necessary to do so on the ground that the accused have been prejudiced in any way by the failure of the Magistrate to express himself clearly.

Finally, it is said, that the order under S. 106 is irregular because such an order can only be justified if the Court finds that a breach of peace is apprehended in future. The Magistrate has explained however that it was necessary to protect the complainant B. Indra Prasad against similar incidents, and if the Court believed this, there was no reason why the order should not have been passed. B. Indra Prasad had been assaulted by the trustees of this temple and had been beaten by them, and he had persuaded the Court that he went in fear of his life. This being so, the order of the Magistrate appears to have been not only regular, but justified. The result is that I find that there is no force in these two references and they are therefore rejected. The papers may be returned and the Magistrate's order may stand.

K.S. *Reference rejected.*

A. I. R. 1935 Allahabad 629

GANGA NATH, J.

Maula Dad Khan and *others*—Defendants—Appellants.

v.

Sri Thakur Radha Kaulji and *others*—Plaintiff—Respondents.

Second Appeal No. 1048 of 1932, Decided on 22nd February 1935, from decision of Addl. Sub-Judge, Muttra, D/- 8th August 1932.

Landlord and Tenant—Manager having power to lease property exceeding his powers by giving permanent lease—Lessee in possession for long time and paying rent regularly—Permanent lease held void—Lessees do not become trespassers—Agra Tenancy Act (1926), S. 45.

Where a manager who has power to grant ordinary leases exceeds his power by granting a permanent lease and lessees have been in possession of the property for a very long time and have been paying rent regularly but permanent lease is declared to be void, the lessees cannot be regarded as trespassers and cannot be ejected: 1928 *All* 617, *Rel on.* [P 630 C 2]

N. P. Asthana and *B. N. Sahai*—for Appellant.

Panna Lal—for Respondents.

Judgment.—This is a defendant's appeal and arises out of a suit brought against them by the plaintiffs-respondents for a declaration that the perpetual lease, dated 12th February 1904, granted by the late mahant Narain Das was ineffective and not binding on the plaintiffs. The plaintiffs further prayed for possession and mesne profits against the defendants. The plaintiffs' case was that Narain Das was the mahant. He granted a perpetual lease of the property in dispute to defendant 1 and the deceased ancestor of defendants 1 to 6. Narain Das died on 18th November 1923, and was succeeded to by Ram Kishan Das, plaintiff No. 4, as mahant and manager of the temple. The plaintiffs' further stated that Narain Das had no power to execute the lease and it did not and could not enure beyond the lifetime of Narain Das. The trial Court found that the lease was with-

out legal necessity and void and decreed the claim. In appeal, the Subordinate Judge upheld the findings of the trial Court as regards the lease being void and without any legal necessity, but modified the decree for the amount of mesne profits. Against this decree, this appeal has been filed by the defendants.

On the concurrent findings of both the Courts below that the lease was without any legal necessity and Narain Das had no power to give a perpetual lease, there can be no doubt about the lease being void and ineffective after the death of Narain Das. The plaintiffs are therefore entitled to the declaration prayed for. The next question is whether the plaintiffs' suit for possession and mesne profits lay in the civil Court. As already stated the lease was given by the plaintiffs' predecessor, who was as good a mahant as the plaintiffs themselves, and was the manager of the property. He had every right to give leases of the property in the ordinary course of management, and there would have been nothing to prevent his granting an ordinary lease to the present lessees. It was only by granting a permanent lease that he exceeded his power. The lessees were admitted by the manager to the occupation of the land as long ago as 1904. They were allowed to remain in possession even after the death of Narain Das for a number of years. The lessees have presumably been in possession since 1904, and have been paying rent regularly. As already stated, the manager Narain Das had legal authority to admit the lessees to the occupation of the land. In these circumstances, it is altogether wrong to regard the lessees as trespassers. S. 45, Agra Tenancy Act, of 1926, lays down:

"Whenever any person, who has been admitted to the occupation of land, or permitted to retain possession of land, by any one having a right to admit or permit him with the intention that a contract of tenancy should thereby be effected, but without any rent being fixed, either he or the person so admitting or permitting him may at any time during the period of his occupation or within three years after the expiry of such period sue to have rent fixed thereon."

The position of the lessees is analogous to that of persons, who have been admitted to the occupation of the land in this way. There is no doubt that the lessees were admitted to the occupation of the land by a written contract which has been held to be void. This fact does not affect the position of the lessees which is not that of a trespasser but is that of a tenant. This view is supported by 1928 All 617 (1). There the brother of the minor plaintiff, acting as the manager of the joint Hindu family, executed a perpetual lease of a portion of the ancestral property at a rental of Rs. 70 a year, whereas it had previously been leased and at any time might have been leased at a rental of Rs. 125 a year and the lessees gave the lessor a nazrana of Rs. 1,200, but there was not shown to have been either any advantage in giving a permanent lease or in realising the ready money. It was held that the permanent lease was null and void and ineffectual as against the plaintiff, but inasmuch as the lessees had occupied the property for a number of years and had been paying rent regularly and as the lessor had legal right to admit them to the occupation of the land, it would be altogether wrong to regard the lessees as trespassers merely because the lessor exceeded his power in executing the permanent lease and therefore the lessees could not be ejected. The relationship of landlord and tenant had been established between the parties and it was open to them to settle their rights and liabilities in the revenue Court.

The result is that the appeal is allowed in part. The plaintiffs-respondents' declaration that the permanent lease is null and void and ineffectual as against them shall be confirmed but their suit in regard to possession and mesne profits shall be dismissed. It will be for the parties to settle their rights and liabilities as to possession and rent in the Revenue Court. The parties shall get and pay costs in all the Courts in proportion to their success and failure. Permission to file a Letters Patent appeal is rejected.

K S. *Appeal partly allowed.*

1. Basdeo Narain v. Mohammad Yusuf, 1928 All 617=116 I C 491.

A. I. R. 1935 Allahabad 630

KENDALL, J.

Munna Lal and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 93 of 1935, Decided on 4th April 1935, from order of Sess. Judge, Meerut, D/- 31st October 1934.

Criminal Trial — Accused charged with two offences—Accused found guilty and sentence passed—Order of Magistrate ambi-

guous in not mentioning whether the accused was guilty of both or only of one—Sessions Judge's interpretation of order that intention of Magistrate was only to convict under one charge—Held there was no need to interfere in revision.

Accused were all charged under two sections of the I. P. C. But the Magistrate in passing his final order said: "The charge is brought home to the accused . . . . . I fine each of them Rs. 50" The Sessions Judge's interpretation of this order was that the Magistrate intended to convict accused under S. 323 and to acquit under S. 427 as they have been fined only Rs. 50 and as such he held that no right of appeal lay.

Held: that in the absence of any indication that the Magistrate intended to pass two sentences or one sentence consisting of two punishments, it cannot be held that the Sessions Judge was clearly wrong in holding that the applicants had no right of appeal and that there was no need to interfere in revision. [P 631 C 2]

J. C. Mukerji—for Applicants.

K. Masud Hasan—for Opposite Party.

Order.—The question raised in this case is whether the applicants have a right of appeal, They were all charged under two sections of the Indian Penal Code, 323 and 427. But the Magistrate in passing his final order said: "The charge is brought home to the accused. . . . . I fine each of them Rs. 50." The applicants appealed to the Sessions Judge, who held that no appeal lay because the applicants had only been fined Rs. 50, so that under S. 413, Criminal P. C., they could not take the matter further. It has been argued that this decision of the learned Sessions Judge is wrong, and that S. 413 read with with S. 415, Criminal P. C., will so operate as to give the applicants a right of appeal. The argument is that as the applicants were charged with two offences and have not been acquitted of either and as the finding is one that the applicants are guilty, it follows that both charges have been brought home to them and that the sentence of fine imposed must be deemed to be a combination of two punishments. one for each of the offences which have been committed. It is true that the order of the Magistrate is ambiguous. It was open to him to acquit the applicants of one of the charges and convict of one, or to convict of both and to pass sentence on both charges. He has done neither. The question is which must he be deemed to have done. The Sessions Judge's interpretation of his order is that he intended to convict under S. 323 and to acquit under S. 427. It is possible that this is not what the Magistrate intended to do, but it is at any rate a reasonable interpretation of the order. The other interpretation would be —and it is this which the applicants' counsel wishes me to accept—that the Magistrate intended to convict on both charges; and that by inadvertance he has only sentenced the applicants for one offence.

In the absence of any indication that the Magistrate intended to pass two sentences or one sentence consisting of two punishments. I cannot hold that the Sessions Judge was clearly wrong in holding that the applicants had no right of appeal. There is therefore no need to interfere, and the application is dismissed.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 631

SULAIMAN, C. J. AND BENNET, JJ.

Govind Pershad — Plaintiff — Appellant.

v.

Kandhai Singh and *others* — Defendants—Respondents.

Second Appeal No. 1184 of 1931, Decided on 22nd February 1935, from decision of Sub-Judge, Fatehpur, D/- 8th June 1931.

Agra Tenancy Act (1926), Ss. 99 and 121—Suit against landholder in chief or against any person claiming to hold through him must be brought in Revenue Court.

Under S. 121 the suit may be brought against the landholder or any person claiming to hold through the landholder; that is the suit may be brought against the landholder in chief or against any person claiming to hold through the landholder in chief. Such a suit should be brought in the Revenue Court. [P 632 C 1]

S. N. Seth—for Appellant.

Shiva Prasad Sinha—for Respondents.

Bennet, J.—This is a second appeal by a plaintiff against a decree of the lower appellate Court finding that the suit of the plaintiff lies in the Revenue Court. The plaintiff filed a suit alleging that defendants 5 to 7 were occupancy tenants and that they had executed a registered sub-lease on 7th July 1928 for a term of five years in favour of the plaintiff and put him in possession, and that defendants 1 to 4, who were trespassers, had interfered with his possession. The plaint was filed on 20th December 1928. The defence was that the occupancy tenants had abandoned their holding and that defendants 2 to 4 were zamindars and defendant 4 was a lambardar and that the suit lay in the Revenue Court. On the question of fact the lower appellate Court has found

that defendants 2 to 4 are zamindars and defendant 4 is a lambardar. On this finding it held that the suit lay in the Revenue Court. On the strength of a ruling reported in 1934 All 685 (1) learned counsel for the appellant-plaintiff argues that the suit lay in the civil Court. Ss. 99 and 121, Agra Tenancy Act (Act 3 of 1926) according to him do not contemplate a suit by a sub-tenant against the original landholder through whom the plaintiff's own landholder claims. We cannot agree with this argument because it is set out in S. 99 (1) (a) that the suit lies in the Revenue Court for dispossession by "his landholder or any person claiming as landholder to have a right to eject him." We consider that a distinction is drawn between the actual landholder of the plaintiff, who was in this case the occupancy tenant, and the landholder in chief, who are in the present case defendants 1 to 4. Learned counsel argued that the distinction was not on those lines in the section but rather on the question of whether the defendant was actually the landholder or only a person claiming to be a landholder. If that had been so the section would have said" or any person claiming as his landholder." But the word "his" is omitted and therefore we consider that the latter part of this sub-section is intended to cover a case like the present where the defendant claims not to be the immediate landholder of the plaintiff but to be the landholder in chief.

Similarly under S. 121 the suit may be brought against "the landholder or any person claiming to hold through the landholder;" that is, the suit may be brought against the landholder in chief or against any person claiming to hold through the landholder in chief. We think, that there is ample provision in the Tenancy Act for a suit such as the present. The lower appellate Court has allowed the plaintiff a period to amend his plaint. He has not taken advantage of that period as he desired to file a second appeal.

We dismiss this appeal with costs throughout and we allow the plaintiff one month from the date of this order to amend his plaint in which case the order of dismissal will be replaced by an order that the plaint should be returned to the plaintiff for presentation to the proper Court, if the plaint is amended as directed by the lower appellate Court. If the plaint is returned the order for costs will also stand.

K.S. *Appeal dismissed.*

1. Shyam Lal v. Hira Nath, 1934 All 685=153 I C 479.

A. I. R. 1935 Allahabad 632

NIAMATULLAH, J.

Sumera and *others*—Defendants—Appellants.

v.

Mormukat and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 118 of 1933, Decided on 27th February 1935, from decision of Addl. Sub-Judge, Etah, D/- 24th October 1932

(a) Deed—Construction—Document should be read as whole.

A document should be read as a whole, and the intention of the executant ascertained from all the clauses considered together and not individually. [P 634 C 1]

(b) Hindu Law — Gift of life interest by father of ancestral property to wife — Remainder to vest in father — Birth of sons subsequent to gift — Remainder is joint family property of father and sons.

A father who is sole owner of a property before the birth of sons can transfer any part of the family property to any one by sale or gift and the sons can acquire an interest by birth in such property as remain in the family at the time of their birth. Hence where a father who has got ancestral property gives to his wife a life estate by gift and the remainder is to vest in him and subsequently sons are born to him, the interest in the remainder is joint family property belonging to the father and the sons. [P 634 C 2]

M. L. Chaturvedi —for Appellants.

N. C. Vaish—for Respondents.

Judgment.—This second appeal has arisen from a suit brought by the two minor plaintiff-respondents for setting aside a sale-deed, dated 14th August 1928, in favour of the defendant-appellants by defendants 5 and 6, who are respectively the father and mother of the plaintiffs, and for possession of the property to which that deed relates. The plaintiffs' mother (defendant 6), acquires an interest in the property in dispute under a deed of gift, dated 3rd June 1920, executed by her husband, the father of the plaintiffs. (Defendant 5). The lower Courts found that the deed of gift conferred a life interest on the donee, the plaintiffs' mother, and that the sale-deed, relied on by the appellants, validly conveyed only her life interest to them. As regards the remaining interest, the sale-deed has been declared to be invalid as against the plaintiffs, who will be entitled to recover possession from the appellants after their mother's death. The defendants assail the decree of the lower

Courts, claiming an absolute interest in the property in dispute under the sale-deed. The trial Court had held that the sale was made by the plaintiff's parents for legal necessity, as money was required for the family business, which consisted of a grocery shop, but that it did not affect the rights of the parties. The lower appellate Court has recorded no finding on this part of the case.

The property in dispute is a house which belonged to the ancestors of the plaintiffs' father, so that, if there had been nothing else in the case, the plaintiffs would have acquired an interest by birth and held it as a member of a joint Hindu family with their father. But on 3rd June 1920, when the father executed the deed of gift in favour of of his wife, he was the sole owner of the house as none of his sons were in existence till then. Plaintiff 1 was born in 1922, and plaintiff 2 in 1924. On the date of suit they were respectively 9 and 7 years of age. The sale-deed obtained by the appellants on 14th August 1928 was executed by both the parents of the plaintiffs obviously because the mother had obtained an interest in certain property, including the house in dispute, under the deed of gift, and as the father was the original owner thereof and was probably believed to have some interest in spite of the deed of gift. The appellants obtained possession of the property purchased by them; but about three years after the sale-deed the minor sons of the vendors instituted the suit which has given rise to this appeal, challenging the validity of the alienation made by their parents. Their case, as set out in the plaint, is that the house in dispute is part of the ancestral property belonging to the plaintiffs and their father, that the deed of gift executed by the latter in favour of the plaintiffs' mother was fictitious and conveyed no title to the donee and that the sale-deed executed by the parents of the plaintiffs on 14th August 1926, was void, there being no legal necessity for the alienation. It was pleaded by the appellants in defence that the gift in question was genuine and given effect to, under which the donee acquired an absolute interest in the property conveyed thereby. It was pleaded in the alternative that there was legal necessity for the sale and that, assuming the deed was fictitious, the sale is binding on the plaintiffs. Both the lower Courts have found that the deed of gift represents a genuine transaction intended to take effect and that the donee acquired thereunder the title which it purports to convey. This finding has not been challenged by either side in this Court. In view of the finding of the trial Court that there was legal necessity for the sale, it is no longer to the interest of the plaintiff to maintain that the gift was fictitious, because if that finding stands and the deed be accepted to be fictitious, the sale-deed which was executed by the plaintiffs' father, must be upheld. If the deed of gift be assumed to be fictitious, the property remained with the father; and though his sons took an interest by birth, a transfer by him for necessary purposes, as found by the trial Court, is valid. As however the lower appellate Court has recorded no finding on the question of legal necessity and as both the Courts have found that the gift was genuine, I do not think it will be right to pin down the plaintiffs to their case in the plaint that the gift was fictitious. I think this appeal ought to be disposed of on the assumption that the gift conveyed such title as it purports to transfer.

The principal question in the case is what right the deed of gift conferred upon the plaintiffs' mother. If she became the absolute owner under that deed the sale in favour of the appellants cannot be challenged by the plaintiffs, who could acquire no interest by birth in the property acquired by their mother from their father before they were born. The father was the sole owner before the plaintiffs' birth and could transfer any part of the family property to anyone by sale or gift. The sons could acquire an interest by birth only in such property as remained in the family at the time of their birth.

The deed of gift has been found by both the lower Courts to confer only a life interest on the donee. The lower appellate Court has adopted all the conclusions of the trial Court without adding any reasons of its own. I have therefore considered the grounds on which the decision of the trial Court proceeds. Though that Court held the donee to have acquired no more than a life interest, its views on some questions arising from interpretation are not quite correct. The deed provides as follows:

"(1) The donee may remain in possession of the property gifted to her as owner like myself. I and my heirs have no concern left with the property, nor will have any concern in the future.

(2) But the condition is that my wife shall have no power to mortgage or sell, or otherwise transfer the property, and if my wife dies sonless in my lifetime, I shall be the owner of the property.

(3) And if a son is born to my wife, he will have a right of transfer in the gifted property; and if no son is born to her, no one will have a right of transfer. But the gifted property shall not devolve on anyone belonging to the family of my wife (i. e., her father's family).

(4) If my wife dies issueless after my death, the gifted property shall go to the people of my family.

(5) If I die in the lifetime of my wife, who is issueless, then my wife shall enjoy the usufruct of the gifted property; and if misled by others she does anything against my interest which may occasion loss to me, then I shall have a right to have the gift cancelled."

The various clauses are not numbered in the deed. I have numbered them according to the numbering adopted by the trial Court except in respect of the last two clauses. The interpretation, which has been accepted by the trial Court and by the lower appellate Court, is that the first clause confers an absolute estate on the donee, and other clauses, e. g., Nos. 2 and 4, being in restraint of alienations and an attempt to alter the legal course of succession, are invalid. The trial Court then considers Cl. 5 and holds that it confers a life interest only. In my opinion this is a very unsatisfactory mode of interpreting a document. It should be read as a whole, and the intention of the executed ascertained from all the clauses considered together and not individually. It is not permissible to take the first clause as if it stood by itself, arrive at the conclusion that it confers an absolute estate, and then proceed to reject the clauses which follow it as repugnant to the absolute estate previously conferred. It is perfectly clear that the words "malik" and "like myself" read with what follows confer no more than a life estate on the donee. This is also the conclusion of the lower Courts as a result of Cl. 5 taken by itself.

None of the lower Courts considered the question whether—assuming the donee had only a life interest—the interest in remainder continued to be vested in the donor. This question is, important in considering the validity of the sale-deed impugned in this case. Ordinarily an estate cannot remain in abeyance and must rest in someone. Ex. hypothesi the deed of gift merely carves out a life estate and makes a gift of it to the donee. The deed does not expressly dispose of the remainder of the property. The power of transfer, which is given to a son, if born to the donee, does not, effectively deal with the interest in remainder. In the first place, no son was in existence at that date; and the only person, in whom it would be vested in the interval between the dates of gift and the birth of a son, was the donor himself. The trial Court is apparently of opinion that the son took only a contingent interest, by which it meant that if one is born, he would become the owner. Taking it in the most favourable light the trial Court's view seems to be that in whomsoever the remainder may be vested at the time of the birth of a son his interest is divested and is vested in the son. There is however nothing in the deed to justify such an assumption. The last clause, which reserves to the donee the right to have the deed of gift cancelled, further strengthens the view that the remainder continued to be vested in the donor after the gift. Such remainder was ancestral property, as before; and as each son was born, he took an interest by birth. Such son, of course, takes an absolute estate, like every male member of a joint Hindu family, and the power of transfer, given by the deed confers no more than such a right. It cannot be said that the father had no interest in the remainder of the estate, which remained in abeyance and became vested in the sons when they were born. In my opinion the interest in remainder was joint family property belonging to the father and the sons.

The sale-deed in favour of the appellants was executed by the mother, who was the owner of a life estate, and the father, who at that time owned the remainder as a member of joint Hindu family with his sons. The alienation, so far as it was made by the mother, did not require legal necessity for its validity; but so far as it conveyed the interest in remainder belonging to the joint family consisting of the plaintiffs and their father, the alienation was not valid unless there was legal necessity for it. The lower Courts have upheld the sale-deed so far as the life interest of the mother is concerned, but have set aside the sale as regards the rest. Both the Courts did not consider the question on the hypothesis that the interest in remainder was joint family property. The trial Court found that money was needed for family business; and if it had held the interest in remainder to be joint family property, it would have upheld the sale

in its entirety. The lower appellate Court has recorded no finding on the question of legal necessity.

The question of legal necessity has two aspects. If the interest in remainder be considered to belong to the joint family consisting of the father and the sons, the question will take the form in which it is put in issue 3 framed in this case. Another aspect of it is that, if the interest in remainder be considered to belong to the plaintiffs alone, as held by the lower Courts, the sale thereof may be still valid if money was needed and was spent for the benefit of the plaintiffs themselves, who were minors, the executants of the sale-deed being their natural guardians. In view of the possibility of a Letters Patent appeal I think it is necessary to have all aspects of this considered and to remit the following two issues to the lower appellate Court for findings: (1) Whether the sale in favour of the appellants, so far as it affected the interest in remainder, assuming the same to be joint family property was justified by legal necessity; and (2) Whether, assuming the interest in remainder to be the property of the plaintiffs, in which their father had no interest, the sale thereof was necessary or for their benefit.

Findings shall be returned within three months. Parties shall be at liberty to adduce fresh evidence. On return of the findings ten days shall be allowed for objections, if any.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 635

SULAIMAN, C. J. AND BENNET, JJ.

Ram Chandar—Defendant — Appellant.

v.

Tiwari Hub Lal and *another* — Plaintiff and Defendants—Respondents.

Second Appeal No. 855 of 1931, Decided on 5th February 1935, from decision of Sub-Judge, Etawah, D/- 11th March 1931.

Agra Tenancy Act (1926), Ss. 196 and 197 —Zamindar giving implied permission to tenant to plant grove—Consent of zamindar to alteration of occupancy holding to grove tenure can be presumed—Such holding can be mortgaged and sold in execution of mortgage decree.

The planting of grove may change the nature of the occupancy holding and render the grove capable of being mortgaged and of being sold in execution sale on a mortgage decree. When zamindar gives implied permission that the tenant should plant a grove on a particular number out of his occupancy holding, the zamindars must be deemed to have consented to the alteration of the tenure to a grove tenure. Accordingly that number becomes capable of mortgage and could be sold in execution of mortgage decree: 1915 *All* 444 and 33 *All* 136, *not Foll.*; 1921 *All* 168; 1924 *All* 430 and 1924 *All* 831, *Rel. on.* [P 636 C 1,2]

A. P. Pandey—for Appellant.

Shiva Prasad Sinha — for Respondents.

Judgment.—This is a second appeal by defendant 3 against concurring decrees of the two lower Courts which have granted the plaintiff-mortgagees a decree for sale on a mortgage of 21st June 1913, executed by one Lalla, who is defendant 1. The mortgage purported to be in regard to two of the former numbers, plots Nos. 50 and 51. We are concerned in the present suit only with plot No. 50 which is the present No. 85. It is found by the lower appellate Court that this number was one of seven numbers which formed the occupancy holding of defendant No. 1 and it was recorded as an occupancy holding in the papers of the settlement of 1872. The plot No. 50 is now occupied by 92 trees, of which 88 are mango trees standing in regular rows and the lower appellate Court has found that this plot is therefore grove-land and was a grove at the time of the mortgage. The question which has been agitated in second appeal is that because the plot was originally part of an occupancy holding therefore the mortgage in 1913 was invalid and the mortgage cannot be enforced by a decree for sale. For the respondents the view is put forward that when the trees were planted on this plot, the plot changed its nature and ceased to be part of an occupancy holding and became grove-land and was therefore transferable by way of mortgage and can be sold in execution of a mortgage decree. There are a number of rulings to which reference has been made and learned counsel for the appellant relies on the following rulings:

1915 All 444 (1), a ruling of 1915; 33 All 136 (2), a ruling of 1909. In the earlier of these rulings of 1909, there was no consideration as to whether the existence of the grove land had changed the nature of the holding, but it was merely held that where an occupancy tenant purported to mortgage a grove which was his occupancy holding, the grove could not be sold in exe-

1. Daya Kishen v. Mohamad Wazir Ahmad, 1915 All 444=30 I C 565.
2. Ram Dial v. Narpat Singh, (1911) 33 All 136=9 I C 931.

cution of a decree on the mortgage. In 1915 All 444 (1), it was held that the planting of a grove by an occupancy tenant on his holding with the permission of the zemindar does not change the nature of the holding from an occupancy tenancy to grove-land and the tenant has not got the right to sell the trees so planted, nor can the trees be sold in execution of a decree against the tenant. This ruling undoubtedly is in favour of the appellant, and if this ruling had been followed by this Court, we consider that it would be a strong reason to allow this appeal. But the ruling has not been followed by this Court. In 1921 All 168 (3), two learned Judges of this Court held the contrary, and this was followed by a learned Single Judge in 1924 All 430 (4), and also by another learned Single Judge in 1924 All 831 (5). These later rulings ranging from 1921 to 1924 lay down that the planting of a grave may change the nature of the occupancy holding and render the grove capable of being mortgaged and of being sold in execution sale on a mortgage decree. That view of the character of the groves has been adopted by the legislature in framing the Agra Tenancy Act, 3 of 1926 and in Ss. 196 and 197 (a) and (b) it is provided that where a tenant such as an occupancy tenant, plants trees on a part of all of his holding so that the portion planted becomes a grove, that part becomes grove-land and is held under non-occupancy tenure and is transferable and the lease will expire when the land ceases to be grove-land. As the view of the later rulings has now been adopted by the legislature we do not think that we should go back to the earlier rulings of 1909 and 1915 on which learned counsel relies, particularly as in one of these rulings, that of 1909, this aspect of the case was not considered as to whether the existence of the grove-land changed the nature of the holding. In the case before us the trees have been standing for a very long time on the holding and the lower appellate Court finds that these trees range in age from 30 to 50 years. On this view of the case we consider that when the zamindars gave implied permission as the lower appellate Court has held that the tenant should plant a grove on this particular number out of his occupancy holding, the zamindars must have consented to the alteration of the tenure of that number from an occupancy tenure to a grove tenure. Accordingly that number became capable of mortgage and could be sold in execution of a mortgage decree.

The decree of the lower appellate Court is correct and we dismiss this second appeal with costs.

K.S. *Appeal dismissed.*

3. Jalesar Sahu v. Raj Mangal, 1921 All 168=63 I C 437=43 All 606.
4. Man Singh v. Madho Singh, 1924 All 430=79 I C 599.
5. Sultan Husain Khan v. Jwala, 1924 All 831=78 I C 480.

A. I. R. 1935 Allahabad 636

NIAMATULLAH, J.

Gopinath Singh and *others*—Plaintiffs—Appellants.

v.

Thakurdin Singh and *others*—Respondents.

Second Appeal No. 4 of 1933, Decided on 1st March 1935, from decision of First Addl. Sub-Judge, Jaunpur, D/- 17th October 1932.

(a) Agra Tenancy Act (1901), S. 22 — Before collaterals can succeed to occupancy tenure on death of widow, they must show that they had shared in cultivation at time of tenant's death—Finding as to this is one of fact.

Before collaterals, who claim an occupancy tenure after the determination of the widow's intervening estate, can succeed, they must establish that they had shared in the cultivation of the holding at the time of the tenant's death. The proviso requires jointness in cultivation at the date of the last male occupancy tenant, whose line of succession is given in S 22 and not merely at the time of widow's death: 1922 *All* 84, *Rel. on.*; 1923 *All* 18, *not Foll.* [P 637 C 2]

The finding as to this is one of fact and must be accepted in second appeal. [P 637 C 2]

(b) Interpretation of Statutes — Courts have to administer law as they find it.

The Courts have to administer the law as they find it. It is for the legislature to remedy the defect, if any. [P 637 C 2]

K. Masud Hasan—for Appellants.

K. Verma and *Ambika Prasad Dube*—for Respondents.

Judgment.—This is a plaintiffs' appeal and arises from a suit for possession of an occupancy holding. Both the Courts below have dismissed the plaintiffs' suit. It is common ground that the occupancy holding in question originally belonged to one Lallu Singh, who died in 1901 and was succeeded by his widow Nidhao. The latter remained in possession of the occupancy holding till her death in 1919. The plaintiffs alleged that their grand-father, Bahadur, was the nearest collateral of her husband alive at the time of

Mussammat Nidhao's death and that he inherited the tenure. The defendants are also collaterals of Lallu, being the sons of one Janki. They are certainly nearer than the plaintiffs: but the plaintiffs' case is that their grandfather Bahadur inherited the tenure on the death of Mussammat Nidhao, when the defendants' father Janki had died. Janki and Nidhao were brothers. The lower Courts have found, or at any rate assumed, that Bahadur was the nearest collateral alive on the death of Lallu; but they have dismissed the plaintiffs' suit on the ground that they failed to establish that Bahadur was joint with Lallu in cultivation of the holding and that, Bahadur could not inherit having regard to the provisions of S. 22 of Act 2 of 1901. The learned Advocate for the appellants points out that Lallu died before the Act 2 of 1901 was passed, and consequently succession to him was not subject to provisions of that Act.

Act 12 of 1881 did not lay down any rule of succession such as is mentioned in S. 22 of Act 2 of 1901. It merely provides that "the right of an occupancy tenant shall devolve as if it were land." This implies that the same rule of succession is to apply to occupancy tenures as to any other land, i. e. in case of Hindus the Hindu Law; but there was an important proviso.

"That no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this clause."

The result is that the Hindu Law as modified by the proviso to S. 9, was applicable to the occupancy holding left by Lallu. The widow remained in possession till 1919, when Act 2 of 1901 was in force. That Act lays down a line of succession providing, inter alia, that the occupancy tenant's widow shall be in possession of the holding "till her death or re-marriage." Like S. 9 of the older case, there is a proviso that

"No collateral relative shall be entitled to inherit in the cultivation of the holding at the time of tenant's death."

Though S. 22 of Act 2 of 1901 lays down rules of succession, it makes no difference so far as the present case is concerned. Whether Act 12 of 1881 or Act 2 of 1901 be applied, in either case the widow of Lallu was entitled to remain in possession for her life, and succession opened on her death. The lower Courts dismissed the plaintiffs' claim on the ground that they, or their grandfather Bahadur, did not share with Lallu in the cultivation of the occupancy tenure. I think that this view is correct. Before collaterals, who claim an occupancy tenure after the determination of the widow's intervening estate, can succeed, they must establish that they had shared in the cultivation of the holding at the time of the tenant's death. Learned advocate for the appellants contends that all that was necessary for the plaintiffs to show was that they had shared in the cultivation of the holding at the time of the widow's death. The argument is based on the assumption that the expression "the tenant" is comprehensive enough to include the widow who paid rent to the proprietor. This view finds some support from 1923 All 18 (1). It is however opposed to a decision of a Division Bench of this Court in 1922 All 84 (2). It is clear to my mind that the proviso requires jointness in cultivation at the date of the last male occupancy tenant, whose line of succession is given in S. 22. It may be, as pointed out by learned advocate for the appellants, that, where the widow's life estate intervenes and the widow proves to be long lived person, it is almost impossible for collaterals to establish that they had shared in the cultivation of the holding at the time of the last male tenant's death. The Courts have to administer the law as they find it. It is for the Legislature to remedy the defect, if any.

On the question of fact whether the plaintiffs' grandfather Bahadur or the plaintiffs shared with Lallu in the cultivation of the occupancy holding the finding of the lower appellate Court is conclusive. That Court held that

"There was practically no evidence in the record to show that the plaintiffs or their father and grandfather were ever joint in cultivation with Lallu Singh himself during his lifetime."

Learned advocate for the appellants contends that this is no finding, as it contains no discussion of evidence and does not take into account Khewats and Khasras. There can be no discussion of evidence where there is none. As for Khewat and Khasras it is not suggested that they contain any entries pointing to the conclusion that the plaintiffs' grandfather and Lallu had anything in common as regards the cultivation of this occupancy tenure. I think the finding is one of fact and must be accepted in second appeal, which is accordingly dismissed with costs.

1. Bhawani Bhikh v. Sidh Narain, 1923 All 18=70 I C 820.
2. Bechu Singh v. Baldeo Singh, 1922 All 84=65 I C 507=44 All 327.

These cross-objections are directed against the findings of the lower Courts and do not attack any part of the decree appealed from. They are not maintainable and are dismissed with costs.

K.S. *Appeal and cross-objection dismissed.*

A. I. R. 1935 Allahabad 638

KENDALL, J.

Tek Chand—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 58 of 1935, Decided on 2nd April 1935, from order of Sess. Judge, Agra, D/- 24th July 1934.

(a) Criminal P. C. (1898), S. 110—Person warning assessor that he would be shot if he did not give opinion in favour of accussd —Held proceedings could be taken against him.

The applicant who was not one of those accused in the conspiracy case, had been present in the precincts of the Court and had threatened one of the assessors in unmistakable term. He was proved to have warned him that if he did not give his opinion in favour of the accused, he would be killed by a pistol or a bomb, and to have made use of other threatening 'expressions and he was proved by the evidence to have sent a threatening message worded in a similar way.

Held: he was a desperate and dangerous character who had unmistakably laid himself open to proceedings under S. 110. [P 638 C 2]

(b) Criminal P. C. (1898), S. 257—Magistrate cannot arbitrarily limit number of defence witnesses — Witnesses summoned— They must be heard or at least reasons for not hearing them should be recorded in writing—Failure to do so vitiates proceedings.

There is no provision in the Criminal Procedure Code by which a Magistrate can arbitrarily limit the number of witnesses for the defence. S. 257 which is one of the provisions relating to warrant cases, lays down that a Magistrate may refuse to issue process for the appearance of witnesses, when he considers the application to be for the purpose of vexatious delay or for defeating the ends of justice; but in such a case the grounds for refusing to summon them shall be recorded in writing. Having summoned them however he must be presumed to have concluded that they are not being produced by the accused for the purpose of vexation or delay, etc., and therefore he should hear them, and in any case he must record his reasons for not hearing them in writing. Failure to do so is an irregularity which is sufficient to vitiate the proceedings. [P 639 C 1]

B. S. Darbari—for Applicant.

Asst. Govt. Advocate—for the Crown.

Order.—The applicant, Tek Chand, was ordered by a First Class Magistrate to provide a personal bond and sureties under S. 118, Criminal P. C., because he was found to be a desperate and dangerous character within the meaning of Cl. (f), S. 110, Criminal P. C. The learned Sessions Judge maintained the order in appeal. I am asked to interfere for more than one reason.

The first point taken is that, as the learned Judge has remarked, the proceedings against the applicant were an off-shoot of what was called the Agra Conspiracy Case in which one Bachcha Babu and several others were prosecuted under the Arms Act for conspiracy and for other offences. In that case the accused were convicted in the Sessions Court on 19th February 1934, but all of them except Bachcha Babu were acquitted by the High Court on appeal on 26th November 1934. The Sessions Judge passed orders in the present case on 24th July 1934, i. e., before the appellate decision of the High Court. It has therefore been pointed out that it has been found by the High Court that the alleged conspiracy has not been proved to exist, and that one or two of the events on account of which proceedings have been taken against the present applicants did not take place. All this is true and has a certain force, but the evidence on which the Magistrate and the Judge mainly relied in the present proceedings was of a special character. It was found that the applicant, who was not one of those accused in the conspiracy case, had been present in the precincts of the Court and had threatened one of the assessors in unmistakable terms. He was proved to have warned Sirdar Singh that if he did not give his opinion in favour of the accused he would be killed by a pistol or a bomb, and to have made use of other threatening expressions, and he was proved by the evidence of Sirdar Singh and another witness, Chhanga Mal, to have sent a threatening message, through Chhanga Mal to Sirdar Singh worded in a similar way. In my opinion, the Courts were perfectly justified in holding that a man who was proved to have acted in this way was a desperate and dangerous character who had unmistakably laid himself open to proceedings under S. 110, Criminal P. C. I have not gone into the other evidence brought against the applicant, though I am told there is plenty of it, because this part of the case for the applicant does not appear to me to be well founded.

There is however one serious irregularity in the proceedings. The ap-

plicant summoned 32 witnesses for the defence and after hearing 21 of them, the Magistrate refused to hear any more. There is no provision in the Criminal Procedure Code by which a Magistrate can arbitrarily limit the number of witnesses for the defence. S. 257, which is one of the provisions relating to warrant cases, the procedure which governs the present case lays down that a Magistrate may refuse to issue process for the appearance of witnesses. when he considers the application to be for the purpose of vexation or delay or for defeating the ends of justice, but in such a case the grounds for refusing to summon them shall be recorded in writing. Having summoned them however he must be presumed to have concluded that they are not being produced by the accused for the purpose of vexation or delay, etc. ,and therefore he should hear them, and in any case he must record his reasons for not hearing them in writing.

This alone would be sufficient to vitiate the proceedings. It has further been pointed out that the conduct on account of which the applicant was prosecuted took place in 1932 and that the result of it was to bind him to be of good behaviour for one year. It has been suggested therefore that the order would not have been very effective, but Dr. Wali Ullah has pointed out that there is other evidence on the file which relates to the conduct of the applicant which took place subsequently in 1932. I have already remarked that I have not thought it necessary to go into the evidence as the present order must be set aside on the grounds of the irregularity I have mentioned. I therefore accept the application, set aside the orders of the Magistrate and of the Sessions Judge, and direct that the bond of sureties if provided be discharged.

K.S. *Application accepted.*

A. I. R. 1935 Allahabad 639

NIAMATULLAH, J.

Kallu and *others* — Defendants—Appellants.

v.

Mt. Jayanti—Plaintiff—Respondent.

Second Appeal No. 1472 of 1934, Decided on 15th February 1935, from decision of Sub-Judge, Saharanpur, D/- 27th August 1934.

Adverse possession—Widow in possession of house after husband's death leaving house and living in another house for convenience — Her mother-in-law having right of residence continuing in possession—Held widow cannot be deemed to be dispossessed as long as her mother-in-law was in possession.

After the death of last male-holder, his widow lived in the house for some time and left it and lived in another house for convenience. Her mother-in- law, mother of last male holder who was entitled to right of residence, lived in the house and on her death some collaterals claimed to possess the house adversely to her on the ground thatshe was dispossessed when she left it.

Held: that merely because she left the house she could not be said to be dispossessed from such date but that she should be deemed to have continued in possession till she was ousted by another person claiming adversely to her.

[P 640 C 1, 2]

G. S. Pathak—for Appellant.

Judgment.—This is a defendants' appeal arising out of a suit brought by the respondent for possession of a house. The respondent, Mt. Jayanti, is the widow of one Bhagwan Singh, who admittedly owned and occupied the house till his death. He died about 21 years before the institution of the suit, leaving the plaintiff, his widow, and Mt. Bhagwan Dei, his mother. Bhagwan Dei died in 1931, and the present suit was instituted in December 1932. The plaintiff claimed the house as the heir of her husband. The defendants are the collaterals of Bhagwan Singh.

The only defence, which need be taken notice of at this stage, is that the plaintiff became unchaste after the death of Bhagwan Singh and left the house which has since been in their adverse possession. The plaintiff had alleged in the plaint that she was dispossessed of the house on the 13th day after the death of her mother-in-law.

The trial Court framed two issues. One was whether the plaintiff was in possession within 12 years. The other was whether the defendants were in adverse possession for more than 12 years before the suit. It is quite clear that up to the time the Court framed issues it had not made up its mind as to whether Art. 142 or 144, Limitation Act, should be applied. Both parties led evidence, the plaintiff attempting to prove her allegation and the defendants attempting to prove theirs, namely, that they were in adverse possession of the house for more than 12 years before the institution of the suit. There is no doubt that if the defendants were in possession of the house for more than 12 years, their possession was prima facie adverse. The trial Court dealt with both the

issues together and expressed the opinion that Art. 144 was applicable. After discussing the evidence it arrived at the conclusion that the plaintiff was in possession of the house for sometime after her husband's death, that she left the house and began to live in other houses which she had rented, but that her mother-in-law continued to reside in the house. The witnesses examined by the defendants in proof of their possession were positively disbelieved. The case having been approached from the point of view already stated, the trial Court held that the defendants failed to establish adverse possession for more than 12 years. On that finding the plaintiff's suit was decreed. In appeal the lower appellate Court also applied Art. 144 and held that the defendants failed to establish the adverse possession set up by them.

In second appeal it is contended that the articles which should have been applied is 142 and that, in the absence of a finding that the plaintiff was in possession within 12 years before the institution of the suit, a decree should not have been passed in her favour. In the view of the case I am inclined to take, it is not necessary for me to express a decisive opinion as to whether Art. 142 or 144 is the correct article to apply. I assume for the purposes of this case that Art. 142 is applicable and that it was for the plaintiff to establish that she was in possession within 12 years before the institution of the suit. In other words, it should be established that she was not dispossessed, or that her possession was not discontinued at a time which was more than 12 years before the institution of the suit. In my opinion the finding of the lower Courts that the defendant's version, as given by their witnesses, is untrue clearly establishes the fact that the plaintiff's possession was continued till the date of Mt. Bhagwan Dei's death. Both the Courts have definitely found that the plaintiff's mother-in-law, Mt. Bhagwan Dei, lived in the house till 1931. It cannot be suggested that her possession was adverse to the plaintiff. She was the mother of the last male holder and had a right of residence; and if she had she lived in the house with the plaintiff's consent. It cannot be said that occupation of the house by the mother-in-law alone after the plaintiff left amounted to dispossession of the latter. That the plaintiff lived in the house for sometime after the husband's death has been found by both the Courts below. It does not appear that she left her husband's house and began to live in a rented house, because she was compelled to do so or because the defendants brought about a situation which made it impossible for her to continue to reside in her husband's house. On the evidence all that can be suggested is that she found it more convenient to live apart from her mother-in-law. I am unable to say that her possession of her husband's house discontinued only because she took up her residence in another house. Her possession must be deemed to have continued till she was ousted by another person claiming adversely to her. Such an event did not happen till the death of Mt. Bhagwan Dei. I am clearly of opinion that on the facts found by both the Courts below the plaintiff must be considered to have had a subsisting title when she instituted the suit, even if Art. 142, Limitation Act, be applied.

This appeal is dismissed, under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 640

NIAMATULLAH, J.

Baloo and *another*—Plaintiff—Appellants.

v.

Nanu and *others*—Defendants—Respondents.

Second Appeal No. 1110 of 1934, Decided on 21st January 1935, from decision of First Sub-Judge, Meerut, D/-18th March 1934.

Civil P. C. (1908), O. 22, R. 3 — Suit for possession of land and demolition of buildings thereon made by defendants decreed—Appeal by all defendants—Death of one of appellants but legal representative not brought on record—Appeal does not abate entirely.

A suit for recovery of possession of a plot of land and for demolition of certain constructions made by the defendants thereon, was decreed by the trial Court. The defendants, eight in number, preferred an appeal to the lower appellate Court. During the pendency of the appeal one of the defendants died and his legal representatives were not brought on the record. The appeal was accepted and plaintiffs suit was dismissed in toto. It was contended that the legal representatives of one of the defendants not having been brought on the record the entire appeal should be deemed to have abated, and that in any case the decree of the trial Court should not have been reversed so far as it affects the deceased.

Held: that the appellants in the lower appellate Court were the defendants any one of them

could have resisted the plaintiff's claim to possession and to demolition of the constructions made by the defendants. If the deceased had not originally joined in the appeal. the remaining seven or, for the matter of that, anyone of them, could have appealed from the decree of the trial Court, impugning it in its entirety. The fact that deceased died can only lead to the conclusion that the appeal in the lower appellate Court abated so far as he was concerned; but the appeal could not abate so far as the surviving appellants were concerned. As any one of them could have impugned the entire decree and the lower appellate Court did set aside the entire decree at their instance and dismissed the plaintiff's suit in toto no fault can be found with the procedure of that Court. Hence the decree of the lower appellate Court dismissing the plaintiff's suit was not open to challenge.

[P 641 C 1, 2]

K. C. Mital—for Appellants.

Judgment.—This is a plaintiffs' appeal and arises from a suit for recovery of possession of a plot of land and for demolition of certain constructions admittedly made by the defendants thereon. The plaintiffs' case was that the defendants had encroached upon the plaintiffs' land in 1927 and that they had no right to build on it. The defence was that the land was the property of the defendants and that the constructions complained of by the plaintiffs had been made 30 years before the suit. The plaintiff's suit was decreed by the trial Court. The defendants, eight in number, preferred an appeal to the lower appellate Court. The appellant has filed an affidavit which shows that during the pendency of the appeal before the lower appellate Court one of the defendants, namely, Amar Singh, died and his legal representatives were not brought on the record. Apparently this fact was not brought to the notice of the lower Court when the appeal was heard. The learned Judge accepted the appeal and dismissed "the plaintiffs' suit in toto." One of the grounds taken in second appeal is that the legal representatives of one of the defendants not having been brought on the records the entire appeal should be deemed to have abated, and that in any case the decree of the trial Court should not have been reversed so far as it affects the deceased Amar Singh. I am unable to give effect to this contention. The appellants in the lower appellate Court were the defendants. It cannot be disputed that any one of them could have resisted the plaintiffs' claim to possession and to demolition of the constructions made by the defendants. If Amar Singh had not originally joined in the appeal, the remaining seven or, for the matter of that, anyone of them could have appealed from the decree of the trial Court. impugning it in its entirety. The fact that Amar Singh died can only lead to the conclusion that the appeal in the lower appellate Court abated so far as he was concerned; but the appeal could not abate so far as the surviving appellants were concerned. As anyone of them could have impugned the entire decree and the lower appellate Court did set aside the entire decree at their instance and dismissed the plaintiffs' suit in toto no fault can be found with the procedure of that Court. In my opinion the decree of the lower appellate Court dismissing the plaintiffs' suit is not open to challenge.

The only other question argued before me is whether the conclusion arrived at by the lower appellate Court on the main question on which his decree proceeds is correct. That conclusion is that the defendants constructed the "gher" in question not in 1927, as alleged by the plaintiffs, but 30 years before the institution of the suit. It is the plaintiffs' own case that in constructing the "gher" the defendants were guilty of an act of trespass. This being so, the trespass complained of by the plaintiffs took place 30 years before the institution of this suit. The logical result of this finding is that the defendants were in adverse possession for more than 12 years before the institution of this suit. The learned advocate for the appellants argues that the defendants did not take the plea of adverse possession in so many words in the written statement. This is true, but it is clearly implied in the defendants' allegation that they constructed the "gher" 30 years before the suit. There was no other object in making an allegation of this kind. It was understood in that sense by the Courts below, and since a finding has been arrived at, effect must be given to it. The only manner in which effect can be given to such a finding is that the plaintiffs' suit should be held to be barred by limitation. This appeal has no force and is dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

A. . R. 1935 Allahabad 642 (1)

BENNET, J.

Chandra Shekhar—Plaintiff — Appellant.

v.

Sri Thakurji Maharaj and *others* — Defendants--Opposite Parties.

Civil Revn No. 613 of 1934, Decided on 27th February 1935, against order of Sub-Judge, Farrukhabad, D/- 2nd October 1934.

Civil P. C. (1908), O. 47, R. 1 — Suit for possession of revenue free land—Profits calculated by taking fasli year and not year as in General Clauses Act—Held there was no error on face of record—Argument of deduction held should be made in original order and not at time of review.

Where in a suit for possession of revenue free land, the Court calculated the profits by taking the fasli year and not year as defined in General Clauses Act :

Held : that it was correct and that there was no error apparent on face of record :

Held further, that argument about deductions was to be made at the time of the original order and not later on an application for review. [P 642 C 2]

M. L. Chaturvedi—for Applicant.

P. M. L. Verma—for Opposite Party.

Order.—This is an application in revision by a plaintiff against an order refusing review. The plaintiff brought a suit for possession of a part of a village which was revenue-free and the defendant filed an objection that the court-fee was insufficient. The Court passed an order in regard to the amount of court-fee, and calculated the profits under the Court-fees Act, S. 7 (v) (c) after hearing the parties. The review asks that the Court should reconsider that order on the ground that there was an error apparent on the face of the record. In the grounds of revision it is set out that there was an error as profits had not been calculated for the next previous year but for a period much prior. Learned counsel explains that the suit was brought on 26th January 1933, and that in his opinion the year to be taken was the year 1932. He bases this on the General Clauses Act, definition of "year" as calendar year. But it is stated in S. 3 that these definitions will apply "unless there is anything repugnant in the subject or context. In the context of this sub-S. (v) there are sub-Ss. (a) and (b) relating to land paying revenue to Government. For Government revenue the perid taken is the Fasli year. The Court therefore naturally took the Fasli year 1339 for sub-S. (c) where the land was revenue free. I consider that from the context the Court was correct and it cannot be said that in not applying the General Clauses Act there was any error on the face of the record. Moreover from the subject also the Court was correct because the profits in the patwari's registers are made up for the Fasli year and not for the calendar year. Learned counsel further argued that the matters in ground No. 4 had not been considered. That was some question of deductions. Whatever argument about deductions was to be made should have been made at the time of the original order and not later on on application for review. Reference was made to 1924 Mad 98 (1). That was a case where there was an error of law apparent on perusal of the record. It cannot be said that the present order was one where there was any such error apparent. For these reasons I dismiss this application with costs.

K S. *Application dismissed.*

1. Murari Rao v. Balvanth Dikshit, 1924 Mad 98=76 I C 342=46 Mad 955.

A. I. R. 1935 Allahabad 642 (2)

GANGA NATH, J.

Munshi Muhammad-ud-din — Plaintiff—Appellant.

v.

Bhupan—Defendant—Respondent.

Second Appeals Nos 1346 and 1347, of 1932, Decided on 8th March 1935, from decision of Sub Judge, Meerut, D/- 19th May 1932.

U. P. Land Revenue Act (3 of 1901), S. 86—Chaukidara is not ground rent but is cess—If not recorded in last settlement, it cannot be recovered under S. 86.

The Chaukidara cannot be regarded as ground-rent for the houses of the raiyats but is apparently a cess. Where no such cess has been recorded in the last settlement, it is not recoverable under the provisions of S. 86 of the Act: 1927 *All* 520, *Rel on*. [P 613 C 1]

A. Aziz—for Appellant.

N. P. Asthana and *H. P. Asthana*—for Respondent.

Judgment.—Second Appeal No. 1347 of 1932 has been heard with this appeal. Both these appeals are plaintiff's appeals and arise out of two suits brought by the same plaintiff against the defendants-respondents to recover arrears of ground-rent. The plaintiff brought the suits as mutwalli of the abadi in which the defendants' houses are. The defendants contended that they had never paid any ground-rent and that they were not liable to pay any. The plaintiff relied on para. 28

of the wajibularz of 1278 Fasli which is as follows:

"Raiyats who have settled in the village render service according to their profession and chaukidara is also realised from them according to their status."

The plaintiff claimed ground-rent from the defendants on the basis of the provision for chaukidara in this wajibularz. As has been rightly held by both the Courts below chaukidara cannot be regarded as ground-rent. On the other hand chaukidara was assessed not to be paid by the defendants on account of the use and occupation of their houses or on account of the rent of the sites of their houses but to be paid by the raiyats on account of the salaries of the chaukidars maintained for the safety of the village. The chaukidara could not be regarded as ground-rent for the houses of the raiyats but is apparently a cess. The same point was considered in 1927 All 520 (1) where the same view was taken. S. 86, Land Revenue Act, provides that:

"A list of all cesses other than those referred to in S. 56 levied in accordance with village custom shall if generally or especially sanctioned by the Local Government be recorded by the Settlement Officer and no cesses not so recorded shall be recoverable in any Civil or Revenue Court; and no such list shall be altered or added to during the currency of settlement."

After the settlement of 1278 Fasli another settlement took place but no wajibularz of it was produced. If there had been any entry of any such chaukidara cess in it as was entered in the wajibularz of 1278 Fasli, the plaintiff would certainly have produced it. As no such cess was recorded in the last settlement, it is not recoverable under the provisions of S. 86, Land Revenue Act.

Both the suits have been rightly dismissed by the Courts below. It is therefore ordered that both the appeals be dismissed with costs and the decrees of the lower Court be confirmed.

K S. *Appeal dismissed.*

1. Tirkha Ram v. Chhotey, 1927 All 520=100 I C 740.

A. I. R. 1935 Allahabad 643

SULAIMAN, C. J. AND BENNET, J.

Bhagwandas— Defendant—Appellant.

v.

Lakshmi Chand and *another*—Plaintiffs and Defendants— Respondents.

Second Appeal No. 1015 of 1931, Decided on 5th February 1935, from decision of Dist. Judge, Agra.

(a) Hindu Law—Joint family—Joint family firm adjudged insolvent—Effect is to make all members of family insolvents -Provincial Insolvency Act, S. 79, rules under, framed by Allahabad High Court, Chap. 19, R. 27.

The effect of the adjudication of a joint Hindu family firm as an insolvent is to make all the members of the family insolvents. [P 644 C 2]

(b) Insolvency—Decree obtained by creditor on understanding that debtor is insolvent —Exclusive remedy is to go to insolvency Court and not by proceeding separately by way of execution.

Where a creditor obtains his decree on the understanding that he was getting a decree against certain insolvents, his exclusive remedy would be to go the Insolvency Court and get rateable shares in the assets and not that he would proceed separately by way of execution and claim priority as against the Official Receiver. [P 644 C 2]

(c) Provincial Insolvency Act (1920), S. 28 —Right of Hindu father to dispose of joint family property is property within meaning of S. 28—Such right vests in receiver and he can seize the property and sell it without taking an attachment.

The right of a Hindu father to dispose of the joint Hindu family property in order to satisfy his own debts is property within the meaning of S. 28 of the Act and vests in the receiver and the receiver is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. It is not incumbent on such a receiver to obtain an order of the Court to execute it and attach the family property. He can straight away seize the property and sell it under a private deed it not being incumbent upon him to take an attachment. Hence the seizure of the property by the receiver must be taken to be tantamount to attachment of the property by him so as to get his interest crystallised in preference to any creditor who subsequently attaches the same property: 1931 *All* 162 (*F B*), *Foll.* [P 644 C 2]

(d) Hindu Law -Joint family — Insolvency of joint family firm—One member surrendering his rights to Official Receiver — Subsequent attachment of his interest by another creditor—It does not confer any additional right on him paramount to that of receiver—Insolvency.

Where a Hindu joint family firm is adjudged insolvent and one of the members surrenders his rights to the Official Receiver and subsequently a creditor attaches his interest, the attaching creditor does not acquire any additional right paramount to that of the Official Receiver. [P 645 C 1]

N. P. Asthana and *B. N. Saha* — for Appellant.

B. Malik—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for declaration as to the plaintiff's ownership in a certain property. Munna Lal and his three sons were carrying on an ancestral business under the name of firm Gobind Ram Munna Lal and became heavily indebted. On the application of some of the creditors the firm

was declared insolvent on 1st August 1922. In the application the firm had been described as the firm Gobind Ram Munna Lal through Munna Lal Radhe Lal and Brij Mohan, and the name of Amolak Chand, the youngest son of Munna Lal, was somehow omitted from the application. But it is noteworthy that it was the firm itself which was adjudicated as insolvent and not the individual members of the family.

The present defendant-appellant obtained a decree against the firm through the four persons on 14th November 1922. An objection had been taken in the suit that the defendants were insolvents and they could not be sued separately but the Court overruled that objection on the ground that a decree could be given on certain conditions and pointed out that the decree-holder would of course take the decree to the insolvent Court and get a rateable distribution of the assets along with the other creditors. In the Insolvency Court a composition scheme was submitted and approved by the Court on 16th May 1924, to which the present appellants also agree. In accordance with the composition scheme one Ram Babu was appointed receiver to the estate and he took charge of the entire family property including the undivided shares of all the members. In order to strengthen the position of the receiver Amolak Chand, whose name had been left out from the application, executed a deed of release on 10th July 1924, relinquishing all claim to any share in the family property. It was after this release that the present defendant in execution of the decree got Amolak's share attached on 14th May 1925. On 5th February 1925, Ram Babu the receiver sold the property to the present plaintiff. It was after the sale that the defendant-appellant purchased Amolak's share at auction. We are not concerned with the result of the finding in a previous proceeding which took place in 1927 to which neither the official receiver nor the present respondent was a party.

The Courts below have disallowed the pleas of the defendants and have decreed the claim holding that the property validly passed to the present plaintiff in preference to the defendant. There are several grounds on which the defendant's case must fail.

In the first place it was the firm itself which was declared insolvent and not any individual persons. Under the authority vested in this High Court by S. 79, Provincial Insolvency Act, this Court has framed certain rules which have the same effect as if enacted in this Act. Ch. 19, R. 27, provides that adjudication order made against a firm shall operate as if it were an adjudication order made against each of the persons who at the date of the order is a partner in the firm. If that analogy be applied to the members of a firm carried on by a joint Hindu family then the effect of the adjudication of the firm as an insolvent was to make all the members of the family insolvents.

In the second place the defendant-appellant obtained his decree on the understanding that he was getting a decree against certain insolvents and his exclusive remedy would be to go to the insolvency Court and get rateable shares in the assets and not that he would proceed separately by way of execution and claim priority as against the official receiver. In the third place the defendant himself agreed to the composition scheme and was a party to the arrangement under which the entire property was to be disposed of by the official receiver. In the fourth place the official receiver had already taken possession of the entire estate on behalf of the creditors and had exercised the right which had previously vested in the father to dispose of the property in payment of his debt.

It has now been held by the Full Bench in the case of 1931 All 162 (1) that the right of a Hindu father to dispose of the joint Hindu family property in order to satisfy his own debts is property within the meaning of S. 28, Insolvency Act, and vests in the receiver and that the receiver is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. Now it is not incumbent on such a receiver to obtain an order of the Court to execute it and attach the family property. He can straightaway seize the property and sell it under a private deed, it not being incumbent upon him to take an attachment. In these circumstances if the principles of English Law are to be applied to the system under which properties are held by a Hindu family the seizure of the property by the receiver must be taken to be tantamount to attachment of the property by him so as

1. Anand Prakash v. Narain Das Dori Lal, 1931 All 162=135 I C 119=53 All 239 (F B).

to get his interest crystallised in preference to any creditor who subsequently attaches the same property. We do not think that the receiver should be put in any worse position than if he had actually taken out an order for attachment and got the property attached though in either case he would sell it afterwards.

In the fifth place the appellant instead of going to the insolvency Court and claiming the rateable share in the assets as had been directed in the judgment, proceeded to execute the decree independently of the insolvency Court and attached the property contrary to the provisions of S. 28 (2), Insolvency Act. He had no right to take this legal proceeding independently of the insolvency Court.

In the sixth place Amolak had already executed a deed of release in favour of the receiver relinquishing all his interest in the property. There is nothing in the law to prevent him from surrendering his rights particularly when the firm was declared insolvent. The debts were due against the whole family and as a member of the family he was under the rules of the High Court liable to pay such debts. The subsequent attachment of the supposed interest of Amolak by the present appellant cannot confer upon him any additional right which would be paramount to the rights of the receiver. We therefore think that the appeal has no force and we accordingly dismiss it with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 645

BAJPAI, J.

(*Firm*) *Sansarchand Lachhman Das*—Appellant.

v.

Dina Nath Dube—Defendant— Opposite Party.

Ex. Second Appeal No. 329 of 1933, Decided on 20th December 1934, from decision of Second Sub-Judge, Saharanpur, D/- 4th February 1933.

Decree—Two conflicting decrees obtained by parties — Last one is effective — But if cause of action and issues are different in two suits, decrees are not conflicting.

If two conflicting decrees have been obtained by parties in two different Courts or even from the same Court then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this salutary rule is that if a party who could raise the plea of res judicata does not raise the same when an opportunity is given to him he must be deemed to have waived it. The plea of res judicata is not one which affects the jurisdiction of a Court. It is a plea in bar and such a plea can be waived. But where the cause of action and the issues in the earlier suit are different from those in the later suit the decrees are not confiicting and the earlier decree can be executed. [P 647 C 1]

Panna Lal and *S. K. Mukerji* — for Appellant.

K. L. Misra—for Respondent.

Judgment.—This is a plaintiffs' appeal and the facts which have given rise to this appeal may be stated: The firm of Sansarchand Lachhman Das has two branches, one at Saharanpur and the other at Hoshiarpur. On 10th January 1927, Dina Nath sued the Saharanpur firm in the Calcutta High Court for recovery of a sum of Rs. 4,301. This suit was numbered as 72 of 1927. The record of the Calcutta case was before the Court below but in spite of attempts made by parties the record could not come to this Court. The plaintiff however has filed the plaint of the suit and a perusal of the same shows that Dina Nath's claim was formulated in the following way: He alleged that between 2nd May 1926, and 11th October 1926, he supplied goods of the value of Rupees 10,502-11-0 to Sansarchand Lachhman Das and again between 14th August 1926, and 11th October 1926, the defendant took delivery of four wagons of soft molasses of the value of Rupees 3,824-13-9 although the defendant had agreed to take delivery of 23 wagons. The total price for the goods actually taken delivery of by Sansarchand Lachhmandas thus came to Rupees 14,327-8-9. To this was added a sum of Rs. 273-7-3 by way of interest. It was then alleged that because of the fact that the defendant did not take delivery of nineteen wagons of soft molasses although he had agreed to that effect, Dina Nath suffered a loss of Rs. 1,200. Thus the claim was for the recovery of Rs. 4,301. On 27th February 1927, this suit was shelved by the Calcutta High Court and the exact reasons for this procedure are not quite apparent. It appears however from certain statements made by counsel before me that Dina Nath, because of certain representations made by a relation of Sansarchand, thought that this matter as well as a certain other matter had been compromised and some payments under the compromise had been made. Dina Nath therefore on 15th January 1930, filed a suit in the Small Cause Court at Calcutta for Rs. 395-2-3 which according to him was the balance due to him under the compromise in respect of the two matters. Sansarchand

Lachhmandas on 15th February 1930, denied that there was any compromise or that the compromise was effected by an authorised person and indeed they alleged that there was an overpayment made by them. Upon this Dina Nath withdrew his suit with liberty to institute a fresh suit on 10th April 1930.

On 5th March 1930 Sansarchand Lachhmandas filed suit No. 729 of 1930 in the Court of small causes at Saharanpur against Dina Nath for the recovery of a sum of Rs. 196-10-0. This claim was formulated in the following manner: It was alleged by them that they purchased goods of the value of Rs. 14,303-6-0 and not of Rs. 14,327-8-9 as alleged by Dina Nath and that they made payments to the extent of Rs. 14,500. This sum of Rs. 14,500 is composed of the Rupees 11,500 admitted by Dina Nath in his suit No. 72 of 1927 and Rs. 3,000 said to have been paid later on after the institution of the suit. Sansarchand's case therefore was that he made an over-payment of Rupees 196-10-0. This suit was decreed ex parte by the Small Cause Court Judge at Saharanpur on 12th June 1930, and the decree has been satisfied.

Dina Nath then took some proceedings in the Calcutta High Court for the revival of his suit No. 72 of 1927. What exactly these proceedings were is not quite known but it appears from the decree of the Calcutta High Court filed on the record of this suit that Dina Nath's claim was decreed for Rs. 1,001 with interest and costs. It is obvious how this sum was arrived at. Dina Nath's claim was originally for Rs. 4,301. Dina Nath admitted that subsequent to the institution of the suit a sum of Rupees 3,300 was paid by Sansarchand Lachhmandas and therefore his claim for Rs. 1,001 was still outstanding and his suit was decreed ex parte for this amount.

It would thus appear that so far as suit No. 72 of 1927 of the Calcutta High Court is concerned, the claim includes a claim for Rs. 1,200 as damages in respect of nineteen wagons and that credit was given for a sum not only of Rs. 3,000 but of another extra sum of Rs. 300. So far as Sansarchand Lachhmandas's suit at Saharanpur is concerned, it is also clear that it did not in any way embrace any question relating to nineteen wagons nor did it in any way admit the payment of Rs. 300 by himself; indeed his case as stated by his counsel was that this sum of Rs. 300 was paid towards the liability of the Hoshiarpur branch. It would therefore appear that in suit No. 72 of 1927 a claim for damages in connection with nineteen wagons was included and a payment of Rs. 300 was also given credit and neither of these two transactions formed part of suit No. 729 of 1930 in the Court of small causes at Saharanpur. It may also be mentioned that Sansarchand Lachhmandas was fully aware of the Calcutta suit as well as the revival proceedings that took place on or about 1st May 1930. In the same way Dina Nath was aware of the suit filed against him at Saharanpur. Dina Nath got his decree in suit No. 72 of 1927 transferred from the Calcutta High Court to the Saharanpur Court and prayed for the realisation of Rs. 1,570-9-0 which is composed of the principal sum of Rs. 1,001 and interest and costs.

Sansarchand Lachhmandas then brought the present suit No. 466 of 1931 in the Court of the City Munsif of Saharanpur praying that the defendant Dina Nath may be ordered not to take out execution of his decree in suit No. 72 of 1927 by the Calcutta High Court. The trial Court held that this was in the nature of an objection to the execution taken out by Dina Nath and therefore the suit was converted into proceedings under S. 47, Civil P. C. It is said by parties that this procedure was a correct procedure. Courts below have come to the conclusion that there is no bar to the execution taken by Dina Nath and that the plaintiff Sansarchand Lachhmandas is not entitled to say that Dina Nath should be restrained from executing his decree.

The contention of Sansarchand Lachhmandas is that by reason of the decree which he obtained in suit No. 729 of 1930, Dina Nath's decree in suit No. 72 of 1927 has become ineffectual. It is contended that there are two conflicting decrees and therefore the last of such decrees should prevail. There is no doubt that the decree at Saharanpur in Sansarchand's suit was passed after the decree of the Calcutta High Court and the question which I have got to decide is whether the two decrees are conflicting or whether they relate to two different matters. It is not correct to say that the plea taken by Sansarchand is a plea of res judicata strictly speaking. His contention

must be deemed to amount to this, that on the principles underlying the plea of res judicata which aims at avoiding multiplicity of litigation and at securing finality, if two conflicting decrees have been obtained by parties from two different Courts or even from the same Court then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this salutary rule is that if a party who could raise the plea of res judicata does not raise the same when an opportunity is given to him he must be deemed to have waived it. The plea of res judicata is not one which affects the jurisdiction of a Court. It is a plea in bar and such a plea can be waived. When Sansarchand filed his suit in Saharanpur it is said that it was open to Dina Nath to plead that the suit was barred by res judicata because of the decree that Dina Nath had obtained in the Calcutta High Court. I have therefore got to decide whether Dina Nath could with success have advanced the plea of res judicata. In an earlier portion of my judgment I have taken some pains to describe at length the claim which was made by Dina Nath in the Calcutta suit and the claim that was made by Sansarchand before the Small Cause Court at Saharanpur, and I have come to the conclusion that the Calcutta suit comprised a claim for damages which was not in issue in the Saharanpur Court. The Calcutta suit, further, took into consideration a payment of Rs. 300 which was not dealt with in the Saharanpur suit and as such the cause of action and the issues in the Calcutta suit were different from the cause of action and the issues in the Saharanpur suit and it was not possible for Dina Nath to have pleaded before the Saharanpur Court that the decree of the Calcutta High Court was res judicata. In this view there are no two conflicting decisions and it is not possible for Sansarchand Lachhmandas to argue that the Calcutta decree is incapable of execution.

For the reasons given above, I think the view taken by the Courts below is correct and I dismiss this appeal with costs. The injunction that has been issued at the instance of the appellant will be discharged. Leave to file an appeal by way of Letters Patent is allowed.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 647

BENNET, J.

Ganga Singh and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn No. 951 of 1934, Decided on 18th December 1934, from order of Sess. Judge, Kumaun, D/- 18th September 1934.

(a) Criminal P. C. (1898), S. 537 — Cross-cases — Joint trial — Prosecution evidence constituting defence evidence in the other — No prejudice caused — Irregularity is cured by S. 537.

Where in a joint trial of two cross-cases, the prosecution evidence in one was taken as the defence evidence in the other, there is an irregularity and if no prejudice is caused to the accused, it is cured by S. 537: 1924 *Lah* 104, *Diss. from*; 1928 *All* 593; 20 *Cal* 537 and 1927 *P C* 26, *Rel. on.* [P 648 C 1]

(b) Penal Code (1860), S. 452 — Criminal trespass committed with object of interfering with religion is not to be lightly treated.

Criminal trespass committed with object of preventing certain person from employing another as his priest is not to be lightly treated, as it is an interference with religion. [P 649 C 1]

H. P. Sen—for Applicants.

Asst. Govt. Advocate—for the Crown.

Order.—This is an application in criminal revision on behalf of six persons who were sentenced by a Magistrate under Ss. 147 and 452, Penal Code to 3 months' rigorous imprisonment and Rs. 50, fine. On appeal the lower Court altered the conviction to one under S. 143, Penal Code, and set aside the sentence of imprisonment and maintained the sentences of fine. The case for the prosecution was that the accused objected to the complainant, Udai Singh, employing a Brahman called Khiali Ram as his priest and because they had out-casted Khiali Ram, the accused in a body forcibly entered the house of the complainant in order to overawe the complainant and threatened to beat the complainant and complainant ran away. The first ground which is argued was No. 3 in revision that the joint trial of the applicants along with the accused in the cross-case filed by Ganga Singh was illegal as prosecution evidence in one constituted the defence evidence in the other. There were these two cross-complaints before the Magistrate, one by Udai Singh and the other by Ganga Singh. The Magistrate has stated that the prosecution in the one case is the defence in the other. The evidence produced by the parties does both for the prosecution in one and

defence in the other case excepting that Udai Singh, etc., have examined three more witnesses in defence besides the nine witnesses examined as prosecution witnesses. Ganga Singh and others have examined six witnesses both for the prosecution purposes and in their defence. The counsel in each case agreed to this course. It is not alleged for the applicants that there was any irregularity in the recording of the prosecution evidence in the present case or that there was any defence evidence which they desired to produce and which was not allowed. Their objection merely is a technical one. Learned counsel relied on the case of 1924 Lah 104 (1) where it was held that any irregularity of this nature could not be cured under S. 537, Criminal P. C. No other ruling was produced in support of the contention. On the other hand it has been held by a Bench of this Court in 1928 All 593 (2) in a similar case that it was not necessary for the Court to interfere unless it were shown that the accused were prejudiced by the procedure. Similar rulings were given in 20 Cal 537 (3). There was also a case reported in 1927 P C 26 (4) in which there were two trials but the evidence for the prosecution was similar to a substantial extent in each case and each party was a witness against the other. The High Court of Lahore gave one judgment and the Sessions Court had also given one judgment. Their Lordships of the Privy Council found that although technically it might have been better to keep the evidence entirely distinct and to have delivered two separate judgments, no injustice has followed from what was done. Therefore there was no interference. Following this ruling, I consider that it has not been shown in the present case that there was any prejudice to the case for the accused. I consider that no ground for interference in revision has been made out on this point.

The next point which was argued was in regard to the charge which is as follows:

"That you on or about 19th May 1934, at village Pastora War with the common object of overawing Udai Singh who had sent for and employed Khialiram, a Brahman, against your wishes at Puja that he offered that day, forcibly entered the house of Udai Singh and there created a riot and thereby committed an offence punishable under Ss. 147 and 452, I. P. C., and within my cognizance."

The learned Sessions Judge was under the impression that the Magistrate intended to make charges under two sections and he made comments on the form of the charge. The ground of revision is No. 4 that the charge did not disclose the common object. In S. 141 (third), Penal Code, it is laid down that a common object of an unlawful assembly may be to commit any mischief or criminal trespass or other offence. The prosecution evidence shows that there was a common object of the accused persons to commit the offence of S. 452. Penal Code—house trespass—after preparation for hurt or assault. I consider that the charge sheet is intended to show that the offence of riot was committed with a common object of committing the offence of S. 452, Penal Code. I do not consider that the charge sheet is in any way defective. I do not think that the Magistrate intended to frame separate charges under each section and he has not in fact framed separate charges. Some further comments were made by the Sessions Judge on the use of the word "overawe" and he considers that the word "overawe" can only be applied to S. 141 (first) where the overawing is of certain branches of Government, etc. But the word "overawe" is tantamount to the word "intimidate" which enters into the definition in S. 441, Penal Code, of the offence of criminal trespass which is involved in the offence of S. 452, Penal Code. The use of the word therefore was correct; I find nothing in this ground.

The next ground argued was ground No. 5 that the Magistrate, having disbelieved the prosecution evidence in material particulars, ought to have discredited the entire evidence and acquitted the applicants. The alleged disbelief is contained in a passage which says:

"It is possible that there has been some exaggeration as there often is in these cases, and the story that the appellants, or some of them entered the complainant's house and threatened his son and daughter-in-law may not be altogether reliable."

In S. 3, Evidence Act, there are definitions of "proved" "disproved" and "not proved." The finding of the learned Sessions Judge clearly means

1. Allu v. Emperor, 1924 Lah 104=75 I C 980=4 Lah 376=25 Cr L J 68.
2. Sukhai Ahir v. Emperor, 1928 All 593=114 I C 721=30 Cr L J 337=50 All 457.
3. Queen-Empress v. Chandra Bhiniya, (1893) 20 Cal 537.
4. Madat Khan v. Emperor, 1927 P C 26=100 I C 126=28 Cr L J 254=8 Lah 193 (P C).

merely "not proved." The ground of revision turns this round into an allegation of "disproved." This is incorrect. The ground as stated does not correspond to the judgment. I therefore consider this ground has nothing in it.

Ground No. 6 argued that the fines of Rs. 50 on each accused were severe as no force was used. But the accused are found to have committed the offence of S. 143, Penal Code, being members of an unlawful assembly the punishment for which may extend to six months' rigorous imprisonment and it has also been found that the common object of the unlawful assembly was to prevent Udai Singh from employing Khiali Ram as his priest. An interference in this manner with religion is not to be treated lightly. Accordingly I do not think that the amount of fine is excessive.

The last point argued was ground No. 2 of the revision which states that the refusal of the trying Magistrate to supply the defence after the framing of the charge sheet with even such copies of the statements of witnesses to the police as had been examined for the prosecution resulted in failure of justice. No such point was taken in the grounds of appeal to the lower Court. The judgment of the lower Court on p. 3 shows that an objection was orally made to the lower Court that a general application was made before the trial commenced for copies of all statements made by witnesses from whom the police had enquired and that the application was refused. The Court said that it would have been better, if the Magistrate had allowed the request. But that application was not one which could come under S. 162 as it had not been made when the witnesses were called for the prosecution. Learned counsel has not been able to find the application mentioned to the lower Court but he finds an application of 2nd August which was the date when the prosecution evidence was heard and when the charge sheet was framed. That application asks for copies of the statements of such prosecution witnesses whose evidence has been recorded. The order of the Magistrate was that the diary should be sent for and it would then be seen which witnesses' statements had been recorded. There was thus no refusal by the Magistrate on the application in question. Learned counsel has not been able to find any further reference in the record of this matter. It is possible that when the statements were produced, they proved to be of no use to the defence and copies were not required. There is nothing to show that when the diary came, the Magistrate made any refusal. I consider that no ground for revision has been made out. In the result I dismiss this application.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 649

GANGA NATH, J.

Paduman Das— Appellant.

v.

Shrimati Parbati—Respondent.

Second Appeal No. 1161 of 1932, Decided on 1st February 1935.

(a) Easements—Customary right—Right of privacy—Suit for removal of construction interfering with right of privacy — Plaintiff should allege such customary right in particular neighbourhood or that he is entitled to take advantage of such right.

In a suit for demolition and removal of certain construction alleged to interfere with the privacy of the plaintiff, it is necessary for the plaintiff to allege that a customary right of privacy exists in the particular neighbourhood in which the plaintiff is living or that he individually or as a member of a particular class is entitled to take advantage of the customary right of privacy: 1929 *All* 676, *Rel on.*[P 650 C 1]

(b) Cosharer—Co-owner—Party wall—One co-owner has no right to do any act so as to interfere with other's reasonable use of wall.

Co-ownership implies that each co-owner should have a reasonable user of the thing owned in common and so long as each co-owner uses the wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he is entitled to do what he likes. A co-owner of a party wall has no right to do any act which may have the effect of excluding the other co-owner from the wall or interfering with his reasonable use of the wall. [P 650 C 2]

(c) Minor—Suit by guardian — Absence of formal order for leave to sue is not fatal.

In a suit by even a non-certificated guardian on behalf of a minor, the absence of a formal order granting leave to sue is not necessarily fatal to the suit. [P 650 C 2]

K. Varma—for Appellant.

Shiva Prasad Sinha—for Respondents.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendants-respondents for a declaration that the western wall of house No. 24-70 situate in Mohalla Gopal Das Sahu, Benares City, appertains to house No. 24-70 which belongs to the plaintiff and defendant 2 and that it was not the eastern wall of house No. 24-68 which

beiongs to defendant-respondent 1, and that the plaintiff was not bound by decree No. 521 of 1925 in the case of Ganesh Das v. Srimati Parbati, defendant. The plaintiff further prayed for the demolition and removal of certain constructions alleged to have been made in the intervening wall in dispute as they interfered with the privacy of the plaintiff. The defendants contended that the suit was not maintainable under O. 2, R. 2, Civil P. C., that the wall in dispute was a joint wall of the parties and that the suit was barred by S. 11, Civil P. C. Both the Courts below have found that the suit was barred by S. 11, Civil P. C. The plaintiff Paduman Das is a minor. The former suit was brought by his brother Ganesh Das on his own behalf and that of plaintiff in respect of the same wall. The interest of Ganesh Das was not adverse to that of plaintiff, nor was plaintiff prejudiced in any way. Both the Courts below have found that the plaintiff is bound by the decree in the former suit.

As a matter of fact and quite independently of the former decision both the Courts below have found that the wall in dispute belongs to the parties. Both the Courts below dismissed the plaintiff's suit. In this appeal the first point urged is that the plaintiff's suit as regards the removal of the construction which affected his right of privacy should have been decreed. The Courts below have found that the plaintiff's privacy is not affected by the constructions in dispute. There is another fatal defect to this part of the plaintiff's case. The plaintiff did not come into Court on the basis of any customary right of privacy. As held in 1929 All 676 (1), it was necessary for the plaintiff to have alleged that a customary right of privacy existed in the particular neighbourhood in which the plaintiff was living or that he individually or as a member of a particular class was entitled to take advantage of the customary right of privacy. As against this, both the Courts below have recorded a finding that on all sides there are houses which overlooked the plaintiff's house and interfered with the plaintiff's right of privacy. The plaintiff's suit therefore has been rightly dismissed as regards his relief concerning his right of privacy. The other point urged by the learned counsel for the appellant was that the defendants have no right to rest their beams on any portion of the wall. It appears from the judgment of the lower appellate Court that the respondents have placed their beams about 6 inches inside the wall towards their side and have covered the wall with plaster. The lower Court has observed:

"Some portion of the beams has been covered by the plaster, and as such, there is practically no support of it nor any interference has been caused nor she has done any act as to make the wall exclusively her own."

Co-ownership implies that each co-owner should have a reasonable user of the thing owned in common and so long as each co-owner uses the wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he is entitled to do what he likes. A co-owner of a party wall has no right to do any act which may have the effect of excluding the other co-owner from the wall or interfere with his reasonable use of the wall. Nothing has been done by the respondents which might tend to interfere with the reasonable use of the appellant. In 1930 All 318 (2), an order refusing to restrain a co-owner of a party wall from opening an almirah in the wall and from placing some beams on his side of the wall was upheld. The lower Courts rightly refused to grant an injunction to the appellant. A preliminary objection was raised by the learned counsel for the respondents that inasmuch as the plaintiff had a certificated guardian, this suit which has been brought by the minor under the guardianship of Ranchor Das who is not a certificated guardian is not maintainable. Both the Courts below have held that implied permission of the Court would be presumed and rightly because the suit has not been dismissed on the ground of want of permission. The absence of a formal order granting leave to sue is not necessarily fatal to the suit: vide 31 All 7 (3). There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court confirmed. Permission to file a Letters Patent appeal is refused.

K S. *Appeal dismissed.*

1. Bhagwan Das v. Zamurrad Husain, 1929 All 676=119 I C 833=51 All 986.
2. Baij Nath v. Janki Prasad, 1930 All 318=127 I C 585.
3. Sridhar Rao v. Ram Lal, (1909) 31 All 7=1 I C 555.

A. I. R. 1935 Allahabad 651

BENNET, J.

L. Beni Prasad and *others* —Plaintiffs —Applicants.

v.

Pt. Saligram and *another*—Defendants —Opposite Parties.

Civil Revn. No. 356 of 1934, Decided on 11th December 1934, against order of Munsif, Fatehpur, D/- 5th July 1934.

(a) Civil P. C. (1908), S. 115 and O. 6, R. 17—Refusal to allow amendment is case decided.

The refusal to allow an amendment of the plaint is a case decided within the meaning of S 115 : 1935 *All* 353, *Rel on.*; 1934 *All* 620 (*F B*) *Ref.* [P 652 C 1]

(b) Civil P. C. (1908), O. 6, R. 17—Suit objecting to constructions made by defendants on certain plot — Plaintiff not knowing in what capacity defendants made construction —Plaintiff applying for amendment of plaint on defendant's reply — Held it should be allowed.

In a suit the plaintiffs objected to the constructions made by the defendants on a certain plot and those constructions did not bear any label as to the capacity in which the defendants had acted when they made the constructions. It was therefore not possible for the plaintiffs to know the particular capacity in which the defendants claimed to have made the constructions. The plaintiffs sued the defendants in their capacity as president and secretary of certain society and the defendants replied that when they made the constructions they were acting in those capacities for another society.

Held : that the real question between the parties could not be properly decided without allowing this amendment and that it was desirable that the present suit should describe the defendants in both capacities in order that other persons may not subsequently claim that a decree passed in the present suit would not bind the members of both societies. It is desirable that there should not be a multiplicity of suits on this rather trival matter but that the matter should be decided once and for all in a suit showing what the actual merits of the case are for the construction of these things on the plot in question. [P 652 C 1]

A. M Khwaja—for Applicants.

Shiva Prasad Sinha — for Opposite Parties.

Order.—This is an application in civil revision by the plaintiffs against an order dated 5th July 1934 by a Munsif on an application to amend the plaint. The plaintiffs brought a suit for possession of a certain plot of land alleging that the plot belonged to them as zamindars and that defendants 1 and 2 had made unauthorised constructions on the plot, and the plaint asked for possession after demolition of these unauthorised constructions and for permanent injunction restraining the defendants from interfering with the possession of the plaintiffs. The plaintiffs understood that defendants 1 and 2 had made these constructions in a representative capacity and the plaint sets out that defendant 1 was president of the Sanatan Dharma Sabha and defendant 2 was secretary of that society. The plaintiffs took proceedings with permission of the Court under O. 1, R. 8 to make the defendants representatives of that society and of its members in the locality in question. The defendants filed a written statement that the Ramlila committee was in adverse possession of the entire plot and that the suit was not maintainable as the Ramlila committee was not made a party. The plaintiffs thereupon applied for the amendment of the plaint asking that it should be noted against the names of defendants 1 and 2 that they were president and secretary respectively of the Ramlila committee also and it was further asked that Lachhman Bhat, alleged in the written statement to be manager of the Ramlila committee, should be made a defendant, and that the plot in suit should be described in the plaint as in the possession of the defendants as members of the Ramlila committee. The Court below passed the following order:

"I have heard the vakils for the parties. The plaintiffs seek to alter the property in dispute to a large extent and to alter the very nature of their claim. I cannot allow such an amendment. The application for amendment is therefore rejected."

In revision it is contended in ground No. 2 that the Court is not correct in stating that the plaintiffs seek to alter the nature of the suit, and in ground No. 4 that the amendment merely sought to add one defendant and to give a further description of the defendants already on the record and that the property had already been described in the plaint; further in ground No. 5 that the rejection of the application would lead to multiplicity of suits. For the opposite parties it is contended that the order of the lower Court did not amount to "a case decided" within the meaning of S. 115, Civil P. C., Learned counsel for the applicants relied on the ruling reported in 1935 All 353 (1). In that ruling a Bench of this Court held that the refusal by a Court to allow amendment of the plaint was

1. Rurahmal v. Ramnath Kapil Man Misir, 1935 All 353=153 I C 65.

a case decided within the meaning of S. 115, Civil P. C., and further that in that particular case the refusal amounted to a disregard of the provisions of O. 6, R. 17 and the lower Court had acted illegally and with material irregularity in the exercise of its jurisdiction and therefore a revision would lie under the third provision of S. 115, Civil P. C. In view of this ruling I consider that I should hold that the refusal to allow an amendment of the plaint is a case decided within the meaning of S. 115, Civil P. C., I do not think that that ruling is shown to be contrary to 1934 All 620 (2). On the further point as to whether the lower Court acted with material irregularity in refusing to allow an amendment under O. 6, R. 17, the provisions of that rule state that:

" all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

In the present suit the plaintiffs objected to the constructions made by the defendants on a certain plot. Those constructions did not bear any label as to the capacity in which the defendants had acted when they made the constructions. It was therefore not possible for the plaintiffs to know the particular capacity in which the defendants claimed to have made the constructions. The plaintiffs sued the defendants in their capacity as president and secretary of one society and the defendants replied that when they made the constructions they were acting in those capacities for another society. The real question between the parties could not be properly decided without allowing this amendment. It appears to me to be desirable that the present suit should describe the defendants in both capacities in order that other persons may not subsequently claim that a decree passed in the present suit would not bind the members of both societies. It is desirable that there should not be multiplicity of suits on this a rather trivial matter but that the matter should be decided once and for all in a suit showing what the actual merits of the case are for the construction of these things on the plot in question. For these reasons I consider that the lower Court acted with material irregularity in failing to allow the amendment and that the lower Court should have used its discretion to obtain jurisdiction over the whole of the subject-matter in dispute between the parties. Accordingly I consider that this is a proper case for the interference of this Court in revision. I therefore allow the application with costs in both Courts and I direct that the plaint should be amended as prayed.

K.S. *Application allowed.*

2. Gupta & Co. v. Kirpa Ram & Bros., 1934 All 620=149 I C 1183 (F B).

A. I. R. 1935 Allahabad 652

KENDALL, J.

Moti Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 934 of 1934, Decided on 5th April 1935, from order of Add. Sess. Judge, Gorakhpur, D/- 20th June 1934.

Criminal P. C. (1898), Ss. 342 and 364—Refusal of accused to answer questions put to him and refusal to sign—For refusing to sign he is liable to punishment under Penal Code (1860), S. 180.

The Magistrate is required to record the examination and if there are no answers by the accused, the record presumably will only contain the questions put by the Court and a note that the accused had refused to answer the questions. If the record has been properly completed in this way by the Court, the law requires that the accused shall sign it in order to show that it is conformable to what he declares is the truth. If he refuses to sign it, there can be no doubt that he is obstructing the process of the Court and that he is liable to punishment under S. 180 of I. P. C. There is no exemption on the groundthat the accused has refused to answer questions or that he has refused to make a further statement. [P 953 C 1]

Madan Mohan Lal—for Applicant.

Asst. Govt. Advocate—for the Crown.

Order.—The applicant Moti Lal has been convicted of an offence under S. 180, Penal Code, read with S. 480, Criminal P. C., for refusing to sign his statement recorded in the course of a criminal proceeding against him. The facts are given in the order of the appellate Court. The present application is made on the ground that the Court was not legally competent to require that he should sign the statement. It appears that the applicant had already made a statement which was referred to as the statement under S. 364, Criminal P. C., and that on a subsequent date after there had been some further cross-examination of the witnesses the Court put further questions to him which he refused to answer and then refused to sign this later statement. It is argued that on the second occasion, when in fact there was no statement by the accused there was no obligation

on him to sign the record, and that he was protected by Sub-S. (2), S. 342, Criminal P. C., which is to the following effect:

"The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them, but the Court and the jury, if any, may draw such inference from such refusal or answer as it thinks just.

The applicant however has not been prosecuted for refusing to answer a question or for giving false answers to questions, but for refusing to sign the record of his examination. S. 342 describes the powers which the Court has to examine an accused person. S. 364 describes how the examination of the accused is to be recorded, and this latter section relates to any occasion on which the accused is examined by the Court. It provides that the whole of the examination including every question put to him and every answer given by him shall be recorded in full, that the record should be shown or read to him, and when the whole is made conformable to what he declares is the truth, the record shall be signed by the accused. There is no exemption on the ground that the accused has refused to answer questions or that he has refused to make a further statement. The Magistrate is required to record the examination, and if there are no answers by the accused, the record presumably will only contain the questions put by the Court and a note that the accused had refused to answer the questions. If the record has been properly completed in this way by the Court, the law requires that the accused shall sign it in order to show that it is "conformable to what he declares is the truth." If he refused to sign it, there can be no doubt that he is obstructing the process of the Court, and that he is liable to punishment under S. 180, Penal Code. There is of course no question but that the Court is legally competent to require him to sign the document. The result is that there is no force in the application and it is dismissed.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 653

KENDALL, J.

Naubat Singh and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 988 of 1934, Deded on 28th March 1935.

(a) Criminal Trial— Confession made under circumstances free from suspicion of undue influence—It should not be rejected. (*Obiter*).

Where a confession was made in circumstances that precluded all suspicion of undue influence:

Held : it would be unfortunate if it had been necessary to decide against admitting it merely on some technical ground or because the rules for recording confession had not been strictly followed. [P 654 C 2]

(b) Criminal Trial— Identification — Proportion of five other persons to one accused is minimum desirable proportion—But where such standard is not fully satisfied, identification should not be rejected but should be subjected to rigid scrutiny.

The proportion of five other persons to one accused person for identification is the minimum desirable proportion for the purpose of satisfying a Court that the identification of the accused was not a question of accident. Where the identification parades had not satisfied the above standard, it is not possible to discard these proceedings on that ground. It is only proper that the evidence of identification should, in the circumstances, be subjected to a more rigid scrutiny than if the proper standard had been maintained. [P 655 C 1]

K. D. Malaviya and *Shiva Charan Lal* —for Appellants.

Govt. Pleader—for the Crown.

Order.—The seven appellants, Naubat Singh, Chob Singh, Ram Sarup, Shib Charan, Hansa, Kharga and Karan Singh, have been convicted by the learned Sessions Judge of Muttra, of an offence under S. 395, Penal Code. and sentenced to seven years' rigorous imprisonment each. The dacoity in question took place on the night between 23rd and 24th April 1934, at the house of Angan Lal in the village of Bajna in the Muttra District. As to the fact of dacoity there is no doubt whatever. and it is also clear that it was a dacoity of a very serious nature. Some 25 or 30 persons are said to have taken part in it; they used firearms and they looted the property of Angan and took it away. But it is also in evidence that they met with serious resistance. The village is a large one, and two police constables named Sadiq Ali and Babu Singh with two chowkidars were patrolling it. On hearing the noise of the dacoity, they came to the spot and finding that looting was going on, they went up on to the roof of Durga, who has a shop at a short distance from Angan's house, and from there they observed the proceedings and also fired at the dacoits, one of whom was afterwards found to have been killed by gunshot wounds and another, as afterwards appeared, was seriously injured. Another of the dacoits was killed by one of the villagers with a spear. The dacoits

had some "mashals" with them and also electric torches, and as it was a moonlit night, it has not been argued that it would not have been possible for the witnesses for the prosecution to have identified the dacoits on account of the absence of any light.

Although the list of property said to have been stolen was handed in to the police, none of this property was recovered. One of the appellants however Naubat was arrested in Bulandshahr District, on the 26th April. It should be mentioned that the report of the dacoity had been made in the early morning of the 24th April, at the thana of Nohjhil in Muttra District, and it was only by accident that Naubat was discovered by the police to have been suffering from gunshot wounds in the District of Bulandshahr, a couple of days later. The Bulandshahr police do not appear to have had at that time any official news about this dacoity. The second officer of the Bulandshahr Kotwali heard from a resident that Naubat was lying in a dangerous condition with gunshot wounds received in a dacoity, and he naturally made inquiries and found Naubat lying on a cot in a precarious condition. He therefore took him before a Deputy Magistrate where Naubat's statement was recorded on the 26th April. Naubat was subsequently sent to hospital where he was kept for about a month.

Sixteen men were ultimately prosecuted in connexion with this dacoity, and seven of them have been convicted. The evidence on which they have been convicted consists of the confession of Naubat and a number of statements by witnesses, a large number of whom have identified the present appellants as having taken part in the dacoity. It was argued in the first place in this Court that the statement made by Naubat to the Magistrate on 26th April 1934 was not admissible in evidence. The Magistrate did not record the questions put by him to Naubat and the answers made by Naubat in the manner required by Ss. 164 and 364, Criminal P. C., and also by the Government orders on the subject. The recording Magistrate gave evidence in the course of which he stated that he did not think that it was necessary to note down the questions and answers. though he stated that he had put all the necessary questions and was satisfied that the statement was voluntary. In these circumstances, the Judge held that the statement was admissible in evidence as a confession, and in this he is supported by the decision of a Full Bench of this Court in the case of 1934 All 81 (1). It has been argued by Mr. Kapildeo Malaviya, however that the irregularity in the procedure could not be cured by the evidence of the Magistrate, because in this case Naubat had been prejudiced by the failure to record questions and answers as required by law. The argument is that although the general impression created by the statement as it has been recorded is to the effect that Naubat took part in the dacoity, yet it is capable of the interpretation that Naubat was merely watching the dacoity and was not one of the dacoits, and that this would have been brought out if the statement had been properly recorded. It has also been argued that this confession was not made to a Magistrate "in the course of an investigation" under Chap. 14, Criminal P. C. because although Naubat had been arrested by the Bulandshahr police. they had not taken action in the course of the investigation which had been instituted in Muttra. It was also argued that the confession, even if admissible against Naubat, could not be used against any of his co-accused, especially as it had been retracted. I do not propose to discuss these questions at length because after hearing counsel on all the evidence for the prosecution, I am satisfied that the evidence is sufficient without making any use of this statement. It is clear however that the statement was of great importance. It was made in circumstances that precluded all suspicion of undue influence, and it would have been unfortunate if it had been necessary to decide against admitting it merely on some technical ground or because the rule for recording confessions had not been strictly followed.

The other evidence which was brought forward to prove that the appellants took part in this dacoity was that of a large number of witnesses who were said to have been able to observe them at the time. No less than 23 such witnesses were produced, and it has been pointd out that the learned Sessions Judge although he has given a concise and clear abstract of the case against each of the individual accused has not made any comment on the value of the evidence of any particular witness, but has merely stated in this part of the judgment the number of witnesses who were able to

1. Muhammad Ali v. Emperor, 1934 All 81= 1934 Cr C 145=147 I C 390=56 All 802.

identify each particular accused. It was pointed out by Mr. Malaviya that the identification proceedings in jail were conducted on five different occasions, and on not one of these occasions were there more than three times as many undertrial prisoners as the accused who were put up for indentification, while on one occasion, namely on 5th June 1934. when nine accused persons were put up for identification, there were only 24 other persons mixed with them. In the case of Criminal Appeal No. 148 of 1927 (2), it was held by a Bench of this Court that the proportion of five other persons to one accused person for identification is the minimum desirable proportion for the purpose of satisfying a Court that the identification of the accused was not a question of accident. It is clear, therefore that in the present case these proceedings would have been very much more satisfactory if the number of undertrials mixed with the accused at each of the identification parades had satisfied the standard described by the Bench. It is not, however possible to discard these proceedings on that ground. It is only proper to hold that the evidence of identification should in the circumstances. be subjected to a more rigid scrutiny than if the proper standard had been maintained. Of the 23 witnesses 11 made such a large number of mistakes that their evidence must be discarded altogether and of the other 12 the following Shib Lal, Lalman, Murari Lal Khubi, Jumna and Musammat Rupdei made as many mistakes as correct identifications. I think it is necessary therefore to regard these witnesses not as moderately successful witnesses whose statements can be used, though not absolutely relied upon, but as witnesses to whose evidence no serious weight can be attached. (After examining the evidence of the several witnesses, His Lordship held that the evidence of identifying witnesses should be believed and the judgment concluded). The result is that after giving the case my best consideration, I see no reason for allowing the appeal in the case of any of the appellants. The dacoity undoubtedly took place, and the prosecution as a whole was supported by a large mass of evidence. The learned Judge appears to have tried the case with every care, and he has acquitted those persons against whom he believed the evidence to be insufficient. I agree with him throughout in his decision, and I dismiss all the appeals.

K.S. *Appeals dismissed.*

2 Allahdia v. Emperor, Criminal Appeal No. 148 of 1927, Decidedon 15th May 1928.

A. I. R. 1935 Allahabad 655

ALLSOP, J.

Durjan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 15 of 1935, Decided on 14th March 1935, from order of Addl. Sess. Judge, Cawnpore, D/- 4th October 1934.

U. P. Municipalities Act (1916), S. 299 (1) —Bye-law of Notified Area Committee — Bye-law that no person can ply trade of weighman without licence — But persons purchasing without employing weighman held were not guilty of infringement of bye-law.

Where a bye-law of the Notified Area Committee was to the effect that no person may ply the trade of a weighman without obtaining a licence.

Held: that they certainly had not made any bye-law that no transaction shall take place without the intervention of a weighman. Hence persons who purchase goods without employing a weighman cannot be convicted for breach of any rules. [P 656 C 1]

K. N. Katju and *H. P. Sen*—for Applicant.

K. O. Carleton—for Opposite Party.

Asst. Govt. Advocate—for the Crown.

Order.—This criminal revision is connected with criminal revision No. 16 of 1935. The facts are similar and the points at issue are the same. I propose to dispose of both these revisions by this order.

The two applicants, Ghasi Ram and Durjan, have each been fined a sum of Rs. 30 under S. 299 (1), Municipalities Act, for infringement of a bye-law of the Notified Area Committee of Mahoba. This bye-law is to the effect that no person may ply the trade of a weighman without obtaining a licence. The facts found in these two cases are that one Ram Nath sold some grain to the two applicants and that they weighed it themselves without employing a professional weighman. In consideration of not employing a weighman they demanded and obtained from the vendor the commission which the weighman would have received. It would be possible to raise a number of questions in connexion with these applications such as the validity of the bye-law and so forth; but for the decision in these two matters it is sufficient to consider the facts. I have no doubt that the real intention behind the pro-

secution was to establish the principle that no person buying or selling goods in Mahoba should do so without employing a weighman who had obtained a licence from the Notified Area Committee and who doubtless had paid a fee for it. It cannot be said in the present case that Ghasi Ram and Durjan were plying the trade of a weighman. A weighman is one who is introduced into a transaction between third parties to determine the weight of goods bought by one and sold by another. It may be that the Notified Area Committee have jurisdiction or have authority to make a bye-law saying that any person who acts in this capacity shall have a licence from them; but they certainly have not made any bye-law that no transaction shall take place in Mahoba without the intervention of a weighman. If they ever succeed in passing such a bye-law, the question may arise whether it was within their authority to do so or not. In the present case it is sufficient to say that the alleged action of the applicants is not one which contravenes the bye-law which has already been framed. I have no doubt that Ghasi Ram and Durjan were not proved to have been plying the trade of weighmen; and consequently whether they had licences or not is immaterial. They have been convicted for doing acts which are not offences within the law. I consequently set aside the convictions and sentences and direct that the fines, if already paid, should be refunded.

K.S. *Conviction set aside.*

A. I. R. 1935 Allahabad 656

NIAMATULLAH, J.

Mt. Joera Bibi — Plaintiff—Appellant.

v.

Mt. Fatma and *others*—Defendants—Respondents.

Second Appeal No. 1596 of 1934, Decided on 18th February 1935, from decision of Addl Sub-Judge, Azamgarh, D/-3rd September 1934.

Benami—Sale — Benami — Pre-emption—Person not having right of pre-emption making another who has such right to file pre-emption suit—Suit decreed and delivery of possession obtained—Mortgage of property by former person—Suit by mortgagee for declaration that his mortgagor is owner of property or for possession of property should be dismissed.

A person who had no right to pre-empt made another who had such a right to file a pre-emption suit. The suit was decreed and delivery of possession was obtained. The property was mortgaged by the former person who it was alleged had met expenses in the pre-emption proceedings and deposited the price. The mortgagee filed a suit for a declaration that his mortgagor was the owner of the property or in the alternative for recovery of possession.

Held: that the suit should be dismissed: 35 *Cal* 551 (*PC*), *Applied*. [P 657 C 1, 2]

Mukhtar Ahmed—for Appellant.

Judgment. — The plaintiff-appellant is a mortgagee from Sheikh Mohammad defendant 3. and sued the defendants three in all for a declaration that his mortgagor is the owner of the property in dispute. In the alternative she prayed for a decree for possession. It is alleged in the plaint that the property in suit belonged to one Saiduddin, who executed a deed of sale in respect thereof in favour of Mathura Prasad and others. Defendant 3 instituted a suit for pre-emption on foot of that sale-deed but realised that owing to a certain partition he had no proprietary interest in the tenure in which the vended property was situate. Accordingly he made Mt. Fatima, defendant 1, who had an interest in that tenure to institute a suit for pre-emption. A decree was passed in favour of Mt. Fatima, who obtained delivery of possession followed by mutation of names in the revenue register. The plaintiff's case is that the price deposited in the name of Mt. Fatima, had been paid by defendant 3 and that he bore all the expenses of the litigation against the vendee. The plaintiff also alleges that she is in fact in possession, and that Mt. Fatima had throughout acted for her mortgagor defendant 3. The suit was contested by Mt. Fatima, who pleaded that she had pre-empted the property for her own benefit and that she paid the purchase money. The suit was dismissed by both the Courts below on the preliminary point that assuming all the allegations to be found in the plaint were true, the plaintiff could not succeed. The lower appellate Court has expressed the opinion in a well-considered judgment, that on his own showing, defendant 3 perpetrated a fraud on the vendee, the law of pre-emption and the Court and the purpose of the fraud having been fulfilled, it is not permissible for her or her representatives-in-interest to say that the pre-emptor obtained the decree for her benefit. The lower appellate Court has also considered the alternative case which appears to have been set up in argument before it, viz. that the defendant 3 be directed to transfer the

property to the plaintiff on proof of the fact that the latter supplied the purchase money and there was an understanding between defendant 3 and the pre-emptor that the property would after the decree in the pre-emption suit be transferred to the former. There is no suggestion in the plaint of any agreement between the pre-emptor and defendant 3 that the former would transfer the property in lieu of the expenses defrayed by the latter. The only point which requires consideration is whether the view taken by the lower appellate Court of the rights of the plaintiff on her own allegation is correct. In my opinion the case falls within the rule which was accepted by their Lordships of the Privy Council in 35 Cal 551 (1). at p. 558. Their Lordships quoted with approval the following passage from Mayne's Hindu Law .7th Edn., p. 595 para. 446:

" Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested. The fact that *A* has assumed the name of *B* in order to cheat *X* can be no reason whatever why a Court should assist or permit *B* to cheat *A*. But if *A* requires the help of the Court to get the estate back into his own possession, or to get the title into his own name it may be very material to consider whether *A* has actually cheated *X* or not. If he has done so by means of his alias, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality, which he has once cast off in order to defraud others. If however he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to *B*, whose roguery is even more complicated than his own. This appears to be the principle of the English decision. For instance persons have been allowed to recover property, which they had assigned away . . . . where they had intended to defraud creditors, who in fact were never injured . . . . But where the fradulent or illegal purpose has acutally been effected by means of the colourable grant, then the maxim applies: In pari delicto potior est conditio possidentis. The Court will help neither party. Let the estate lie where it falls."

It seems to me that the circumstances of this case clearly attract the application of the rule embodied in the passage quoted above. Defendant 3 had no preferential right of purchase as against Mathura Prasad and others. who as vendees would have successfully resisted his suit for pre-emption. If the plaintiff's allegations are true, defendant 3 set up his alias as is now alleged to claim the property by right of pre-emption which she undoubtedly possessed and which could not be successfully resisted by Mathura Prashad. The latter in full belief that defendant 1 was pre-empting for herself either did not put forward any defence or lost the case against her. The Court, likewise, treated defendant 1 as the real pre-emptor, passed a decree in her favour and put her into possession. If it be assumed that the real pre-emptor was defendant 3 and defendat 1 acted only as his benamidar in that suit, Mathura Prasad had been clearly defrauded. If the real nature of the arrangement now asserted had been disclosed in the pre-emption suit. Mathura Prasad would have defeated the claim of defendant 1. It is, to my mind, doubtful if the Courts will recognize a benami pre-emption. But assuming that such a thing is permissible having regard to the provisions of the law of pre-emption, I think it is not open to defendant 3 to assert that he ousted Mathura Prasad and others vendees, by the device of making defendant 1 to exercise her right of pre-emption, though in fact he himself was the pre-emptor. For these reasons I think the lower Courts have taken a correct view of the case. The appeal is dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

1. Petherpermal Chetty v. Muniandi Servai, (1908) 35 Cal 551=35 I A 98=7 C L J 528 (PC).

1935 A/83 & 84

A I. R. 1935 Allahabad 657

KENDALL, AG. C. J. AND HARRIES, J.

Qasim Raza—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 786 of 1934, Decided on 13th December 1934, from order of Sess. Judge. Agra, D/- 16th July 1934.

(a) Police Act (1861), S. 30 — Authorities have no power under Act absolutely to forbid procession— They have only power to regulate it.

It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so, and the taking out of a procession is not in itself an offence, nor does it require a special license, except as provided by S. 30, Police Act. That is a section which empowers the authorities to control processions, and the manner in which they are to be controlled, if it is necessary to control them, is set forth in sub-S. (2). Neither in the marginal note, nor in the body of the section, is any express power given to the authorities absolutely to forbid the taking out of a procession. Hence the Superintendent of Police has no power under the Act absolutely to forbid a procession, but only has the power to regulate one : 1926 *Pat* 172, *Rel on.* ; 1923 *Pat* 1 (*S B*), *not Foll.*

[P 659 C 2]

(b) Police Act (1861), S. 32 — Breaking promise to Superintendent of Police is not to disobey order.

Where applicant gave a promise to the Superintendent of Police that he would not take out the procession but he broke this promise :

Held : that to break a promise to the Superintendent of Police was not to disobey an order issued under the Act and that the applicant could not be convicted. [P 660 C 1]

A. P. Dube—for Applicant.

Assist. Govt. Advocate—for the Crown.

Order.—This is an application for the revision of an appellate order of the Sessions Judge of Agra, dismissing an appeal from an order of the City Magistrate in which he convicted the applicant of an offence under S. 30 of the Police Act of 1861 and sentenced him to pay a fine of Rs. 100. It appears however that the Magistrate intended to convict the applicant of an offence under S. 32 of the Act, which provides a penalty for disobeying orders issued under the three preceding sections or for violating the conditions of a licence. The circumstances of the case are fully stated in the orders of the Magistrate and the Sessions Judge. It is only necessary to repeat here that the applicant, who is a Shiah Muhammadan had been up to 1931 in the habit of taking out a procession called the "Duldul" procession from his house in the City of Agra, that in 1931 and the two following years the procession had been discontinued owing to certain orders passed by the authorities, and that in 1934 the applicant applied both to the District Magistrate and to the Superintendent of Police for permission to take out a procession. On a report by the Superintendent of Police, this application was refused, apparently by both the authorities applied to. After this, some time in April 1934, notices were issued by the Superintendent of Police, and one of these was affixed to the applicant's house. It evidently purports to be a notice under sub-S. (2) of S. 30, Police Act, and it contains the following order:

"Besides the persons who have already obtained permission no other person without obtaining permission of the Superintendent of Police will be authorized to take a procession on the public way and thoroughfare."

On April 23, the applicant made another application by telegram to the District Magistrate informing him that he was proposing to take out the procession, and this was forwarded to the Deputy Magistrate in charge of the mohalla, who sent for the applicant and informed him that his application had already been refused. We are informed by Counsel that after this the applicant asked for a written order for his use in the Civil Court, and then decided to take out a formal procession, which he did. The procession was stopped about five paces from his house and no trouble resulted. But the applicant was prosecuted and convicted, as described above. Both the Courts have convicted the applicant on the grounds that order refusing permission to take out a procession was issued under Ss. 30 and 31 Police Act and that as the applicant disobeyed that order, he is therefore liable to punishment under S. 32. But it has been argued by Mr. Dube that the conviction is illegal, because the order refusing permission to take out the procession was in itself not a legal order, and in any case was not an order passed under the provisions of Ss. 30 and 31 of the Act. We may mention that two other matters were argued which may at once be disposed of. It was said that on the facts as stated by the witnesses for the prosecution the procession was stopped before any harm was done and therefore there was no offence. This however is irrelevant, as the question is whether a legal order under the Police Act has been contravened. It was also said that the applicant had committed no offence because the road on which he had actually taken out the procession was his private property. It has not however been proved that this road is his private property, and as it has been admitted that this road is freely used as a public thoroughfare, the objection cannot be seriously considered. The more technical objection however is not so easily disposed of. S. 30, Police Act, as the marginal note shows, is one for "regulating of public assemblies and processions and licensing of same." sub-S. (1) shows that:

"The District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads or in the public streets and thoroughfares and prescribe the routes from which or the time at which such processions may pass."

Sub-S. (2) says:

"If he is satisfied that it is intended by any person or class of persons to convene or collect an assembly in any such road, street or thoroughfare or to form a procession which would, in the judgment of the Magistrate of the District or of a Sub-Division, if uncontrolled, be likely to cause a breach of the peace, he may require by general or special notice that the person convening or collecting such assembly or directing or

promoting such procession shall apply for a licence."

The third sub-section shows that when such application has been made, "he may issue a licence specifying the names of the licencees and defining the conditions on which alone such assembly or such procession is to be permitted to take place, and otherwise giving effect to the section."

In the present case, it is not denied that the applicant had applied for a licence, and that the application had been rejected. The learned Judge has remarked that under sub-S. (3) of S. 30, the Magistrate may issue a licence, and that this means that he has the power to refuse to issue one, otherwise the word "shall" would have been used. It appears to us that under the section it is the Superintendent of Police and not the Magistrate who may issue the licence, but this is not a matter of importance in the present case. We may agree with the learned Judge that there could be no obligation on the Superintendent of Police to issue a licence merely because an application has been made for one. What the Judge does not appear to have considered however is what the effect of "refusing to grant" a licence will be. We have used the expression "refusing to grant a licence" because that is in fact what the authorities did or claimed to have done. But we think we shall be following the wording of the section more closely if we hold that the Superintendent of Police under sub-S. (3) of S. 30 either may issue a licence or may not issue a licence, because when the matter is put in this way it is clear that the Superintendent of Police is authorised by the Act to issue a licence, if he thinks it necessary, or not to issue a licence, if he thinks it unnecessary to do so. The Act does not in terms give him authority to refuse to issue a licence, for the purpose of preventing a procession from being taken out. It is quite conceivable that after an application for a licence has been made and the Superintendent of Police has satisfied himself, after examining the application and, if necessary, questioning the applicant, that there is no danger to the public peace, it may be unnecessary to issue a licence or regulate or direct the conduct of the procession at all, and in this case he would presumably not issue a licence and not lay down any conditions.

In such a case it could hardly be contended that it would be an offence to take out a procession merely because no licence had been issued. In fact it has not been suggested to us that the act of taking out an unlicensed procession is in itself an offence against any law. It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so, and the taking out of a procession is not in itself an offence, nor does it require a special licence, except as provided by S. 30, Police Act. That is a section which empowers the authorities to control processions, and the manner in which they are to be controlled, if it is necessary to control them, is set forth in sub-S. (2). Neither in the marginal note, nor in the body of the section, is any express power given to the authorities absolutely to forbid the taking out of a procession. It has been argued by Dr. Wali Ullah, on behalf of the Crown—and again this must be obvious—that if this interpretation of the section is correct, then a person whose application for a licence under sub-S. (2), S. 30 has been refused is in a better position than one whose application has been accepted and who has obtained a licence, because the procession of the latter will be regulated by the conditions of his licence, whereas the unsuccessful applicant will not be fettered in any way. The apparent paradox however appears to us to be due to a misreading of S. 30 of the Act. If once it is admitted that the Superintendent of Police has no power under the Act absolutely to forbid a procession, but only has the power to regulate one, it becomes clear that it is his duty to regulate a procession, if he thinks that it requires regulating, in the manner prescribed by the Act, that is to say, by the issue of a licence, or to leave it alone; and thus the issue of a licence imposes a liability on the applicant and not a privilege.

We are far from saying that the Act has been worded as clearly as it might might have been, but we have to interpret it strictly, and we consider that it is impossible to read into it any authority for absolutely refusing permission to take out a procession. We have been referred to a decision of a Full Bench of the Patna High Court in the case of 1923 Pat 1 (1), in which there are some passages which support the argument of the learned Assistant Government Advocate in this case. In the course of his judgment Mullick, J., remarked:

1. Emperor v. Abdul Hamid, 1923 Pat 1=68 I C 945=23 Cr L J 625=2 Pat 134 (SB).

"Now S. 30, Police Act, though not happily worded appears to mean this. The Superintendent of Police has to be satisfied that an assembly or procession is in the judgment of the District Magistrate likely to cause a breach of the peace. He may then issue a notice upon the person. . . . to apply for a licence. It is contended that the Superintendent is not authorized to issue a general order, but must call upon the convenor or promoter of the assembly or procession to take out a licence for the occasion. In my opinion, the words are sufficiently general to enable the Superintendent to issue a general notification containing a prohibition from convening or collecting an assembly or promoting or directing a procession without a licence. The terms of the section are also wide enough to cover a prohibition without any limit of time. If the person or persons against whom the notice is directed convene or collect an assembly or promote or direct a procession without licence, he or they will be punishable under S. 32 of the Act."

This is an obiter dictum, as the persons who were convicted in that case were not convicted under the provisions of the Police Act, but under the Penal Code and we notice that Das, J., disagreed with the other two learned Judges in the interpretation of the Police Act. In a later case, that of 1926 Pat 173 (2), in dealing with a case under S. 32, Police Act, it was remarked:

"So far as I can see the police have no power to forbid the issue of a procession. The power to control does not include the power to forbid."

and that is the view we have taken in the present case. It was, believed by the Legislature that it should be possible for the authorities so to regulate a procession by the conditions of a licence that no danger to the public peace would be likely to arise, and for this reason it was not thought necessary to restrict the liberties of the subject further than has, been already done in S. 30 of the Act.

It has been remarked by the Magistrate that the present applicant gave a promise to the Superintendent of Police that he would not take out the procession and that he broke this promise, and if this is so his conduct was most improper. But to break a promise to the Superintendent of Police is not to disobey an order issued under the Act, and we must therefore hold that the applicant has been wrongly convicted. We therefore set aside the orders of the Courts below convicting the applicant and direct that he be acquitted and that the amount of the fine, if paid, be returned to him.

Order set aside.

K.S

2. Sitaram Das v. Emperor, 1926 Pat 173=93 I C 986=27 Cr L J 522=4 Pat 795.

A. I. R. 1935 Allahabad 660

NIAMATULLAH, J.

Mt. Amna—Plaintiff—Appellant.

v,

Ratan Lal—Defendant—Respondent.

First Appeal No. 238 of 1933, Decided on 22nd February 1935, from order of First Sub Judge, Saharanpur, D/- 23rd September 1933.

Civil P. C. (1908), O. 5, R. 15 (as amended by Allahabad High Court)—Pardanashin lady is not person who cannot be personally served—Lady present in house—Merely serving summons intended for pardanashin lady on male member is not sufficient requirement of law.

Summons can be delivered or tendered to a pardanashin lady, even though it may not be possible for the process-server to have access to her; nor can a pardanashin lady be considered to be a person who cannot be personally served. It is the duty of the process-server to make an attempt to find ways and means of delivering or tendering the summons to the pardanashin lady for whom it is intended. He can very often find some one living with her or in the neighbourhood, male or female, who can take the summons to her. If the pardanashin lady accepts service, it is personal service as contemplated by Rr. 10 and 15. He should in ordinary cases obtain the attestation of the witness taking the summons to the pardanashin woman concerned which should also be done in case of refusal by her to accept the summons. If the process-server cannot find any one, male or female who can take the summons to her, it may be a case referred to in R. 15, namely, that the defendant cannot be personally served. [P 661 C 2]

Where a summons intended for a pardanashin lady was served on a male member, even though the lady was inside the house: *Held*: the requirement of law was not complied with. [P 662 C 1]

M. H. Faruqi—for Appellant.

S. K. Mukerji—for Respondent.

Judgment.—This is an appeal from an order of the learned Subordinate Judge, Saharanpur, refusing to set aside an ex parte decree passed in an appeal in which the present appellant was the respondent. That appeal arose out of a suit brought by her for a declaration that a certain property which she claimed to be hers was not liable to be sold at the instance of the opposite party in execution of a decree obtained by him against her husband. She established her claim in the trial Court which declared that the property in dispute belonged to her and not to her husband. The opposite party preferred an appeal to the lower Court (Subordinate Judge, Saharanpur). A summons was issued to the appellant, who is a pardanashin lady. The process-

server's report was to the effect that the appellant, who is a pardanashin lady, was in the house, that she was called out, but did not answer and that accordingly the summons was handed over to her husband's elder brother, Mohammad Bakhsh, who affixed his thumb mark on the back of the summons. On the date fixed for the hearing of the appeal no one appeared on behalf of the respondent (the appellant in this appeal), and an ex parte decree was passed against her allowing the appeal and dismissing her suit. The appellant made an application under O. 41, R. 21, Civil P. C., for an order to set aside the ex parte decree. She filed her own affidavit swearing that Mohammad Bakhsh never informed her of the process-server having delivered a summons; nor did she otherwise come to know of the date fixed for the hearing of the appeal in which she was respondent. Mohammad Bakhsh was not examined on behalf of any party. The opposite party filed a counter-affidavit in which the appellant's allegations were traversed. It is however clear that, a denial of the truth of her allegations by one who had no personal knowledge of the matter is not of any value. The lower Court dismissed her application on the solitary ground that:

"No reason has been shown on behalf of the appellant why her husband's own brother did not inform the appellant of the date of hearing."

That Court did not apply its mind to the question whether in the circumstances of the case service on Mohammad Bakhsh was due service. O. 41 R. 21, provides like O. 9, R. 13, Civil P. C., that where an appeal is heard ex parte and the judgment is pronounced against the respondent, the latter may apply for the appeal being reheard, and, if the Court is satisfied

"that the notice was not duly served or that the respondent was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal."

The appellant's contention is that she was not duly served. This contention has force. O. 5, R. 15, Civil P. C., as amended by this Court, permits service being effected on a male member of a family only:

"When the defendant is absent or cannot be personally served and has no agent empowered to accept the service of the summons on his behalf."

The process-server's report in this Court makes it abundantly clear that the appellant was not absent; she was inside the house. The learned advocate for the opposite party has strenuously contended that it was a case in which the party could not be personally served. He argues that every pardanashin lady should be considered to be a person who cannot be personally served. It is said that from her position a pardanashin woman cannot appear before the process-server and therefore personal service is impossible. The manner in which personal service is to be effected is mentioned in O. 5, R. 10, which provides that:

"Service of the summons shall be made by delivering or tendering a copy thereof."

It is argued that unless a process-server can directly approach the lady to be served or rather unless the lady can appear before the process-server, it is impossible for the latter to deliver or tender the summons to her. I am unable to accept these contentions. Summons can be delivered or tendered to a pardanashin lady even though it may not be possible for the process-server to have access to her nor can a pardanashin lady be considered to be a person who cannot be personally served. It is the duty of the process-server to make an attempt to find ways and means of delivering or tendering the summons to the pardahnashin lady for whom it is intended. He can very often find some one living with her or in the neighbourhood, male or female, who can take the summons to her. If the pardanashin lady accepts service, it is personal service as contemplated by Rr. 10 and 15, Civil P. C. He should in ordinary cases obtain the attestation of the witness taking the summons to the pardahnashin woman concerned which should also be done in case of refusal by her to accept the summons. If the process-server cannot find any one, male or female, who can take the summons to her, it may be a case referred to in R. 15, namely that the defendant cannot be personally served. To accept the contention of the learned advocate for the appellant will be to deprive a pardanashin lady of the privilege of personal service of the summons in cases to which she is a party.

Coming to the facts of the present case it is not suggested that Mohammad Bakhsh would have declined to take the summons to the appellant. Apparently he was quite willing to do what the process-server would ask him to do. He accepted service and signed it in token thereof. It is perfectly clear that if everything was fair and square in this case, the process-server, who

could not be expected to know all the nicoties of law regarding personal service, considered it sufficient to serve it on the male member of the appellant's family. He did not however comply with the requirements of law and the appellant cannot be considered to have been "duly served."

The Subordinate Judge was not justified in presuming that Mohammad Bakhsh informed the appellant of the visit of the process-server and of the date fixed for hearing of her case. It is not permissible to have recourse to speculation in a matter of this kind. It might well be that the opposite party, who had lost his case in the First Court, desired to have the appeal heard ex parte, and arranged for a service in a manner which may not be calculated to convey information of the pendency of the appeal to her. This is however a pure conjecture, no better or worse than that made by the lower Court. The question whether the appellant was aware of the date fixed in her appeal and was prevented by sufficient cause from appearing in the case does not arise in view of my finding that the appellant was not duly served. Under O. 41, R. 21, the Court is bound to set aside an ex parte decree if the respondent satisfies it that the summons was not duly served.

The result is that this appeal succeeds. It is accordingly allowed with costs. The order of the lower appellate Court and the ex parte decree are both set aside. The appeal of the opposite party shall be reheard according to law.

K S. *Appeal allowed.*

A. I. R. 1935 Allahabad 662

NIAMAT-ULLAH, J.

Banaphal Singh—Plaintiff — Appellant.

v.

Noor Mohammad and *another*— Defendants—Respondents.

Second Appeal No. 68 of 1933, Decided on 27th February 1935, from decision of Dist. Judge, Azamgarh, D/- 14th October 1932.

(a) Deed—Inconsistency between two parts of document—Case is one of ambiguity.

The document must be taken as a whole and if there is inconsistency between two parts of it, there can be no doubt, whatever that the case is one of ambiguity. [P 663 C 1]

(b) Evidence Act (1872), S 97—Language applying partly to one set of facts and partly to another but whole not applying correctly to either—Extrinsic evidence to show which of two applies is admissible — Finding on such point is one of fact not open to be attacked in second appeal—Civil P. C. (1908), S. 100.

Where the language of the deed, so far as the boundaries are concerned, is indicative of the fact alleged by the defendant, namely, that the whole of the grove was sold and another part of the deed, which refers to the number and area, is indicative of the fact alleged by the plaintiff. namely that part only of the grove, that is to say, No. 257, was sold in this state of things, evidence is clearly admissible to show whether it was meant that the deed should convey the whole of the grove or only part of it. Such evidence being admitted the finding of the lower Court on such a question is one of fact and cannot be questioned in second appeal.

[P 663 C 1, 2]

A. P. Pandey—for Appellant.

Mukhtar Ahmad—for Respondents.

Judgment.—This second appeal has arisen from a suit brought by the appellant for recovery of possession of plot No. 258 with trees standing thereon. The trial Court decreed the suit. The lower appellate Court dismissed it.

It is common ground that the plaintiff owned what looked on the spot like a grove surrounded by a ditch all round. It is however composed of two distinct plots, No. 257 area 753 karis or one bigha 6 biswas 14 dhurs and No. 258 area 97 kari or 3 biswas 9 dhurs. There are trees all over the grove on both the plots. The plaintiff executed a sale-deed in favour of the defendant in 1925 in respect of a grove which is described in the body of the sale-deed as No. 257, area 753 karis, bounded as stated at the foot of the deed. The boundares include not only plot No. 257, but also No. 258. The lower appellate Court treated it as a case of ambiguity and proceeded to decide on evidence whether the sale-deed was meant to cover the entire grove, including plots No. 258, as alleged by the defendant, or only No. 257, as alleged by the plaintiff. There was oral evidence on both sides which the lower appellate Court did not consider to be quite reliable. On the documentary evidence and certain circumstances referred to in the judgment that Court held that the plaintiff sold the entire grove, including No. 258, and that the defendant has been in possession of the entire grove ever since the date of sale. On that finding the plaintiff's suit was dismissed.

The learned advocate for the appellant argues that this was not a case of latent ambiguity and that extrinsic evidence was not admissible. He points out that the sale-deed clearly mentions the area of the property sold

besides its number and that the vendee is not entitled to any area in excess of what is mentioned in the deed. If there had been nothing else in the sale-deed, this argument would have been unanswerable but the document must be taken as a whole and if there is inconsistency between two parts of it, there can be no doubt, whatever, that the case is one of ambiguity. The deed purports to convey plot No. 257 subject to the qualification, viz., the area enclosed within the boundaries set forth at the foot of the deed. The defendant's case was that the plaintiff showed to him on the spot the grove which was enclosed by a ditch on all sides of it, and that the parties entered into the transaction of sale in respect of the entire grove which at that time was considered to be only No. 257 with an area of 753 karis. The lower appellate Court has found that the defendant has been in possession of the entire grove, including No. 258, ever since the date of sale. The plaintiff himself admits that he (the defendant) is in possession of No. 258, because the present suit is one for possession. The "khatauni" of 1334 Fasli which corresponds to 1926-27, records both plots Nos. 257 and 258, in the name of the defendant as grove-holder. In all subsequent years the same entry is found. Learned advocate for the appellant attempted to explain away the entry in the khatauni of 1334 Fasli on the ground that plot No. 258 is shown in red ink. It does not however appear what significance of the entry in red ink is. He suggests that plot No. 258 was subsequently entered in the defendant's grove khata. This may be so. The fact remains that the plaintiff did not take any exception to the defendant's possession for nearly 8 years, or to the entries in the "khatauni." This fact is strongly relied upon by the lower appellate Court, which refers to one or two other circumstances which, according to it, give rise to an inference in favour of the defendant.

It is conceded that the finding arrived at by the lower appellate Court is one of fact and is supported by, at least, some evidence. The only contention which is put forward on behalf of the appellant is that the lower appellate Court was not justified in entering into the question as to whether anything more than plot No. 257 was sold. In my opinion S. 97, Evidence Act is fully applicable. It provides that, when the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show which of the two it was meant to apply. In the present case, the language of the deed, so far as the boundaries are concerned, is indicative of the fact alleged by the defendant namely, that the whole of the grove was sold. Another part of the deed which refers to the number and area is indicative of the fact alleged by the plaintiff, namely, that part only of the grove that is to say, No. 257, was sold. In this state of things, evidence is clearly admissible to show whether it was meant that the deed should convey the whole of the grove or only part of it. In my opinion, the lower appellate Court was justified in admitting extrinsic evidence. As already stated, such evidence being admitted, the finding of the lower appellate Court is one of fact and cannot be questioned in second appeal, which is accordingly dismissed, with costs.

Leave to appeal under the Letters Patent is refused.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 663

SULAIMAN, C. J. AND BENNET, J.

Muhammad Mustafa Ali Khan — Plaintiff—Appellant.

v.

Dist. Board, Bareilly and *another*—Defendants—Respondents.

Second Appeal No. 1396 of 1933, Decided on 22nd January 1935, from decision of Dist. Judge, Bareilly, D/- 31st October 1933.

U. P. District Boards Act (10 of 1922), S. 48—Agenda paper mentioning that draft resolution and report regarding dismissal of secretary would come for final decision—It is sufficient notice under S. 48.

Where the agenda paper as issued made it perfectly clear that the draft resolution of the members together with the explanations and the report of the sub-committee would come up before the Board for final resolution:

Held: that it was sufficient notice under S. 48. [P 664 C 2]

K. N. Katju and *Mukhtar Ahmad* — for Appellant.

G. S. Pathak—for Respondents.

Sulaiman, C. J.—This is a plaintiff's appeal arising out of a suit for an injunction brought by the plaintiff who was the Secretary of the District Board, Bareilly, against the Board restraining the Board from enforcing their resolution of 8th March 1933. A relief for a declaration that the plaintiff's

dismissal was against law and unenforceable had been claimed, but was withdrawn.

The Courts below have dismissed the plaintiff's suit. In appeal it is contended that the decree is wrong. A question has been raised as to whether a suit for an injunction by a Secretary of Local Board, filed in a Civil Court is at all maintainable and whether any relief for injunction can be granted in the face of the provisions of S. 21 (b), Specific Relief Act. Under that section a contract which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms cannot be specifically enforced. The question whether the contract of service of the plaintiff was dependent on his personal qualifications or the volition of the parties is of some difficulty and I would not express any final opinion on it at this stage of the case because the case can be disposed of without deciding this question.

Before considering the obejctions raised by the plaintiff it would be convenient to give briefly the previous history of the matter: Early in January 1933, a proposal signed by 18 members of the Board in the form of a resolution was received by the Board. It suggested that the Secretary and the Engineer had been negligent in the discharge of their duties and guilty of lack of supervision causing disorder in the affairs of the Board and making its finances suffer heavily and that they were incapable and unworthy of the posts they held. The proposal was that they should be called upon to submit replies to the charges against them within 15 days and in case of their not doing so or their replies being unsatisfactory the question of their dismissal should be considered by the Board. There was a further proposal that the post of the Secretary and the Engineer should be combined. On receipt of this resolution the Chairman called upon the persons complained against to furnish explanations. Copies of the charges as well as copies of the draft resolution were handed over to them. The draft resolution together with the explanations submitted were placed before a meeting of the District Board on 15th February 1933. The resolution was considered and it was resolved by the Board that a sub-Committee of three members should be appointed to go into the charges and examine the explanations submitted on those charges and to submit a report to the Board before its next meeting on 8th March, and that the matter should come up for final decision on that date. Admittedly 10 (?) days before 8th March 1933, a notice was issued notifying that a meeting of the Board would be held on 8th March 1933. On 1st March 1933, an agenda paper was issued which contained, as the matter for consideration, the draft resolution of the 18 members about the dismissal of the Secretary and the Engineer along with the report of the Sub-Committee, the explanations of the Secretary and the Engineer as well as the report of the Special Officer and the resolution of the Board dated 15th February 1933. A complete copy of the draft resolution as well as a copy of the resolution of the Board dated 15th February 1933, were appended. On 8th March 1933, at a full quorum the Board passed a resolution dismissing the plaintiff.

The first objection taken is that there was no due notice given of the business that was transacted. S. 48, U. P. District Boards Act, requires that no business which is required to be transacted by a special resolution shall be transacted unless previous notice of the intention to transact such business has been given, and under S. 71 the dismissal of a Secretary is one of the matters for which a special resolution is necessary. It also appears that the Board acting under the power conferred upon it by S. 173, has framed certain regulations which require that there should be ten days' notice of a meeting and a seven days' notice of the agenda. The first objection is that there was no notice given within the meaning of S. 48 of the Act. We are wholly unable to accept this contention. The agenda paper as issued made it perfectly clear that the draft resolution of the members together with the explanations and the report of the Sub-Committee would come up before the Board on 8th March 1933, "for final decision." This undoubtedly notified that final orders would be passed on the matter. That necessarily included a resolution adopting the draft resolution as proposed by the members. We therefore think that there is no force in this objection.

The second objection is that under the regulations the agenda papers should have been issued ten days earlier. We are unable to accede to this contention. The notice which is to be

issued ten days before the meeting is a notice of the meeting itself, whereas the agenda is a notice of the matters which have to be considered at the meeting. There has in fact been no non-compliance with the regulation for notice of the meeting was given ten days earlier and the agenda paper was issued seven days before the meeting. This objection also has therefore no force. I would therefore dismiss this appeal.

Bennet, J.—I concur.

K S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 665

KENDALL, J.

Narain and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 36 of 1935, Decided on 12th March 1935, from order of Sess. Judge, Bareilly, D/- 3rd December 1934.

Penal Code (1860), S. 366—Object of accused being to bring pressure on husband of woman to withdraw certain complaint — S. 366 is not applicable—Jury not properly charged—Conviction is bad—Criminal Trial.

If the object of the accused is to bring pressure to bear on the husband of the woman to withdraw certain complaint, then it can hardly be said that they knew it to be likely that she would be forced or seduced to illicit intercourse.

Where the jury were likely to be misled by Judge's direction that they were likely to believe that what they had to find was not that the woman was abducted for illicit intercourse but that she was abducted for the purpose of bringing pressure to bear on her husband and if the jury brought in a verdict of guilty on this understanding.

Held: that the couviction under S. 366 ought not to stand, [P 665 C 2]

G. S. Pathak—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—The three appellants have been convicted by the learned Sessions Judge of Bareilly of an offence under S. 366, Penal Code, and sentenced to three years' rigorous imprisonment. The trial was by jury, and the appeal is made on the ground that there was a misdirection of the jury by the learned Judge. The three appellants and one other were charged with abducting Mt. Tulsha while she was going on her way to Khamaria with her maternal uncle Hira Lal, in order that the appellant Narain should commit illicit intercourse with her, and knowing it to be likely that she would be forced to illicit intercourse with another person by means of criminal intimidation. It has been pointed out that in the charge to the jury the Judge has not explained the ingredients of an offence under S. 366, Penal Code. The first of the ingredients is the abduction of the woman, and the second is the:

"intention that she may be compelled or knowing it to be likely that she may be compelled or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she would be forced or seduced to illicit intercourse."

i. e., the object of the abduction must be an enforcement or compulsion or seduction to illicit intercourse. At the beginning of the charge to the jury the Judge said that the prosecution case was that the idea of the accused was to bring such influence to bear on the woman or her family that the burglary case which was then pending against Narain accused would be withdrawn or seriously prejudiced. This matter is again referred to a little lower down where the Judge says that the defence does not:

"carry any great weight if their intention was merely to force her family to withdraw the case by abducting her or to force her herself to give evidence in favour of Narain."

If this was the object of abduction, then S. 366 would not be applicable. It is true the Judge remarks:

"section 366 also refers to a case in which the accused knows that it is likely that the woman will be seduced or compelled to illicit intercourse, and it is on this case that the prosecution proceeds."

I am not quite clear as to the meaning of this sentence. If the object of the accused was to bring pressure to bear on the husband then it can hardly be said that they knew it to be likely that she would be forced or seduced to illicit intercourse. Putting the case at its highest, it may fairly be said that the jury were likely to be misled, that is to say, that they were likely to believe that what they had to find was not that the woman was abducted for illicit intercourse but that she was abducted for the purpose of bringing pressure to bear on her husband and if the jury brought in a verdict of guilty on this understanding it is quite clear that the conviction under S. 366 ought not to stand.

It should be remarked that the Judge did not in his charge remind the jury that if they had any reasonable doubt about the guilt of the accused, they were to bring in a verdict of not guilty.

I therefore allow the appeal, set aside the order of conviction and sentence passed on the appellants, and direct that the case be returned to the

learned Sessions Judge for re-trial. The appellants may remain on bail until further orders have been passed by the Sessions Judge.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 666

GANGA NATH, J.

Braj Kishore Upadhia and *others*—Defendants—Appellants.

v.

Panchaiti Akhara Maha Nirwani Firqa Goshaiyan Naga — Plaintiff — Respondent.

Second Appeal No. 762 of 1933, Decided on 6th March 1935 from decision of Addl. Sub-Judge, Allahabad, D/- 22nd April 1933.

U P. Land Revenue Act (3 of 1901), S. 118 —Heap of manure or cattle trough is not dwelling house.

A heap of manure or a cattle trough with thatch is not a 'dwelling house or other building' within the meaning of S. 118 of the Act. Hence a cosharer to whose share a plot of land, over which another cosharer has made cattle troughs or stores heaps of manure, is allotted in partition is entitled to actual possession of the plot: 1917 *All* 413, *Ref*; 1917 *All* 412, *Rel on*. [P 667 C 1, 2]

N P. Asthana and *A. P. Pandey*—for Appellants.

K. N. Katju, Ladli Prasad Zutshi and *Janki Prasad*—for Respondent.

Judgment.—This is a defendants' appeal and arises out of a suit brought against them by the plaintiff-respondent for possession over plot No. 196 of Abadi and parti land described in the plaint by removal of the defendants' cattle troughs and thatch. The parties were co-sharers. A partition took place between the parties and other cosharers in 1926. The plot in dispute was allotted to the patti of the plaintiff at the time of the partition. There was at the time of partition a bagar "of the defendants" on the plot in dispute. The plaintiff brought this suit on the allegation that he was obstructed by the defendants when he wanted to make some constructions on the plot in dispute. The defendants contended that they had their bagar on the plot in suit and therefore they had a right to remain in possession. The trial Court decreed the suit partly for possession over the plot except over that portion on which the defendants' chhappar stood. A cross-objection was filed by the plaintiff and an appeal by the defendants. The Additional Subordinate Judge allowed the cross-objection and dismissing the defendants' appeal, decreed the suit. Against this decision, this appeal has been filed by the defendants. The chief point for consideration is whether the defendants have any right of possession over the plot in suit. The defendants' case is that they had a building standing on the plot in dispute at the time of the partition and therefore they had a right to remain in possession. S. 118, United Provinces Land Revenue Act, provides that:

"If, in making a partition, it is necessary to include in the portion allotted to one cosharer the land occupied by a dwelling house or other building in the possession of another cosharer, the latter shall be allowed to retain it with the building thereon, on condition of his paying for it a reasonable ground rent to the cosharer in whose portion it may be included."

In the Full Bench case of 1917 All 412 (1), it was held that:

"Where a partition has been effected under the provisions of the United Provinces Land Revenue Act, 1901, and the site of the house of one cosharer has been allotted to the share of another cosharer, the presumption is, the owner of the house was to retain possession of the house. The mere fact that ground rent has not been assessed cannot deprive the owner of the house of his right to it."

The question therefore that arises for consideration is whether the defendants had any house or building on the plot in suit or not at the time of the partition. At present no building exists on the land in dispute. There are some cattle troughs and pegs and a rotten thatch is supported on some wooden poles. This thatch cannot be called a building. The defendants led evidence to show that they had a mud-house which had a tiled roof and, when it fell down, a thatch was put. This evidence is against the defendants' own allegations in their written statement. In para. 9 where they describe the buildings which according to them stood at the time of the partition, they have made no mention of any tiled building. On the other hand, they have referred to the thatch which according to them still exists. If there had been any mud-walls on which the present chhappar had been resting, there is no reason as to why those mud-walls were not re-built when they fell down, nor it has been explained as to how the chhappar was made to rest on the wooden poles if formerly there were any walls. The allegations in para. 9 of the written statement coupled with those in para. 1 in the defendants' cross-objection leave no room for

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1 Sarup Lal v. Lala, 1917 All 412=42 I C 589=39 All 707 (F B).

doubt that the defendants had no such thing as a building, on the land in dispute. They had only some cattle troughs and pegs and a thatch for the shelter of the cattle. These things cannot be called a building. The lower Court has also found that the condition of the cattle troughs and the thatch shows that they have not been in the enjoyment of the defendants since partition. The learned Additional Subordinate Judge has observed:

"The broken down condition of the troughs and the rotten condition of the chappar would show that defendant abandoned possession and enjoyment after the partition."

A heap of manure or a cattle trough is not a "dwelling house or other building" within the meaning of S. 118, U. P. Land Revenue Act. A cosharer to whose share a plot of land, over which another cosharer has made cattle troughs or stores heaps of manure, is allotted in partition is entitled to actual possession of the plot: vide 1917 All 413 (2). As already stated, as there was no building at the time of partition, the defendants have no right to remain in possession over the plot in dispute, which was admittedly allotted to the plaintiff in partition. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal dismissed.*

2. Ram Kishore v. Kalka Dichhit, 1917 All 413 =39 I C 575.

A. I. R. 1935 Allahabad 667

THOM AND IQBAL AHMAD, JJ.

Ishwar Dayal — Plaintiff — Appellant.

v.

Amba Prasad and *others*—Defendants —Respondents.

First Appeal No. 139 of 1933, Decided on 18th February 1935, from decision of Sub-Judge, Bulandshahr, D/- 14th February 1933.

(a) Court-fees—Question should be decided with reference to relief prayed for in plaint — Fiscal enactment should be construed strictly—Interpretation of Statutes.

At the stage at which the consideration of the question of Court-fee arises the Court is not concerned with the question as to what reliefs should have been prayed for by the plaintiff. It has to confine its attention to the reliefs contained in the plaint and to see whether the Court-fee paid by the plaintiff is or is not sufficient in accordance with the provision of the Court-fees Act. Further. in the decision of the question of court-fee the Court has to bear in mind the principle that a fiscal enactment is to be strictly construed and in favour of the subject. [P 668 C 1]

(b) Court-fees Act (1870), Sch. 2, Art. 17 (iii) — Suit for declaration that mortgage bond is not enforceable and that family property mortgaged could not be sold in execution of mortgage decree — Latter relief is merely declaratory relief and not consequential relief.

Consequential relief means some relief which is a necessary corollary to the principal declaratory relief prayed for by the plaintiff [P 668 C 2]

Where a suit was filed for a declaration that a mortgage bond was not enforceable and that the family property mortgaged by that bond was not liable to be sold in execution of the mortgage decree.

Held: that the relief for a declaration that the family property was not saleable in execution of the decree was a declaratory relief and not a consequential relief and the case was governed by Sch. 2, Art 17 (iii): *Case Law Ref.* [P 669 C 1]

Chandra Bhan Agarwalla—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant for a declaration that the hypothecation bond, dated 2nd January 1925, executed by defendant 2, the father of the plaintiff, in favour of defendant 1, was unenforceable and that the family property mortgaged by that deed was not saleable in execution of an ex parte decree for sale obtained by defendant 1 on the basis of the said mortgage-deed. The plaintiff also prayed for a declaration that the purchase made by defendant 3 in execution of a simple money decree is null and void as against the plaintiff and the property in dispute.

The plaintiff valued the suit for the purpose of jurisdiction at Rs. 10,000 and paid a court-fee of Rs. 20. The plaintiff's case was that there was no legal necessity for the execution of the mortgage-deed by defendant 2, and the amount, if any, borrowed by defendant 2 was spent by him on "improper acts and immoral purposes." It was recited in the plaint that defendant 1 obtained an ex parte decree on the basis of the mortgage-deed without impleading the plaintiff. The relief as against defendant 3 mentioned above was based on the allegation that the purchase made by her was in execution of a simple money decree with respect to a debt that was taken by defendant 2 for immoral purposes.

Defendant 1, alone contested the suit and one of the pleas raised by him was that ad valorem court-fee on Rs. 10,000 was payable and the plaint was insufficiently stamped. The learned Subordinate Judge relying on the Full

Bench decision in the case of 1932 All 485 (1), accepted the contention of the defendants and called upon the plaintiff to pay ad valorem court-fee on Rs. 10,000. He granted time to the plaintiff for making good the deficiency in the court-fee, but as the plaintiff failed to make good the deficiency, he dismissed the suit with costs. The plaintiff has come up in appeal to this Court and it is contended on his behalf that the court-fee paid on the plaint was sufficient and the view taken by the Court below was erroneous. In our judgment this contention is well-founded.

The question whether the court-fee paid is or is not sufficient must be decided with reference to the relief prayed for in the plaint irrespective of the fact whether the omission of the plaintiff to ask for some further or consequentiel relief would or would not entail the dismissal of the suit in view of some statutory provision, e. g., the provisions of S. 42, Specific Relief Act. At the stage at which the consideration of the question of court-fee arises the Court is not concerned with the question as to what reliefs should have been prayed for by the plaintiff. It has to confine its attention to the reliefs contained in the plaint and to see whether the court-fee paid by the plaintiff is or is not sufficient in accordance with the provision of the Court-fees Act. Further, in the decision of the question of court-fee the Court has to bear in mind the principle that a fiscal enactment is to be strictly construed and in favour of the subject.

It is contended on behalf of the plaintiff-appellant that as the plaintiff merely prayed for a declaratory decree, the case fell within the purview of Art. 17 (3), Sch. 2, Court-fees Act, which provides a fixed court-fee of Rs. 10 for a plaint "to obtain a declaratory decree where no consequential relief is prayed." It is contended, on the other hand, on behalf of the defendant-respondents that the prayer contained in the plaint was not only for a declaratory decree, but also for a consequential relief and the plaintiff was therefore liable to pay ad valorem court-fee on the amount (Rs. 10,000) in accordance with S. 7 (4) (c), Court-fees Act, that provides about court-fee in suits to obtain a declaratory decree or order where consequential relief is prayed.

1. Kalu Ram v. Babu Lal, 1932 All 485=139 I C 32=54 All 812 (F B).

The Full Bench decision in 1932 All 485 (1), mentioned above has no application to the case before us. In that case the relief prayed for in the plaint was for the cancellation of an instrument and also for the cancellation of the compromise, the preliminary decree and the final decree in a certain suit and it was held by this Court that the court-fee payable was under the residuary articles, Sch. 1, Art. 1, Court-fees Act. We are not concerned in the present case with any prayer for the cancellation of any instrument or for the cancellation of any decree. The only question that we have to consider is whether the reliefs sought by the plaintiff were mere declaratory reliefs or there was also a consequential relief prayed for by the plaintiff. In the Full Bench case mentioned above it was observed that the words "consequential relief" in S. 7 (4) (c) mean some relief which follows directly from the declaration given and "cannot be claimed independently of the declaration as a substantive relief." Similarly in 1915 Mad 444 (2), it was held that consequential relief means a substantial and immediate remedy in accordance with the title that the Court has been asked to declare. In short, consequential relief means some relief which is a necessary corollary to the principal declaratory relief prayed for by the plaintiff. Instances of consequential relief within the meaning of S. 7 (4) (c), Court-fees Act, are furnished by cases in which, over and above the prayer for declaration of his title, the plaintiff asks for some relief by way of injunction, or possession, or appointment of receiver, or for partition of his share, etc. Such cases must be distinguished from cases in which two or more declaratory reliefs are prayed for by the plaintiff. It may be that one of such declaratory reliefs can in one sense be said to follow from the other declaratory relief claimed by the plaintiff, but this fact alone cannot make a declaratory relief a consequential relief within the meaning of S. 7 (4) (c), Court-fees Act. Instances of suits in which more than one declaratory relief were prayed for and each of the reliefs was held to be an independent declaratory relief, are furnished by the decisions of this Court in 1932 All 560 (3), 1933 All 350 (4) and

2. Hyder Ali Sahib v. Hussain Raza Sahib, 1915 Mad 444=24 I C 316.
3. Brij Gopal v. Suraj Karan, 1932 All 560=141 I C 112.
4. Lakshmi Narain Rai v. Dip Narain Rai, 1933 All 350=148 I C 152=55 All 274.

1934 All 56 (5). In the last mentioned case the plaintiff prayed for a declaration that a deed of gift executed by a certain person in favour of the defendant was illegal and ineffectual as against the plaintiff and that the defendant had no right to interfere with the possession of the plaintiff. It was held that a court-fee of Rs. 20 paid on the plaint was sufficient as the relief claimed in the plaint involved two declarations.

In the case before us the declaratory relief prayed for by the plaintiff that the hypothecation bond was unenforceable and that the family property was not saleable in execution of the decree obtained by defendant 1, was really only one declaratory relief for the simple reason that on the date of the suit the hypothecation bond had merged in the decree and had ceased to exist, and it was the apprehension of the family property being sold in execution of the decree that led the plaintiff to institute the suit and to claim the relief noted above. Indeed, if he had simply asked for a declaration that the property was not saleable in execution of the decree, the relief could, on proof of the facts alleged by the plaintiff, have been granted to him. The relief for a declaration that the family property was not saleable in execution of the decree was therefore a declaratory relief and not a consequential relief. The plaint was therefore sufficiently stamped and the Court below was wrong in dismissing the suit.

For the reasons given above we allow this appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it to its original number and to try and dispose it of according to law. Costs here and hitherto shall be costs in the cause and shall abide the result.

K.S. *Appeal allowed.*

5. Abdul Samad Khan v. Anjuman Islamia, Gorakhpur, 1934 All 56=149 I C 802.

A. I. R. 1935 Allahabad 669

BAJPAI, J.

B. B. & C. I. Ry. Co. — Defendant — Appellant.

v.

Dwarka Nath — Plaintiff — Respondent.

Second Appeal No. 1199 of 1932, Decided on 23rd January 1935, from decision of Sub-Judge, Farrukhabad, D/- 8th June 1932.

Tort — Negligence — Damage caused to plaintiff's property by spark from engine — Onus of proving that proper precaution was taken is on the railway — Plaintiff not in position to avert damage — There is no contributory negligence — Railway.

In a plaintiff's suit for damages brought against a railway company on the allegation that his property adjoining the railway line was destroyed by a spark from the engine of a running train the burden of proof as to whether proper precaution had been taken to avoid emission of such sparks lies on the railway company and the latter will be liable if it failed to take all reasonable precaution : 1927 *All* 349, *Rel on.*; 14 *Beng L R* 1, *Dist.* [P 670 C 2]

Where the lower Court has found that it was not possible for the plaintiff to have averted the damage by adopting such steps as are humanly possible he is not guilty of contributory negligence. [P 671 C 1]

K. N. Katju and *R. N. Gurtu* — for Appellant.

S. B. Johari — for Respondent.

Judgment.—This is a second appeal by a Railway Company against the decree of the Courts below awarding damages to the plaintiff for loss sustained by him through fire. The origin of the fire was stated to be that certain sparks from an engine of the Railway Company fell on the grass growing on the Railway bank and spreading on to the jungle of the plaintiff's adjoining land damaged some patel grass and trees. The plaintiff is the owner of village Bholanpore Chirpura and a portion of its area is situated close to the Railway line which passes over a certain portion of the land of this village. There are waste and jungle lands belonging to the plaintiff in this village and various kinds of timber and fruit trees and patel grass grow on these lands. The plaintiff's case is that on 13th April 1930, a passenger train owned by the B. B. & C. I. Railway Company was running between Cawnpore and Farrukhabad, and certain sparks from the engine were responsible for the fire and the damage to the plaintiff's property. Courts below have decreed the plaintiff's suit for damages to the extent of Rs. 600 on the finding that the defendant company was guilty of negligence.

In second appeal it is contended before me that on the findings of the lower appellate Court no negligence, such as is actionable in law, has been established and that the plaintiff was guilty of contributory negligence. It is said that the Railway Company has a statutory power of running locomotive engines on the Cawnpore-Farrukhabad line and therefore they are not

responsible for the consequences of the fire because:

"when the legislature has sanctioned the use of a particular means for a given purpose the sanction carries with it the consequence that the use of the means itself for that purpose is not an act for which an action can lie."

This argument however was modified by the concession that in case of negligence the Railway Company would not be exonerated. The question therefore is whether the defendant was guilty of such negligence as to entitle the plaintiff to obtain damages. The lower appellate Court has found that "the plaintiff's oral evidence is worthy of being relied on."

It has also discussed the defendant's evidence and has come to the conclusion that

"in face of the plaintiff's clear evidence no weight can be given to the defence evidence."

It is not possible in second appeal to come to a different conclusion on the question of the weight to be attached to the evidence adduced by the parties. It was however argued by Dr. Katju that the lower appellate Court has misread a portion of the evidence given by Ala Rakhu, a witness for the defendant, and that the finding is vitiated because the Court thinks that Ala Rakhu to a certain extent corroborates the plaintiff's evidence. Ala Rakhu in examination-in-chief supported the defence case, but in cross-examination stated that when he was about to start for Fatehgarh to report the matter to the Permanent-way Inspector the fire had already gone out of the Railway fencing (ag tar ke bahar pahunch chuki thi). The case of the defendant was that the fire did not have its origin within the Railway boundaries, but in the land belonging to the plaintiff caused by the negligence of some of the plaintiff's servants. The lower appellate Court therefore was justified in saying that the admission by Ala Rakhu to the effect that the fire had gone out of the Railway fencing suggests that the fire originated on the Railway banks. In my view there has been no misreading of the testimony of Ala Rakhu. After a review of the evidence produced by the parties the lower appellate Court records this finding:

"There was grass on the defendants' land, between the fencing on either side of the railway line, 1 to 1½ cubit high; that that grass caught fire, owing to sparks falling down from the railway engine; and that that fire spread on to the plaintiff's land and burnt his patel and trees."

It is then argued that even if this finding be accepted the plaintiff has no cause of action to maintain a suit for damages. The contention is that although it may be the duty of the Railway Company to take proper precaution for the avoidance of fire due to sparks from Railway engines yet an impossible duty should not be imposed and if the Railway Company were liable for damages caused to the plaintiff's land by reason of the sparks from the engine falling on the grass on the Railway banks and then spreading on to the plaintiff's land the task of the Railway Company would be an impossible one, because it would amount to asking them to keep the banks of their line "trimmed like a lawn or altogether preventing visitation thereon." It is said that the imposition of such a liability was not intended by the Legislature which gave the Railway Company power and authority to run trains and locomotive engines.

It was held by Mukerji, J., in 1927 All 349 (1), in a plaintiff's suit for damages brought against a Railway Company on the allegation that his property adjoining the Railway line was destroyed by a spark from the engine of a running train the burden of proof as to whether proper precaution had been taken to avoid emission of such sparks lay on the Railway Company and the latter would be liable if it failed to take all reasonable precaution. Mr. Dey was examined in the present case by the Railway Company and he said that 10 feet of land near the Railway fencing is kept clean by the Railway Authorities and this track is known as the fire line, then again a piece of land 2 feet in width near the Railway track itself is kept clean and that all these precautions were taken in 1930 also. This would go to show that the Railway Company itself did not consider it impossible to keep about 10 feet wide land near the fencing and 2 feet wide land near the Railway track clean. It also appears in the evidence of the plaintiff and of Mr. Dey that the plaintiff had made several complaints to the Railway Authorities for damage caused to this property by the sparks from the engine and that several thekadars who had taken a theka of cutting grass from the plaintiff's land had shown their disinclination to take the theka. The attention of the authorities was pointedly drawn to the duty of cutting the tall grass inside the fencing in order to prevent damage to the plain-

1. Secy. of State v. Dwarka Prasad, 1927 All 349 =100 I C 640=49 All 559.

tiff. The lower appellate Court has refused to believe Mr. Dey when the latter said that the precaution of cutting the grass had been taken in the year 1930. The learned Judge says:

" neither his oral statement nor his reports can be worthy of being given any weight."

Under these circumstances I am of the opinion that the finding of the lower appellate Court that the defendant Railway Company was guilty of actionable negligence was sound in law.

Reliance however was placed by Dr. Katju on the case of 14 Beng L R 1 (2). This case lays down that if every precaution which the nature of the case suggests has been observed then the Railway Company which has a statutory power of running locomotive engines will not be liable for damages caused to the plaintiff's property independent of negligence. Coming to the facts of that case it appears that they were entirely different from the facts of the present case. The learned Single Judge as well as the Judges who heard the Letters Patent appeal relied greatly upon the evidence tendered by the Railway Company which was to the effect that the grass on the Railway banks was not more than a foot high and that it was not to be expected that the Railway Company would trim the grass on the banks like a lawn. In the present case it is admitted by the Railway Company that the fire line and another two feet wide line near the Railway track has to be kept clean of grass, and the finding is that the grass on the defendants' land between the fencing on either side of the Railway line was about 18 to 24 inches high. The case cited by the appellant therefore does not help the Railway Company. Next it was contended that the plaintiff was guilty of contributory negligence inasmuch as some of his servants saw some live coal falling from the ash-pan of the Railway engine which ignited the grass on the Railway line and this fire in its turn by the westerly wind that was blowing spread on to the plaintiff's land. It is said that the plaintiff's servants could have managed to extinguish the fire if they had taken proper steps. According to the defendants' own witness Ala Rakhu the fire spread with great rapidity and the jungle was ablaze within a very short time, and therefore it was not possible for the plaintiff's servants to have averted the damage by adopting such steps as were humanly possible.

2. Halford v. The E. I. R. Co., (1875) 14 Beng L R 1.

For the reasons given above there is no force in this appeal and I dismiss it with costs. Dr. Katju has asked for permission to file an appeal by way of Letters Patent saying that the question is of great importance to the Railway Company and I give him leave.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 671

SULAIMAN, C. J. AND BENNET, J.

Amir Ahmad—Plaintiff—Appellant.

v.

Syed Hasan—Defendant—Respondent.

Second appeal No. 924 of 1931, Decided on 6th February 1935, from decision of First Sub-Judge, Saharanpur, D/- 14th April 1934.

(a) Provincial Insolvency Act (1920), Ss. 4 and 53—Transfer by insolvent— Transfer by transferee to third party — Application by receiver for annulment of insolvent's transfer— Third party not impleaded — Order against first transferee ex parte or after contest is not final adjudication as against real claimant of title.

When property has been transferred by the transferee of an insolvent to a third party and the receiver is aware of the transfer the dispute is really between the receiver on the one hand and the subsequent transferee on the other and not between the receiver and the first transferee who has no longer got any interest, in the property left. In order to start a proceeding under S. 4, the application should therefore be by the receiver against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the receiver chooses to proceed under S. 4 against the first transferee who has no interest left in the property and obtains an order against him either ex parte or after contest, he cannot use that order as a final adjudication of the matter in dispute against the real claimant of the title. [P 674 C 1]

(b) Provincial Insolvency Act (1920), S. 28 (2) (7)—Vesting of property dates back to date of insolvency application — It does not date back to previous transfer by insolvent.

The vesting of the property in the receiver dates back to the date of the application for insolvency. There is no provision in the Act under which the vesting of property dates back to a previous transfer made by the insolvent. Indeed such a transfer stands unless it is annulled ay the Court [P 674 C 2]

A. M. Khwaja—for Appellant.

M. A. Aziz—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for partition in which a question arose as to the title of the rival claimants. On 2nd February 1925, one Abdul Ghani, who was heavily in debt sold his share in the house in question to one Abdul Qaiyum. On 19th October 1926, Ab-

dul Ghani himself applied for being adjudicated an insolvent and he was declared an insolvent on 21st December 1926. On the following day, namely, 22nd December 1926, Abdul Qaiyum sold the property to the present defendant, Saiyid Hasan. On 25th June 1927, on an application made by the official receiver the sale deed of 2nd February 1925, which had been executed by the insolvent in favour of Abdul Qaiyum was annulled by the Court. In that proceeding Abdul Qaiyum alone had been impleaded and did not appear, the subsequent transferee, Saiyid Hasan was not impleaded by the official receiver at all. After having obtained the order of annulment the official receiver on 4th August 1927, transferred the property to the present plaintiff Amir Ahmad. As Amir Ahmad did not obtain possession of the house, the present suit was instituted by him on 21st August 1930, for partition and separation of his share.

The plaint was very vague and did not clearly state how Saiyid Hasan came on the scene. The written statement was in the same way vague and did not contain an express plea that Abdul Qaiyum was a bona fide transferee for value nor did it contain any express plea that the application did not lie under the Insolvency Act at all. Both the Courts below have dismissed the claim holding that inasmuch as Saiyid Hasan, the defendant, in the absence of any evidence to the contrary must be taken to have been a bona fide purchaser for good consideration his title cannot be impeached.

This view is challenged in appeal. Our attention has been drawn to a large number of cases which have a close bearing on the point arising in this case, but there is no case which can be said to be directly in point.

It seems quite clear that if a transfer made by a debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void ab initio and subsequent transferees can never be protected because the foundation of their title does not exist. There would be no necessity for the official receiver to have such a wholly ineffective, void and fictitious transfer annulled under S. 53 or S. 54 of the Provincial Insolvency Act. In case of dispute he can always ignore it and treat it as a nullity either in a separate suit or in a proceeding under S. 4, Insolvency Act.

On the other hand, if the transfer made by the debtor was not wholly fictitious and bogus but the intention of the parties was that property should in fact pass to the transferee, then the result would depend on whether the transferee was a purchaser in good faith and for valuable consideration or not. The transfer for the time being is valid, though it is voidable at the option of the receiver, and it is discretionary with the Court to annul it under S. 53, Provincial Insolvency Act. But so long as the transfer has not been avoided by the receiver and not annulled by the Court, the title vests in the transferee even though he may not have acted in good faith and might not have paid full consideration. Such a transfer can however be annulled, that is to say, declared to have ceased to be binding on the receiver. The annulment, however cannot be equivalent to a declaration that it was void from the very beginning.

Reliance has been placed on some English cases, but all of them are not of much help because the language of the relevant sections in the various Bankruptcy Acts under which they arose was substantially different. But there are a large number of cases in India in which the view appears to have been expressed that S. 53, Insolvency Act has no application when once the transferee from the insolvent has transferred the property to a third party: See 1920 Mad 917 (1), 9125 Lah 295 (2), 1927 Mad 58 (3), 1925 Rang 351 (4) and 1930 Nag 34 (5).

This view is based on the sole circumstance that S. 53 in terms does not apply to a transferee from a transferee. No doubt the transfer that is annulled by the Court is the transfer made by such transferee as is adjudged insolvent, but it does not follow that a subsequent transferee who is a legal representative is not equally bound by the annulment.

There is one significant circumstance which does not appear to have been brought to the notice of the learned Judges who decided the above mentioned cases, and it is that if S.

1. Jagannath Ayyangar v. Narayana Ayyangar, 1920 Mad 917=52 I C 761.
2. Sudha v. Nanakchand Daulatram, 1925 Lah 295=88 I C 89.
3. Ponnammai Ammal v. District Official Receiver, Tinnevelly, 1927 Mad 58=97 I C 918.
4. Maung Myint v. Official Assignee, 1925 Rang 351=90 I C 969=3 Rang 313.
5. Govind v. Sonba, 1930 Nag 34=121 I C 663.

54 (1) had stood by itself there would have been an equal reason for holding that it would not be applicable to a transferee from a creditor because the language of both the sections is almost similar. But there can be no doubt that the legislature has thought otherwise, and has provided in Sub-S. 2 of S. 54, that the rights of any person who has acquired title through or under a creditor will not be affected if he has acted in good faith or for valuable consideration. It follows that but for this sub-section such a second transferee would not have been protected. Reading Ss. 53 and 54 together, it would then seem to follow that the sections are general in their scope and if the transfer made by the insolvent has been annulled the annulment is binding on the initial transferee as well as his subsequent representative. It is noteworthy that the language of para. 1, S. 53, T. P. Act, is similar and there too there is a provosion in the last paragraph that the rights of a transferee in good faith and for consideration would not be impaired.

This view finds some support from the remarks made by Vaughan Williams, J., (1893) 2 Q B 377 (6). In that case the learned Judge was dealing with the plea of pawnee from the wife of the insolvent to whom he had gifted certain jewellery. The learned Judge observed:

"Of course, no question could arise at all unless it is that the respondents were persons claiming in good faith and for valuable consideration."

In that case the pawnee had taken the jewellery from the wife previous to the application for insolvency. Nevertheless the learned Judge considered that if he had not been a transferee in good faith and for valuable consideration, no question would have at all arisen.

On general principles also there seems to be no reason why, if the original transfer made by the insolvent is found to be voidable and has been annulled by the Court, the annulment should not be binding on subsequent transferees and affect their title. There is however one distinction. S. 54 (1) declares that the transfer made by a person unable to pay his debts to a creditor with a view of giving that creditor a preference shall be deemed fraudulent and void and shall be annulled by the Court. The provision is imperative and the Court has no option but to declare it fraudulent and void and to annul it. It was therefore necessary to provide in Sub-S. 2 that the rights of any person who in good faith and for valuable consideration has acquired title through or under a creditor would not be affected. On the other hand, the provisions of S. 53, are not so mandatory. A transfer other than one for consideration and made in favour of a purchaser acting in good faith, is only voidable as against the receiver and it is a matter of discretion for the Court to annul it or not. Obviously the Court would decline to exercise its discretion, if the transferee were to satisfy the Court that he acted in good faith, paid full consideration and was entitled to protection on equitable grounds. It was therefore not necessary to add any sub-section to S. 53, corresponding to Sub-S. 2 to S. 54. The question of good faith and payment of good consideration as well as that of care and precaution can all be considered by the Court itself. But as the annulment made by the Court does not date back to the original transfer and can at the very most, date back to the date of the application for insolvency, it would follow that the avoidance of a second transfer against a second transferee, who took the second transfer before the application for insolvency was made, cannot be annulled under S. 53 of the Act, but if it is either absolutely void from the very beginning or is voidable under S. 53, T. P. Act, it can be declared to be void or avoided either in a separate suit or in a proceeding under S. 4, Provincial Insolvency Act.

Sections 53 and 54 as laid down by the majority of the Full Bench in the case of 1929 All 105 (7) do not deal with the jurisdiction to the Insolvency Court but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that Court and in no way control the provisions of S. 4. It therefore follows that in order to apply S. 53, the condition precedent is a finding that the transfer was otherwise than one made in good faith and for valuable consideration. That finding of fact can be arrived at only when a dispute as to title arises between two rival claimants. When property has been transferred by the transferee of

6. *In re* Vausittart, Ex parte Brown, (1893) 2 Q B 377=62 L J Q B 279=41 W R 286=68 L T 233=10 Morrel 44.

7. Anwar Khan v. Muhammad Khan, 1929 All 105=113 I C 819=51 All 550 (F B).

an insolvent to a third party and the receiver is aware of the transfer the dispute is really between the receiver on the one hand and the subsequent transferee on the other and not between the receiver and the first transferee who has no longer got any interest in the property left. In order to start a proceeding under S. 4, the application should therefore be by the receiver against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the receiver chooses to proceed under S. 4, against the first transferee who has no interest left in the property and obtains an order against him either ex parte or after contest, he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title.

Some difficulty is certainly caused by the phraseology used in S. 4 (2) under which all claimants against the debtor and all persons claiming under claimants are bound. But if the first transferee has ceased to have any interest in the property at all it is difficult to regard him as a claimant against the debtor so as to bind the second transferee. The real situation then is that the claimant is the subsequent transferee in whom the property vests for the time being and it is he and his legal representatives or persons who will claim through him afterwards who would be bound by the order. If a transfer were older than two years prior to the application for insolvency the only remedy open to the official receiver would be to avoid the transfer if he can, in accordance with the provisions of S. 53, T. P. Act, and he has to establish an intent to defraud or delay creditors. The learned counsel for the appellant has argued that the order of annulment is a judgment in rem and operates against the whole world and that it dates back to the initial transfer made by the insolvent. This argument is based on the insolvency jurisdiction of the Court and also on Ss. 4 (2) and 28 (7) of the Act. All adjudications as between the receiver representing the whole body of creditors on the one hand and the insolvent on the other are certainly judgments in rem and are binding on the whole world. But when a dispute as to title to property arises between the receiver representing the creditors on the one hand and a stranger to the insolvency proceeding, the judgment would be binding on the person against whom the decision is given and not against the whole world. S. 28 (7) merely lays down that the order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition. Under S. 28 (2) on the making of an order of adjudication the whole of the property of the insolvent vests in the Court of the receiver. The result of these two sub-sections is that the vesting of the property in the receiver dates back to the date of the application for insolvency. There is no provision in the Act under which the vesting of the property dates back to a previous transfer made by the insolvent. Indeed such a transfer stands unless it is annulled by the Court.

It therefore seems to follow that the official receiver wrongly omitted to implead Saiyid Hasan, particularly as it appears from the record that he was aware of the transfer in his favour, and that the order of annulment which he obtained against the absent Abdul Qaiyum is not binding upon the present defendant Saiyid Hasan and it is open to Saiyid Hasan to show that the original transfer in favour of Abdul Ghani was made to purchaser in good faith and for valuable consideration and that it is also open to him to show that he himself acted in good faith and paid full consideration being unaware of insolvency proceedings. As the pleadings were defective the first question has not been gone into by the Courts below, but it has been assumed as a result of the previous order of annulment passed against Abdul Qaiyum that he was not a purchaser in good faith and for valuable consideration. There is however a clear finding that the defendant Saiyid Hasan in the absence of evidence to the contrary must be taken to be a bona fide purchaser for good value. As S. 53 applies only to cases of transfer other than those for consideration and in good faith, the burden of proving that the transaction was not in good faith and was without consideration would lie on the official receiver in the insolvency proceedings: See (1931) A C 67 (8) where the language of the statute was almost identical with that before us. Si-

8. Official Assignee of the Estate of Cheah Soo Tuan v. Khoo Saw Cheow, (1931) A C 67=144 L T 130=100 L J P C 45.

milarly the burden of proof would lie on the present plaintiff who claims through the official receiver. That burden has not been discharged. The plaintiff did not come to Court on the allegation that the transfer made by the debtor was voidable under S. 53, T. P. Act, and the case therefore has not been considered from that point of view. In our opinion the plaintiff cannot avail himself of S. 53, Insolvency Act, when the respondent acted in good faith, and he cannot succeed without making out a case under S. 53, T. P. Act, which he did not put forward in the plaint. Such a claim cannot be investigated without an amendment of the plaint and without allowing him to make out a new case which he cannot be allowed to do. We therefore dismiss this appeal with costs.

K.S. *Appeal dismissed.*

** A. I. R. 1935 Allahabad 675

(Full Bench)

SULAIMAN, C. J., THOM AND IQBAL AHMAD, JJ.

Abdul Rahman—Defendant — Appellant.

v.

Nihal Chand—Plaintiff—Respondent.

Second Appeal No. 913 of 1932, Decided on 4th April 1935, from decision of Addl. Sub-Judge, Meerut, D/- 22nd April 1932.

(a) Provincial Insolvency Act (1920), S. 28 (2) — Property of insolvent whether existing before adjudication or acquired or devolved afterwards, vests in receiver.

Whether the property in question be property which existed at the time of the adjudication or was acquired by or devolved on the insolvent afterwards, it vests in the receiver, and he alone is entitled to deal with it: *Case law discussed.* [P 676 C 1,2]

**** (b) Provincial Insolvency Act (1920), Ss. 28 (2), (5) and 59 (d)—Suit by insolvent after adjudication is not expressly prohibited —If property should vest in receiver, he alone is proper person to institute suit—But if property is such as does not vest in receiver but is insolvent's own, suit by insolvent is competent — But Official Receiver should be made party so that no fraud is committed.**

Section 28, Sub-S. (2) prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceeding by a creditor. But there is no specific provision in the Act, under which a suit by an insolvent after his adjudication is, in express terms, prohibited. S. 59 (d) implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property. Where the property in dispute in a suit is admitted to be or is of such a natnre that it must vest in the receiver, a receiver alone is the proper person to institute suits and proceedings. The suit brought by an insolvent behind the back of the receiver would be defective. But where a loan is advanced by the insolvent after his adjudication to the defendant, it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal, in which case he would be entitled to sue even though an insclvent and the suit would, of course, be for the benefit of the real owner. Again, under S. 28 (5) properties exempted by the Code of Civil Procedure or other enactments from liability to attachment and sale in execution of a decree do not vest in the receiver. Such moneys as are exempted, remain the property of the insolvent and if he has lent the money out of such accumulated savings, there would be no bar either to his lending the money to the defendant or to his bringing a suit to recover the amount. At the same time as a receiver is an officer of the Court acting under the control and direction of the Court and in the interest of the insolvent's creditors, it is the duty of the Court to see that no fraud is perpetrated before its eyes and that the insolvent does not walk away with moneys which ought to go to the officer of the Court. An appropriate course would seem to be to implead the Official Receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the receiver and the insolvent: *Case law referred.* [P 677 C 2; P 678 C 1]

*** (c) Provincial Insolvency Act (1920), S. 28 (2), (5)—Suit by insolvent for money lent after adjudication—As receiver has not seized it, presumption is that it is plaintiff's own and defendant cannot be allowed to deny that it is plaintiff's own—Suit cannot be thrown out on ground of plaintiff's insolvency.**

Where an insolvent filed a suit for money lent after adjudication the defendant who took the money from the plaintiff should not be allowed to deny that the money belonged to the plaintiff. Prima facie there is no presumption that the money does not belong to the plaintiff and if the receiver has not intervened and seized this amount, there is a presumption in favour of the plaintiff that the money is his own and the suit cannot be thrown out on the mere ground that the plaintiff is an insolvent. [P 678 C 1]

Shiva Prasad Sinha—for Appellant.

K. N. Katju and *N. C. Vaish* — for Respondent.

Sulaiman, C. J.—This is a defendant's appeal arising out of a suit brought by the plaintiff for recovery of Rs. 2,000 lent by him to the defendant on 19th February 1927, together with interest at Rs. 1-4-0 per cent

per mensem. The defence inter alia was that the plaintiff was an undischarged insolvent, and was not entitled to sue. The Courts below have overruled the objection and decreed the claim. In second appeal the Division Bench before which the case came up for disposal referred the following question to a Full Bench:

"Whether the plaintiff, in view of the fact that he is an undischarged insolvent, is entitled to maintain the present suit."

As in several rulings, the rule of law prevailing in England has been frequently invoked, it may be convenient to point out at the outset that in England some distinction has undoubtedly been drawn between property which was owned by the insolvent at the time of his adjudication and property which is acquired by him afterwards. Following certain previous rulings it was laid down in the case of 25 Q B D 262 (1), which was a suit for wrongful conversion of certain machinery that as regards after acquired property, a transaction by a bankrupt if entered into before the trustee had intervened, would not be invalid if the person dealing with him acted bona fide and for value. At the same time it was pointed out on p. 266 that if a trustee had interfered before the money was paid over, he would have been entitled to demand that it should be paid to him. In England this view of the law has been accepted and we now find in S. 47, Bankruptcy Act of 1914, 4 and 5 Geo 5), that a special provision is made in respect of property acquired by an undischarged bankrupt subsequently in which case he is allowed to deal with it before any intervention by the trustee. S. 45 of the Act also gives protection to certain bona fide transactions without notice.

But in India neither the Provincial Insolvency Act, 1907, nor the Act of 1920 draws any such distinction. S. 28 (2) makes the whole of the property of the insolvent vest in the Court or the receiver on the making of the order of adjudication, and sub-S. (4) provides that all property which is acquired by or devolves on the insolvent after the date of the order of adjudication and before his discharge shall forthwith vest in the Court or the receiver and the provisions of sub-S. (2) shall apply in respect thereof. It is therefore perfectly clear that property existing at the time of the adjudication as well as property acquired by or devolved on the insolvent after adjudication stands on the same footing, and both vest forthwith in the Court or the receiver as the case may be. No distinction appears to have been drawn by the legislature in respect of these two classes of property. It would amount to legislating if any such distinction were to be imported into the section on account of certain rules of law which prevail in England. The Insolvency Act in India is not in every respect identical with the Bankruptcy Act in England, and there is accordingly no justification for deciding cases under the Indian Act, in the light of cases decided in England.

No doubt in the case of 1924 Mad 223 (2), such a distinction was laid down. I am, with great respect, unable to accept such a view. The cases of 1919 Bom 115 (3), and 1934 All 703 (4), are not in point, because they were not cases arising under the Insolvency Act at all, but were governed by the Insolvent-Debtors Act of 1848. They are therefore not applicable. On the other hand, the Rangoon High Court in the case of 1926 Rang 179 (5), held that where the insolvent before the discharge became entitled by inheritance to certain property, the transfer of the property made by him, even before any action was taken by the receiver in regard to such property and even if the transferee took the property for value, bona fide and without notice, was void as against the receiver.

The view taken by the Full Bench in the case of 1924 All 341 (6), undoubtedly was that an insolvent has no transferable interest left in his property after the vesting order. The position has now been made clear by their Lordships of the Privy Council in the case of 1927 P C 108 (7). After quoting S. 16, Insolvency Act of 1907, their Lordships on p. 597 observed:

1. Mitchel v. Kohen, (1890) 25 Q B D 262.

2. K. Ramanatha Iyer v. T. S. Nagendra Aiyar, 1924 Mad 223=76 I C 805.
3. Ali Mahmad Abdul Hussein v. Vadi Lal Devchand, 1919 Bom 115=53 I C 197=43 Bom 890.
4. Chhote Lal v. Kedar Nath, 1924 All 703=84 I C 289=46 All 565.
5. Ma Phaw v. Maung Ba Thaw, 1926 Rang 179=97 I C 221=4 Rang 125.
6. Gobind Ram v. Kunj Behari Lal, 1924 All 341=83 I C 403=46 All 398 (F B).
7. Kala Chand Banerjee v. Jagannath Marwari, 1927 P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

"This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the receiver already appointed, and he alone was entitled to deal with the equity of redemption."

Again on p. 599 it was said:

"That does not in the least imply that an action against him (insolvent) may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it and he and not the insolvent has the sole interest in the subject matter of the suit."

Their Lordships pointed out that the contrary view would encourage collusive arrangements and might involve the sacrifice of properties which ought to be made available for the benefit of creditors. I am of opinion that whether the property in question be property which existed at the time of the adjudicating or was acquired by or devolved on the insolvent afterwards, it vests in the receiver, and he alone is entitled to deal with it. The case of 1933 All 449 (8), is distinguishable, because in that case the mortgagor was subsequently discharged and he could be held to be estopped from denying the validity of his own mortgage. The question whether an insolvent can maintain a suit for recovery of a loan advanced by him stands on a slightly different footing.

It has been held in the case of 1920 Pat 277 (9), that an insolvent cannot maintain a suit in his own name for the deferred dower of his daughter. even though the receiver has refused to bring such a suit. In the case of 1924 Bom 460 (10), it was held that where an insolvent without the knowledge of the Official Assignee and without bringing the fact of his adjudication to the notice of the Court obtained a decree in respect of a debt due to him prior to his insolvency, the decree could be set aside on the ground of fraud, even by the judgment-debtor. In the case of 1926 Bom 366 (11), it was held that as the whole of the insolvent's property vests in the Official Assignee, nothing is left vesting in the insolvent which can give him a cause of action, and that a suit by him in his own name after his adjudication cannot be maintained. It was even held that the addition of the Official Assignee later would amount to adding a new plaintiff. In the case of 1928 Lah 675 (12), the right of appeal to a judgment-debtor was denied after he had been declared an insolvent and it was held that the receiver alone should appeal.

There is however one aspect of the matter which does not appear to have been pressed by counsel in these cases. S. 28, sub-S. (2), prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal proceeding by a creditor. But there is no specific provision in the Act, under which a suit by an insolvent after his adjudication is, in express terms, prohibited. S. 59 (d) however empowers a receiver, by leave of the Court, to institute, defend or continue any suit or other legal proceedings relating to the property of the insolvent. This provision implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property. Where the property in dispute in a suit is admitted to be or is of such a nature that it must vest in the receiver, a receiver alone is the proper person to institute suits and proceedings. The suit brought by an insolvent behind the back of the receiver would be defective.

But where a loan was advanced by the insolvent after his adjudication to the defendant it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal, in which cases he would be entitled to sue even though an insolvent and the suit would, of course, be for the benefit of the real owner. Again, under S. 28 (5), properties exempted by the Civil Procedure Code, or other enactments from liability to attachment and sale in execution of a decree do not vest in the receiver. Such moneys as are exempted remain the property of the insolvent and if he has lent the money out of such accumulated saving, there would be no bar either to his lending the money to the defendant or to his bringing a suit to recover the amount.

At the same time as a receiver is an officer of the Court acting under

8. Rup Narain Singh v. Har Gopal Tewari, 1933 All 449=143 I C 836=55 All 503.
9. Khelafat Husain v. Azmat Husain, 1920 Pat 277=54 I C 699.
10. A. Rozario v. Mahomed Ebrahim Sarang, 1924 Bom 460=83 I C 34=48 Bom 583.
11. Daud Sayad Mahomed v. Mahomed Sayad, 1926 Bom 366=95 I C 538.
12. Bhagwan Das v. Official Liquidator, Amritsar National Bank, 1928 Lah 675=111 I C 432.

the control and direction of the Court and in the interest of the insolvent's creditors, it is the duty of the Count to see that no fraud is perpetrated before its eyes and that the insolvent does not walk away with moneys which ought to go to the officer of the Court. An appropriate course would, seem to be to implead the official receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the receiver and the insolvent.

But it seems to me inappropriate that the present defendant who took the money from the plaintiff should be allowed to deny that the money belonged to the plaintiff. Prima facie there is no presumption that the money did not belong to the plaintiff. As a matter of fact as the receiver had not intervened and seized this amount, there is a presumption in favour of the plaintiff that the money was his own. The suit therefore cannot be thrown out on the mere ground that the plaintiff is an insolvent. Had the defendant established definitely that the money had in fact, vested in the receiver and was not the property of the plaintiff, the matter might possibly have been different. Notice should accordingly be given of this appeal to the receiver and then the decree of the Courts below upheld.

Thom, J.—I concur.

Iqbal Ahmad, J.—I agree.

K.S. *Question answered.*

A. I. R. 1935 Allahabad 678

NIAMAT ULLAH AND RACHHPAL SINGH, JJ.

S. Tahir Hasan—Judgment-debtor—Applicant.

v.

L. Chander Sen—Decree-holder—Opposite Party.

Ex. First Appeal No. 400 of 1933, Decided on 28th March 1935, from decree of Sub-Judge, Moradabad, D/- 26th August 1933.

(a) Pensions Act (23 of 1871), Ss. 4 and 11 —S. 4 applies not only to pensions but also to grants of money or land revenue.

Section 4 is of wider scope than S. 11 inasmuch as the latter refers to pensions, while the former refers not only to pensions but also to grants of money or land revenue: 1930 *All* 681, *Rel on.* [P 679 C 2]

(b) Jurisdiction — Mortgage of non-transferable property—Court passing decree on foot of such mortgage cannot be said to have no jurisdiction– Decree.

It cannot be said that a Court which passes a decree on foot of a mortgage, which relates to non-transferable property and is therefore invalid, has no jurisdiction to pass it and the decree cannot be treated as a nullity. [P 680 C 2]

(c) Pensions Act (1871), S. 11— S. 11 is not limited to execution of simple money decree—It includes cases where property is sold in execution of mortgage decree.

Section 11 is wide enough to include cases where the property is to be sold in execution of a mortgage decree and cannot be limited to cases of simple money decrees. It draws no distinction between a case where the property is directed to be sold by a decree or is directed to be sold in pursuance of an attachment made by the order of a Court. [P 681 C 2]

(d) Execution—Objection that sale of property sought to be sold prohibited — Court must enquire into truth of allegation.

A Court is not bound to refuse to hear evidence which is offered to show that the property is one the sale of which is prohibited. The Court must ascertain the truth of the allegation that it has no jurisdiction to sell the property which it is required to sell. [P 682 C 1]

(e) Jurisdiction — Jurisdiction of Court challenged—It cannot refuse to consider question on which jurisdiction depends.

Where the jurisdiction of a Court is challenged, it cannot refuse to enquire into questions on which its jurisdiction depends. [P 682 C 1]

(f) Res judicata - General principles are applicable to proceedings in execution.

The general principles of the law of res judicata are applicable to execution proceedings. [P 682 C 1]

(g) Civil P. C. (1908), S. 11 — Exparte decree as against one defendant—Finding actually recorded as between decree-holder and another defendent is not res judicata between decree-holder and ex parte defendant. (*Per Niamat Ullah, J.; Rachhpal Singh J. Doubting.*)

Where the appellant had not contested the suit, and the decree against him was ex parte and his co-defendant had raised the question, but failed to establish her allegation;

Held: that apart from any bar which may exist as between the decree-holder and the appellant in consequence of the latter not having raised the question in the suit, though he might or ought to have done so, the finding actually recorded between the decree-holder and another defendant cannot be res judicata between the parties. [P 682 C 1, 2]

(h) Estoppel — Mortgagor representing to mortgagee that he had power to mortgage property—He cannot subsequently in mortgage suit contend that he has no power— But he is not estopped from contending that property cannot be sold by Court in execution.

Where the mortgagor has himself mortgaged the property, representing to the mortgagee that he has the power to mortgage and that the pro-

perty is such that could be mortgaged, he is estopped from derogating from his own grant and from pleading that his representation, on which the mortgagee advanced the money, is incorrect: 33 *All* 783, add 16 *I C* 629 *Rel on.* [P 682 C 2]

But it cannot be rightly said that he is likewise estopped from objecting to the Court selling the Property. [P 683 C 1]

A. M. Khwaja—for Appellant.

A. Dharam Das—for Respondent.

Niamatullah, J.—This is an execution of decree appeal by Syed Tahir Hasan, who objected in the Court below to the execution of a decree obtained by the respondent, L. Chander Sen, on foot of a mortgage deed executed by the appellant's parents and the appellant himself, on 21st March 1921, in respect of proprietary right in the right to hold revenue free shares in a number of villages described in the mortgage deed.

The objector-appellant was a party to the suit in which the decree for sale of the mortgaged property was passed. The father of the appellant had died before the institution of that suit, which was brought against the other two executants, including the appellant, and certain subsequent transferees. The appellant did not enter appearance, and the proceedings were ex parte against him. His mother however contested the suit. She pleaded that the property to which the mortgage related was not transferable under the Pensions Act 23 of 1871, nor had the Court any jurisdiction, without the Collector's certificate, to entertain the suit. Subsequently the plaintiff obtained the requisite certificate from the Collector and filed it. The written statement was amended, and it was pleaded that as the plaintiff (the mortgagee) was a stranger to the group of grantees, he could not maintain the suit in spite of the Collector's certificate. The Court struck a number of issues, Nos. 2 and 3 of which ran as follows:

"(2) Whether the property in suit is not transferable under Ss 4, 6, and 12 Pensions Act of 1871? (3) Whether the suit is cognizable by this Court without the Collector's certificate?"

The Court decided both the issues in favour of the plaintiff and decreed the suit. A final decree was passed in due course, and the decree-holder applied for its execution. The present appellant then objected to the sale of the property, inter alia, on the ground that under S. 11, Pensions Act, the Court had no jurisdiction to sell the property which was of the nature described in the aforesaid section. The objection was disallowed in a very summary order which betrays want of appreciation on the part of the lower Court as regards the nature of the objection and the questions thereby raised. The case was argued at considerable length before us as if the entire controversy was of first impression. The Pensions Act (Act 23 of 1871) is described as "An Act to consolidate and amend the law relating to pensions and grants by Government of money or land revenue."

Section 4 debars a civil Court from entertaining any suit relating to:

"pensions or grant of money or land revenue conferred or made by the British Government or any former Government."

Section 6 however empowers such Court to entertain such suits if the Collector grants a certificate that the case may be tried. As already stated, the mortgagee had obtained the certificate of the Collector, and assuming the suit for enforcement of the mortgage was a suit relating to any pension, etc., as alleged by the contesting defendant, the jurisdiction of the Court to entertain and try it was saved by the Collector's certificate. No question can now arise in respect of the Court's jurisdiction so far as it was effected by S. 4, Pensions Act. The contesting defendant had also pleaded that the property covered by the mortgage deed was not transferable in view of the provisions of S. 12, which cannot be understood without reference to S. 11. Both the sections may therefore be conveniently quoted in full. They ran as follows:

"(11) No pension granted or continued on political considerations, or on account of past services or present infirmities or as a compassionate allowance and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court. (12) All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance mentioned in S. 11, in respect of any money not payable at or before the making therefor on account of any such pension, pay or allowance, or for giving or assigning any future interest thereunder, are null and void."

As was pointed out by a Bench of this Court in 1930 All 681 (1), S. 4 is of wider scope than S. 11 inasmuch as the latter refers to pensions, while the former refers not only to pensions but also to grants of money or land re-

1. Lakhmi Chand v. Madho Rao, 1930 All 681=130 I C 801=52 All 868.

venue. One of the contentions put forward on behalf of the respondent is that the decision in the suit itself is a bar to the appellant's objection being heard so far as it involves the question whether the property covered by the mortgage deed is a pension within the meaning of S. 11. It should be observed, that S. 11 had not been pleaded in the suit, nor could it be pleaded at that stage. That section forbids sale of a pension in satisfaction of a decree or order of any Court. That stage arrived after the decree was passed. The question which could arise in the suit itself and was raised had reference to the powers of the mortgagor to make the mortgage as to which provision is made in S. 12, which declares:

"all assignments, agreements, sales and securities of every kind made by the person entitled to any pension . . . . null and void."

It is contended on behalf of the respondent that the operation of S. 12 depends entirely upon a consideration which is also a prerequisite of the application of S. 11, namely, that the property which the Court is called upon to sell is "pension" within the meaning of S. 11. Unless the property in question is a pension, neither S. 11 nor S. 12, can have any application. It may therefore be contended for the respondent that, as the plea of the contesting defendant based on S. 12 was rejected in the suit itself, it cannot be considered in execution proceedings, though the objector invokes the aid of S. 11, and not of S. 12. For a proper consideration of this part of the case, it is necessary to quote the finding of the Court on issue No. 2, which bore on the point. It is as follows:

"There is no evidence to show that the revenue of any of the villages in question was assigned by any of the former rulers to any of the predecessors of the defendant. It appears that these villages were released by the Government as revenue free holdings between 1840 and 1842. There is nothing to show that these "muafi" rights amount to a pension within the meaning of the Pensions Act. The villages in question were, it is stated by the defendant in her written statement, received by transfer from Muhammad Naqi. I find that they are not untransferable and decide the issue in the negative."

The line of argument adopted in this Court on behalf of the objector appellant is that the Court had no jurisdiction to pass the decree for sale of the property which the law declares to be non-transferable, that it is always open to a party to establish by evidence that a certain decree is null and void for want of jurisdiction in the Court passing it, that S. 11, Civil P. C., does not in terms apply and that the general principles of the rule of res judicata did not preclude the appellant from raising a question which was not actually decided between the decree-holder and himself, and that in any view the Court should refrain from doing what the law forbids.

I do not think that in the circumstances of this case it can be held that the decree sought to be executed was passed by a Court which had no jurisdiction to pass it. The suit, in which the decree was passed, was brought on foot of a mortgage under O. 34, R. 4, Civil P. C. Such a suit is cognizable by a civil Court; and it cannot be denied that the Court could pass a decree on foot of a mortgage which was not proved before it to be invalid. The real question in controversy in the suit was whether the mortgage sought to be enforced was valid. One of the defendants to that suit (not the present appellant) had impugned the mortgage as invalid on the ground that it related to property which was declared to be non-transferable by S. 12, Pensions Act, (No. 23 of 1871). The validity of the mortgage depended on proof of the fact whether the property was of the description given in the aforesaid section. The Court having held on evidence that the property had not been proved to be of that description, the validity of the mortgage was affirmed and a decree could be passed. There is nothing in these circumstances which affects the jurisdiction of the Court passing the decree. It cannot be said that a Court which passes a decree on foot of a mortgage, which relates to non-transferable property and is therefore invalid had no jurisdiction to pass it. Arriving at an erroneous decision on a question of fact or law and acting without jurisdiction are two different matters. If the Court held erroneously that the property covered by the mortgage was not non-transferable, the utmost that can be said is that it acted on a wrong assumption in passing a decree. I am therefore of opinion that the decree in question in this case cannot be treated as a nullity for want of jurisdiction in the Court passing it.

In view of what I have held above, it is not necessary for me to decide the general question whether it is open to a party to establish by evidence

that the decree, sought to be executed, is null and void for want of jurisdiction in the Court passing it. The question has been recently considered at considerable length by a Full Bench of this Court in 1934 All 609 (2). The learned Chief Justice, who delivered the leading judgment in the case, has expressed a very cautious opinion and confined himself strictly to the facts of the case before him. Mukerji, J., is inclined to subscribe to the general rule that the Court executing the decree cannot, in any case, go behind the decree. The third learned Judge, who was a member of the Full Bench, agreed with the conclusion arrived at by his colleagues and did not express any opinion on that general question. In my opinion that case is no authority for the broad proposition that in no circumstances can a Court executing the decree go behind it.

To my mind the question which we are called upon to decide is not whether the Court passing the decree had jurisdiction to pass it; but whether the Court executing the decree can sell the property. It may be contended that, in so far as the decree of a competent Court directs the sale of a certain property therein specified, the Court executing the decree must sell it and not listen to objections to its own power in that behalf. This contention cannot be allowed to prevail in view of the pronouncement of a Full Bench of this Court in 1921 All 118 (3). In that case a decree for sale was passed on foot of a mortgage, and an objection was taken in the Court executing the decree that the property to which the mortgage related was an occupancy tenure which the Court was prohibited by law from selling. The Full Bench held that the Court executing the decree was not competent to sell the occupancy tenure. The learned Judges observed as follows:

"No doubt it was not open to the judgment-debtor to contest the validity of the decree which was passed against him; but it was open to him to say to the Court that as the law contains a mandatory provision which precludes a Court executing the decree from selling an occupancy holding, the Court was bound to carry out the provisions of the law and not to act in violation of those provisions."

It seems to me that the position is precisely the same in the present case, except in one respect which I shall presently discuss. It may not be open to the appellant to attack the validity of the decree. Indeed, I have held that the decree is a perfectly valid document so far as it goes; but it is certainly open to him to satisfy the Court executing the decree that, though it is called upon by the decree to sell the property, the law forbids it, and that if the sale takes place at the instance of the Court, it will be in violation of an express provision of law, namely, S. 11, Pensions Act (No. 23 of 1871), which declares that a certain kind of property shall not be sold "in satisfaction" of a decree or order of any such Court. The section is wide enough to include cases where the property is to be sold in execution of a mortgage decree and cannot be limited to cases of simple money decrees. It draws no distinction between a case where the property is directed to be sold by a decree or is directed to be sold in pursuance of an attachment made by the order of a Court. As was observed in 1921 All 118 (3), already referred to, by Banerji, J., who delivered the judgment of the Court:

"Section 20, Cl. (2), Agra Tenancy Act, distinctly prohibits a Court from transferring an occupancy holding in execution of a decree. It seems to me to be immaterial whether the decree ordered sale or whether it was a simple money decree. What the decree-holder is now seeking is to sell an occupancy holding in execution of his decree. This is prohibited by the provisions of S. 20, and the Court executing the decree is bound to carry out the mandatory provision of the section."

In the latest Full Bench case 1934 All 609 (2) the learned Chief Justice, after referring to that case, expressed the following opinion:

"That the ratio decidendi of the Full Bench case was that where there is some statutory enactment which prohibits the sale of some property, then it is the duty of the executing Court to refuse to sell it, even though a decree has been passed by another Court. When an execution Court refuses to execute it, it is not really holding that the decree was passed without jurisdiction or is not really setting aside the decree, but is merely staying its hand from proceeding further, because it is itself prohibited by law from selling the property. There may accordingly be cases where the decree is incapable of execution or is void and a nullity, in such a way as to make it impossible for the executing Court to execute it or there may be cases where there are certain statutory provisions which prevent the executing Court from proceeding to sell certain property, for instance, where the sale of certain land is prohibited and not necessarily their attachment and order for sale. In such cases, it may be possible for the Court in one sense to go behind the decree and not to

2. Cantonment Board v. Kishan Lal, 1934 All 609=149 I C 636=3 A W R 721 (F B).
3. Katwari v. Sita Ram Tewari, 1921 All 118=63 I C 264=43 All 547.

execute it; but in reality the Court is merely staying its own hand and not enquiring into the jurisdiction of the Court which passed the decree."

I find myself in entire agreement with the views expressed in these passages, which do not in any way call in question the correctness of the decision in 1921 All 118 (3). Mukerji, J., has expressed some vague doubt about the soundness of the view taken in that case, for he says:

"With all respect, I have some doubt in my mind as to the correctness of this decision; but it is not really necessary to doubt the correctness. Even if it be a correct decision, the learned Judge who delivered the judgment and the two learned Judges who agree with the judgment expressly held that an executing Court could not go behind the decree. The reason for non-execution of the decree in its terms was not existent within the decree or was not existent in the want of jurisdiction on the part of the Court passing the decree, but resided in a rule of law which stood apart from the decree."

Even this reasoning is applicable to the circumstances of this case. It was not disputed in 1921 All 118 (3) that the property to be sold was an occupancy tenure; whereas in the present case the fact that the property is of the description mentioned in S. 11, Pensions Act, is in controversy. The question is whether a Court is bound to refuse to hear evidence which is offered to show that the property is one the sale of which is prohibited by S. 11, Pensions Act. In my opinion the Court must ascertain the truth of the allegation that it has no jurisdiction to sell the property which it is required to sell. The only bar that can be suggested is that of res judicata arising from the finding of the Court in the suit that it was not shown by the contesting defendant that the property is non-transferable. Where the jurisdiction of a Court is challenged, it cannot refuse to enquire into questions on which its jurisdiction depends. The rule of res judicata, as contained in Section 11, Civil P. C., does not in terms apply, except where the plea is taken in a suit. The general principles of the law of res judicata are however applicable to execution proceedings. The appellant had not contested the suit, and the decree against him was ex parte. His co-defendant had raised the question, but failed to establish her allegation. Apart from any bar which may exist as between the decree-holder and the appellant in consequence of the latter not having raised the question in the suit, though he might or ought to have done so, the finding actually recorded between the decree-holder and another defendant cannot be res judicata between the parties.

The next question is whether, in applying the general principle of res judicata, the terms of explanation 4 to S. 11 are applicable, and the fact that the appellant might and ought to have raised the question (assuming he could have raised it—a point which I will discuss later) precludes him from raising the question now. There is considerable difference of opinion on this question. There is however little divergence of opinion so far as the authorities of this Court are concerned. It has been held that the rule of constructive res judicata, as embodied in explanation 4 to S. 11, Civil P. C., does not apply to execution proceedings: see 3 All 141 (4), 1915 All 344 (5), 1922 All 413 (6) and 1930 All 628 (7). In some cases the Calcutta High Court has taken the same view, e. g., 35 Cal 1060 (8). There is yet another ground on which it can successfully, be contended that the appellant is not barred. The question directly and substantially in issue in the previous case was whether the mortgage deed was invalid; whereas the question now before the Court is whether the Court has power to sell the property. The power of the Court to sell was not directly and substantially in issue in the suit.

Moreover, I think it was not open to the appellant to prove in the suit that the property was not transferable. He had himself mortgaged the property, representing to the mortgagee that he had the power to mortgage and that the property was such that could be mortgaged. He was estopped from derogating from his own grant and from pleading that his representation, on which the mortgagee advanced the money, was incorrect. This has been repeatedly held by this Court. See, for instance, 33 All 783 (9) and 16 I C 629 (10). In a case like this, the mortgagor may well consider it fu-

4. Rup Kuari v. Ram Kirpal Shukul, (1881) 3 All 141 (F B).
5. Kalyan Singh v Jagan Prasad, 1915 All 344 =30 I C 523=37 All 589.
6. Sheo Mangal v. Mt. Hulsa, 1922 All 413=65 I C 377=44 All 159
7. Ram Charan v. Salik Ram, 1930 All 628=121 I C 702=52 All 217.
8. Umed Ali v. Abdul Karim, (1908) 35 Cal 1060 =8 C L J 193.
9. Muhammad Muzamil-ullah Khan v. Mithu Lal (1911) 33 All 783=11 I C 220.
10. Bishumbhar Dayal v. Parshadi Lal, (1912) 16 I C 629.

tile to contest the mortgagee's suit. It cannot be rightly said that he is likewise estopped from objecting to the Court selling the property. To hold otherwise will be to create a very anomalous position. Where a person mortgages property which the law prohibits the Court from selling, he cannot be heard to plead, when a suit is brought on foot of the mortgage, that the property is inalienable, as he is estopped; and when the Court proceeds to sell the property in execution of decree, he is told that he might and ought to have raised the question in the suit itself. It is true in some cases a mortgagor may not be estopped, if it is found that the mortgagee was aware of the character of the property; but in a majority of cases this is not so. The mortgagor in such cases makes a representation as regards a fact, namely, that the property is alienable. It is not a case of inherent disability, as in cases of mortgages by a minor or a disqualified proprietor, in which estoppel, being against statute, does not apply.

In the present case, the mortgage deed mentions two distinct rights in the shares which the mortgagors are said to have possessed: the proprietary right, and their right to hold the same revenue free. It is possible that, so far as they may be grantees of the revenue, the property may be of the description mentioned in S. 11, Pensions Act, and the rest may not be of that description. In all the circumstances of the case and for the reasons discussed above, the lower Court should have given an opportunity to the appellant to establish that the property, or some incidents thereof, cannot be sold in execution of decree. Accordingly, I would remit the following issues to the lower Court:

"Whether the property sought to be sold by the decree-holder is such property as is declared incapable of sale by S. 11, Pensions Act (Act 23 of 1871)."

Rachhpal Singh, J. — I agree. I would however like to add that it is with considerable amount of hesitation that I have come to this conclusion. It appears to me that no other course is open to us in view of the opinion expressed in some of the cases decided by this Court. I would however like to make a few observations in connection with the case before us. The facts of the case are set forth in the order of my learned brother, and it is therefore unnecessary to repeat them.

Cases in which judgment-debtors may raise a plea in the execution department that Courts executing decrees cannot sell properties sought to be sold may come under the following three categories: (1) Where want of jurisdiction in the Court which passed the decree is patent on face of the record. (2) Where a plea of want of jurisdiction had been taken at the time of the trial and the Court decided the point against the defendant after considering the evidence produced in the case in respect of the plea of want of jurisdiction. (3) Where a defendant has not entered appearance and an ex parte decree has been passed against him.

I will, at first, take up the case in which want of jurisdiction in the Court which passed the decree appears on face of the record. By "jurisdiction" is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the Court is constituted or may be extended by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. Halsbury's Laws of England, Edn. 2, Art. 1176, p. 531. It should also be borne in mind that that it is a fundamental rule of law that a judgment of a Court without jurisdiction is a nullity. It is well settled that where by reasons of any limitations imposed by statute, charter, or commission, a Court is without jurisdiction to entertain any particular action or matter, neither the express acquiesence nor the express consent of the parties, can confer the jurisdiction upon the Court: Mulla's Civil Procedure Code, Edn. 10, p. 125. This is also the view which has been accepted in some of the American cases which are cited in Hukam Chand's Law of Res Judicata, pp. 398 and 399:

"In 1 Ret 340 (11), Trimble, J., said that if a Court should 'act without authority its judgment and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

In 8 Lea 760 (12) the Tennessee Supreme Court said:

"A void judgment is, in legal effect, no judgment. It neither binds nor bars any one. All

11. Elliot v. Peirsol, 1 Ret 340.
12. Holmes v. Eason, 8 Lea 760.

acts performed under it, and all claims derived from it are void, parties attempting to enforce it are trespassers .... No action is required to revoke it; it is null in itself. The nullity ought therefore to appear on its face."

If the case reported in 1933 All 163 (13) is considered in this light, then, I would say, with all respect, that it was correctly decided. Where a judgment is passed without jurisdiction, it would be wrong to hold that the judgment-debtor cannot show in the execution proceedings that it is wholly null and void. The condition precedent however is that the nullity should appear on the face of it. Take the following instance: The Revenue Courts are Courts of limited jurisdiction and have no power to pass a simple money decree (except in case of rent due) or a mortgage decree. Suppose a tenant creates a mortgage of his tenancy, the mortgagee goes to the rent Court and asks for a decree for sale of mortgaged tenancy land. The Court passes an ex parte decree against the defendant. In such a case it will be certainly within the competence of the Court executing the decree not to execute it for the simple reason that it was without jurisdiction. In the words of my Lord, the Chief Justice, in 1934 All 609 (2):

"Prima facie a Court, which has no jurisdiction to entertain a claim, cannot by seizing the case usurp jurisdiction and then by deciding that it has jurisdiction make its decision binding on the defendant."

Coming to the second class of cases we find that the position is somewhat different. The question which arises in such cases is this: Can a defendant, who takes the plea of want of jurisdiction raise the same plea in execution department when in the regular suit, after evidence has been recorded in respect of the plea, that point has been decided against him. For instance, in the case before us Mt. Madina one of the mortgagors had contested the suit. She had taken a plea that the mortgage was invalid as it offended against the provisions of Ss. 4, 6 and 12, of Act 23 of 1871 (Pensions Act). The Court framed an issue in respect of this plea. The parties produced evidence and then the point was decided against Mt. Madina. If she had come forward in the execution department and had raised the plea that the mortgaged property was not liable to be sold because of the provisions of the Pensions Act referred to above, then, I would have been prepared to hold that she was incompetent to take such a plea. The reasons for this are very lucidly stated in 10 Bard 111 (14), cited in Hukam Chand's Law of Res Judicata at p. 440, and are as follows:

"The want of jurisdiction may always be shown by evidence, except in one solitary case, that is, when jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favour of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding."

In a large number of cases noticed in Hukam Chand's Law of Res Judicata at pp. 474 and 475, the view expressed is that where a Court has jurisdiction, it has a right to decide every question which occurs in the case and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. The reason for the rule has thus been stated in 35 U S 440 (15):

"The error of the Courts however apparent can be only examined by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment ..... If that time elapses, common justice requires that what a defendant cannot directly do in the mode pointed out by law, he shall not be permitted to do collaterally by evasion. A judgment irreversible by a superior Court cannot be declared a nullity by any authority of law. If after its rendition it is declared void for any matter which can be assigned for error, only on a writ of error appeal, then the said Court not only usurps the jurisdiction of an appellate Court, but collaterally nullifies what such a Court is prohibited by express statute law from even reversing. If the principle once prevails that any proceeding of a Court of competent jurisdiction can be declared to be a nullity by any Court after a writ of error of appeal is barred by limitation, every Country Court or Justice of the Peace in the Union may exercise the same right, from which our own judgment or process would not be exempt."

It appears to me, if I may say so with respect, that the same view is expressed by My Lord, the Chief Justice, in 3 A W R 721 (2) (at p. 726); where he observed:

"But to hold that an executing Court must always inquire into the question of the jurisdiction of the Court which passed the decree would be to reopen matters which might have been the subject of the controversy in the original suit and which might well have been decided on a consideration of the oral and documentary evidence. Such questions may be mixed questions of law and fact, for example, as to the place where the cause of action arose, the place where

13. Cantonment Board, Agra v. Kanhaiya Lal, 1933 All 163=144 I C 1016.

14. Wright v. Douglas, 10 Barb 111.

15. Voorhees v. The United States Bank, 35 U S 440.

the contract was broken, the sub-division in which the property in dispute was situated, the nature and character of land as to whether it is saleable or not and the validity of certain transfers. All such questions are properly speaking questions which arise for consideration in the suit itself and which have to be determined on an examination of the evidence on the record. It would be too much to lay down that the executing Court can go behind these findings and reopen the question and determine afresh that the Civil Court decided this question wrongly and, therefore improperly usurped jurisdiction."

In the case of 1934 All 609 (2), it was held that:

"Where a suit filed in the Civil Court, is, under the Agra Tenancy Act, 1926, cognizable by the Revenue Court alone, but no objection as to jurisdiction is taken or if taken is disallowed, and no appeal is preferred from the judgment to the District Judge, nor there is further remedy sought from the High Court, it is not open to the defendant in the suit to raise the question of jurisdiction in the execution department and contend that the Civil Court has no jurisdiction to entertain the suit at all."

The principle of this ruling would have been clearly applicable to the case before us if Mt. Madina had come forward and had raised a plea that the property was not liable to be sold on account of the provisions of the Pensions Act. In 1917 Cal 844 (16) (at p. 638 of 44 Cal), the following observations were made:

"The safest course to follow is to adhere rigidly to the established principle that every order and judgment however, erroneous, is, in the words of Lord Cottenham in 2 Phil 113 (17), good until discharged or declared inoperative, and that the execution Court cannot enquire into the validity or propriety of the decree. This, no doubt, assumes that there is a valid decree in existence, that is, an adjudication by a Court of Justice, a decree or order which has not ceased to be operative and is capable of execution."

On behalf of the appellant reliance was placed on a Full Bench ruling of the Calcutta High Court, 1925 Cal 907 (18). I have perused the case and I think that it is distinguishable from the case before us. The head note of that ruling runs thus:

"Where decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits, the executing Court is authorised to question the validity of a decree."

I would place this case in the first category as being one in which the decree was null and void because the Court granting the decree has no jurisdiction and that fact appeared on the face of the record. A Court has jurisdiction both to decide every question which occurs in the case as well as its judgment, until reversed, is regarded as binding in every other Court. I may point out here that in the Calcutta case it was conceded that the executing Court will not be entitled to question the jurisdiction of the Court passing a decree, where facts have to be investigated. I quote the argument on this point from the above mentioned Calcutta ruling:

"Where there is an apparent nullity, the executing Court can certainly question the lack of inherent jurisdiction and refuse to proceed. Where however facts are to be investigated, the matter is different."

If it be considered that the learned Judges who decided the above mentioned case intended to lay down that the Court executing a decree can permit the judgment-debtor to take the plea that the Court passing the decree had no jurisdiction, even after that point had been heard and decided against him in the original suit, then, I, most respectfully, beg to dissent from that view. The view expressed in the Full Bench ruling reported in 1925 Cal 907 (18) was dissented from in a Full Bench ruling of this Court, 1934 All 609 (2). In the case before us Mt. Madina, who defended the suit raised a plea that the mortgage was invalid because it related to properties which could not be mortgaged in view of the provisions of the Pensions Act. This was denied by the plaintiff and an issue was framed. The decision of the question depended on the evidence which could have been produced in the case by the parties. Evidence was produced and the Court gave a definite finding that the plea was not established. Under these circumstances I am clearly of opinion that Mt. Madina could not have been allowed in the execution department to reagitate the same question which had been decided against her. It is said that when a defendant in a case like this raises the plea which has been decided against him in the former suit, he is not asking the Court to hold that the decree was invalid but he is asking that owing to the statutory bar the property is not liable to be sold. I personally see no difference between the two cases. In reality he is asking that he should be permitted to reagitate the same plea which has been rejected in the regular suit and to produce evidence to show that the

16. Kalipada Sirkar v. Hari Mohan Dalal, 1917 Cal 844 =35 I C 856=44 Cal 627.
17. Chuck v. Cremer, 2 Phil 113.
18. Gora Chand Haldar v. Prafulla Kumar Roy, 1925 Cal 907=89 I C 685=53 Cal 166 (F B).

judgment which has otherwise become final was wrong.

In view of the decision in 1934 All 609 (2) he cannot be permitted to take this course. When the judgment-debtor says in a case like this that he is only asking the Court not to execute the decree because of some statutory prohibition, then the simple reply to this would be that the plea is no longer open to him. He will be told that the question as to whether or not the property was liable to be sold in view of some statutory law has already been decided against him finally, and it has already been held that the property is saleable and so the same question cannot be permitted to be raised a second time. When we say that the question of jurisdiction can be raised at any time all that it means is that it can be raised by way of appeal or otherwise in the course of proceedings of the Court, whose jurisdiction is questioned. Caspersz in his Law of Estoppel, Edn. 4, p. 862, para. 830, says:

"It is commonly said that a question of jurisdiction may be raised at any time, but as pointed out in 11 Bom 160*n* (19), the question must be raised by way of appeal or otherwise in the course of the proceedings of the Court whose jurisdiction is questioned. In that case Anpurnabai was held to have acquiesced in the irregularity and was debarred from raising the question of jurisdiction after the proceedings were carried to completion."

Now I come to the third class of such cases. Cases coming under this head may be of two descriptions: There may be cases in which there was only one judgment-debtor who did not appear to defend the suit. The other class may consist of cases in which some of the judgment-debtors raised the plea of want of jurisdiction, but it was decided against them while the other judgment-debtors did not appear to defend the suit. In 1921 All 118 (3), it was held that where a mortgage decree has been passed for the sale of occupancy holding, it was open to an executing Court to go behind the decree and to hold that it could not be executed in view of the provisions of S. 20 (Cl. 2), Tenancy Act. The view expressed in this case certainly supports the contention of the appellant. In that case an ex parte decree on foot of a mortgage deed had been obtained. I may be permitted to remark that the facts of that case were somewhat different from the facts of the case before me. In that case the mortgage deed itelf recited that the property mortgaged was occupancy holding, in other words it appeared on the face of the record that the decree had been passed by a Court which had no jurisdiction in view of the statutory bar enacted by Section 20 of the old Agra Tenancy Act. On the other hand in the case before us the statutory bar can only arise if the appellant who had not appeared to defend the suit is able to prove by producing evidence that the provisions of the Pensions Act are applicable to the property sought to be sold. In another recent ruling 1935 All 588 (20) a Bench of two learned Judges of this Court has held that:

"Even if an occupancy holding has been mortgaged and a decree for its sale has been obtained, objection can still be raised in the execution department that the property is not saleable in execution of the decree and the execution Court would be bound to decline to sell it."

When we read the three rulings 1921 All 118 (3), 1934 All 609 (2) and 1935 All 588 (20), it appears that the following two propositions have been laid down: (1) Where a suit filed in the civil Court is under the Agra Tenancy Act, 1926, cognizable by the Revenue Court alone, but no objection as to jurisdiction is taken or if taken is disallowed, and no appeal is preferred from the judgment to the District Judge, nor there is further remedy sought from the High Court, it is not open to the defendant in the suit to raise the question of jurisdiction in the execution department and contend that the civil Court had no jurisdiction to entertain the suit at all. (2) If a defendant however does not appear and an ex parte decree is passed against him, then, it is open to him to raise the question of jurisdiction in the execution department which he could have raised at the trial.

Somewhat anomalous position may arise in a case where there are two or more defendants. Take the instance of the case before us:. Mt. Madina had taken a plea in the trial Court that the mortgage was invalid because of the provisions of the Pensions Act. An issue was framed and was decided against her. If she had now come forward to take the same plea in the execution department, then, according to the rule expressed in 1934 All 609 (2), she could not have been permitted to reagitate the same question.

But as the appellant had not appeared in the trial Court and the decree

19. Naro Hari v. Anpurnabai, (1887) 11 Bom 160*n*.

20. Sukhdeo v. Dongar, 1935 All 588.

passed against him was ex parte, so according to the view expressed in 1921 All 118 (3) and 1935 All 588 (20), it is still open to him to raise the plea that the property cannot be sold. The results are somewhat curious. In the same case one defendant is not permitted to take a plea on the ground that the question has already been decided against him after contest. At the same time the other defendant is permitted to raise the same plea which had been decided against his co-defendant after contest. It may be that the defendant who is allowed to take the plea in execution department may succeed in establishing his point. The result of this may be that even the share of the other defendant against whom the decree was passed after contest may not be sold in the execution department on the ground that the property could not have been mortgaged or sold in view of the provisions of the Pensions Act. Thus there would be two contrary findings in one and the same case. At the trial the decision may go against the defendant while in the execution department it may go against the plaintiff. It appears to me that this state of things is unsatisfactory and requires reconsideration. My personal opinion is that the correct rule which should be applied to cases of this description is that:

"The want of jurisdiction may always be shown by evidence except in one solitary case, that is, when jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favour of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment recorded is conclusive evidence of the jurisdiction, until set aside or reversed by a direct proceeding."

If the question were still an open one I would hold that in a case where there are two defendants and one of them takes the plea of want of jurisdiction and it is decided against him then in view of Explanation 4, S. 11 the matter should be deemed to have been decided not only against the defendant who appeared to contest, but also against the other defendants who failed to appear. It is true that S. 11 does not in terms apply to the execution proceedings in a suit inasmuch as each of such proceedings is not a separate suit, but is only a proceeding in the same suit. But I think that the general principles of res judicata should be applicable to such proceedings. It however appears to me that so long as the view taken in the Full Bench ruling 1921 All 118 (3), is not reconsidered it is not binding on us. It is under these circumstances that I have felt bound to agree with the order proposed by my learned brother.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 687

NIAMATULLAH, J.

Keshab Deo—Appellant.

v.

B. Rajendra Kumar Bhattacharji, Official Receiver, Aligarh, and *others*—Respondent.

First Appeal No. 186 of 1933, Decided on 6th February 1935, against order of Dist. Judge, Aligarh, D/- 19th August 1933.

Provincial Insolvency Act (1920), S. 68—Sale by Official Receiver by public auction—Highest bidder depositing 1/4 price—Another person making higher bid and Official Receiver executing sale in his favour—Insolvency Court cannot on application of first bidder set aside sale—Controversy should be settled by suit.

Where in a sale held by public auction by the Official Receiver a person who makes the highest bid deposits 1/4 of price but subsequently another person makes a higher bid and the Official Receiver executes a sale in his favour, the Insolvency Court cannot set aside the sale on the application of the first bidder summarily. In such a case the Court should leave the controversy to be settled in more appropriate proceedings granting leave, if necessary, for a suit against the Receiver and the third person claiming rights under the sale-deed. [P 688 C 1, 2]

B. Malik and *J. C. Mukerji*—for Appellant.

Panna Lal and *K. N. Malaviya*—for Respondents.

Judgment.—This is an appeal from the order passed by the learned District Judge, Aligarh, in the exercise of his jurisdiction as Judge of the Insolvency Court. One Ganga Saran was adjudged insolvent. The Official Receiver proceeded to sell a house belonging to the insolvent. On 7th May 1933, he held a public auction and one Ram Prasad offered the highest bid of Rs. 775. He deposited one-fourth of the price on that day and the three-fourths on 16th May 1933. The Receiver duly acknowledged receipt of these sums. In the meantime on 12th May 1933, Ganeshi made an offer of Rs. 1,025 to the Receiver, who referred the matter to the Court, and the Court directed that the property should be sold to the highest bider. The Receiver sent a notice by registered post to Ram Prasad intimating the fact that Ganeshi had offered Rs. 1,025. The letter was returned with the endorsement that the addressee had refused

to take it. Thereupon the Receiver executed a sale-deed in favour of Ganeshi and had it registered. This was done under the orders of the Court. It now appears that Ram Prasad, who had offered the highest bid on 7th May 1933, was the agent of the appellant and entered into the transaction of sale on behalf of his master and not himself. The appellant then applied to the District Judge insisting on the sale made to him on 7th May 1933, and in the alternative offering to purchase the property for Rs. 1,800. He prayed that the sale-deed in favour of Ganeshi be cancelled. The learned District Judge dismissed this application on the ground that a registered sale-deed having been executed in favour of Ganeshi Lal could not be set aside by him. The present appeal has been preferred from that order.

The view taken by the learned District Judge is perfectly correct. The regularity of the Receiver's action in entering into the transaction of sale to Ganeshi after having accepted the purchase money from the appellant and the validity of the order of the Court permitting the Receiver to sell to Ganeshi cannot be considered at this stage. The fact remains that a registered sale-deed exists, and that Ganeshi, who has paid the full purchase money, has a vested interest in the house so long as the sale is not set aside. It is open to the appellant to impugne the act of the receiver and attack the sale-deed in favour of Ganeshi in such manner as he may be advised. The learned District Judge, sitting in insolvency proceedings could not have summarily cancelled the sale-deed in favour of Ganeshi.

The learned advocate for the appellant contended that S. 68, Insolvency Act, allows an appeal to the Court from an order of the Receiver, and that it was open to the Court to "confirm, reverse or modify the act or decision complained of." Even if the Court had power to reverse or modify such acts of the Receiver as have had the effect of vesting rights in third persons which, I doubt, I do not think the lower Court should have granted the relief prayed for by the appellant under S. 68. In the circumstances of the case the matter in controversy between the appellant on the one side and the Receiver and Ganeshi on the other cannot be decided except in proceedings admitting of detailed pleadings and evidence. In such a case the Court should leave the controversy to be settled in more appropriate proceedings granting leave, if necessary, for a suit against the Receiver and the third person claiming rights under the sale-deed. In the view of the case I have taken, this appeal fails, and is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 688

NIAMATULLAH, J.

Mt. Humela—Defendant—Applicant.

v.

Ori Sahoo and *another* — Plaintiff and Defendant — Opposite Parties.

Civil Revn. No. 520 of 1934, Decided on 24th January 1935, against decree of Sm. C. C. Judge, Gorakhpur, D/- 5th February 1934.

Contract—Agreement to lend money cannot be specifically enforced—Specific Performance.

An agreement to lend money is not specifically enforceable.

Where a person who was indebted to plaintiff executed a bond in favour of defendant and no money was advanced to promissor but the entire amount was for payment to plaintiff and on plaintiffs not receiving the amount he sued on basis of bond.

***Held*: that the plaintiff's case, so far as it is based on the bond, amounted to a claim for enforcement of defendant's promise to advance money in future and that no decree could be passed against the defendant.** [P 689 C 2]

Shiva Prasad Sinha—for Applicant.

K. Verma—for Opposite Parties.

Order.— This revision has arisen from a Small Cause Court suit, brought by the plaintiff-respondent against Ram Raj, defendant 1, and Mt. Humela Kunwar, defendant 2, for recovery of Rs. 546-14-0 principal and interest. The lower Court decreed it against defendant 2, who has applied in revision. Defendant 1 owed Rs. 1,473 to the plaintiff. On 4th July 1930, he satisfied his liability by handing over some cattle delivering some grain and by executing a mortgage deed for Rs. 977. There remained a balance of Rs. 350, for which he executed a bond in favour of defendant 2, leaving the entire amount with the latter for payment to the plaintiff. The plaintiff's case is that defendant 2 did not make any payment.

The suit was not contested by defendant 1. The defendant 2 however filed a written statement in which it was pleaded that there was no privity of contract between her and the plaintiff and a suit for enforcement of the bond, executed in favour of defen-

dant 1, could not be maintained against her. There was also a plea of payment. This plea has not been accepted by the lower Court whose finding on this point has not been impeached before me. As regards the principal question, the lower Court found in favour of the plaintiff. His case was that defendant 2 had personally undertaken to pay to him Rs. 350, for which defendant 1 executed a bond in her favour, and that relying on her assurance the plaintiff returned certain bonds, duly endorsed, to defendant 1. The only evidence in the case consisted of the testimony of the plaintiff and the husband of defendant 2. The latter, who is said to be a "pardanashin" lady, did not give her own evidence. The plaintiff supported his case in its entirety and deposed that the transaction was carried though at one sitting, at which the plaintiff-defendant 1, defendant 2 and her husband were present. Defendant 2's husband, Ram Kumar, contradicted the plaintiff so far as the presence of his wife was concerned. He said that he represented his wife on that occasion and she was not present. The lower Court has given no finding on the question of fact whether defendant 2 was present and gave the assurance relied on by the plaintiff. The learned Judge apparently thought that the lady was effectively represented by her husband. He observed:

"Whether defendant 2 was present at the time of the settlement or she was represented at that time by her husband, it is clear that plaintiff and defendant 1 and Musammat Humela or her husband all took part in the settlement, and it was expressly agreed by Musammat Humela or her husband to pay Rs. 350 to the plaintiff."

If Mt. Humela had been present and had given an undertaking to the plaintiff for the payment of Rs. 350, for which she took a bond from defendant 1, and acting on that undertaking the plaintiff had given a discharge to defendant 1 returning certain bonds that were at that time outstanding, a case of estoppel might have been made out against defendant 2. The lower Court has not given any finding as to whether defendant 2 gave such an undertaking to the plaintiff. The same result will undoubtedly be arrived at if her husband had the requisite authority to act on her behalf and gave an undertaking to the plaintiff. If the plaintiff's evidence that defendant 2 was herself present be discarded, there is no evidence on the record to prove that defendant 2 had authorised her husband not only to take a bond from defendant 1 but also to enter into a collateral arrangement with the plaintiff undertaking to pay to him the sum of Rs. 350, for which defendant 1 was to execute a bond in her favour. In the absence of such evidence it is impossible to hold defendant 2 liable for the consequences of any verbal undertaking given by her husband on her behalf. This controversy narrows down to the simple question whether defendant 2 was personally present, as is alleged by the plaintiff. It is a case of oath against oath: and as the plaintiff is highly interested in the result of this suit, I do not think it safe to accept his uncorroborated testimony on this point. The lower Court apparently felt the same hesitation and therefore did not definitely find that defendant 2 was present. In these circumstances, I hold that so far as the plaintiff's case is based on the undertaking alleged to have been given by defendant 2, it must fail.

As regards defendant 2's liability to the plaintiff arising from the bond executed by defendant 1 in favour of defendant 2, the plaintiff cannot succeed. Defendant 2 did not advance anything at the time when the bond in question was executed. She promised to pay it in future. In substance, the claim is to enforce a promise to advance money. It has been held in numerous cases that an agreement to lend money is not specially enforcible. In substance, the plaintiff's case, so far as it is based on the bond, amounts to a claim for enforcement of defendant 2's promise to advance money in future. The lower Court has relied upon 1918 Cal 941 (1). That case is clearly distinguishable as it was a transaction of sale of immovable property. Money was left in the hands of the purchaser for payment to a third person. It was held that the purchaser was, to that extent, a trustee and therefore the third person, who should be regarded as a beneficiary, was entitled to enforce payment. It was not a case which could be considered to be one for enforcement of an agreement to lend.

The plaintiff claimed the sum in suit from both the defendants. The lower Court decreed it against defendant 2 only. In view of the findings which I have recorded, no decree can be passed against defendant 2; but the plaintiff is undoubtedly entitled to a decree against defendant 1 who in turn can

1. Dwarkanath v. Piya Nath, 1918 Cal 941=36 I C 792.

sue defendant 2 for damages for breach of promise to lend. Accordingly I allow this application, set aside the decree of the lower Court and decree the plaintiff's suit against defendant 1, who is a respondent in this case but has not entered appearance. I am clearly of opinion that in circumstances like those appearing in this case, a decree can be passed against defendant 1 under O. 41, R. 33, Civil P. C. The plaintiff shall have his costs from defendant 1 in both Courts. Defendant 2 shall bear her own costs in both Courts.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 690

BENNET, J.

D. D. Vidyarthi—Defendant—Applicant.

v.

Ram Pearey Lal—Plaintiff—Opposite Party.

Civil Revn. No. 379 of 1934, Decided on 13th December 1934, from decision of Sub-Judge, Gorakhpur, D/- 25th July 1934.

(a) Provincial Small Cause Courts Act (1887), S. 16 — Suit filed in Small Cause Court can be transferred by District Judge to Sub-Judge not having small cause powers — Civil P. C. (1908), S. 24 (4).

Where a suit is filed in a small cause Court and the District Judge transfers it under S. 24, Civil P. C., it is not necessary that the transfer must be made to a Court which has Small Cause Court powers. [P 691 C 1]

(b) Provincial Small Cause Courts Act (1887), S. 25—Finding of fact cannot be considered in revision.

It is not open to the High Court in a revision under S. 25 from a Small Cause Court to consider the findings of fact on their merits. [P 691 C 2]

(c) Provincial Small Cause Courts Act (1887), S. 4—No distinction between Small Cause Court Judge and Court having Small Cause powers.

There is no distinction between a Small Cause Court Judge and a Court which had Small Cause Court powers. [P 691 C 1]

Baleshwari Prasad—for Applicant.

K. Verma—for Opposite Party.

Order.—This is an application in revision by a defendant against whom the Small Cause Court has passed a decree. The first three grounds deal with the question of jurisdiction. The suit was for Rs. 759-14-11. It was filed in the Small Cause Court in Gorakhpur. On 11th July 1934, this suit along with certain other suits was transferred by the District Judge from the Small Cause Court to the Subordinate Judge under S. 24, Civil P. C. The Subordinate Judge tried the suit on the regular side. The form heading has the words "Judge of Small Cause Court" altered to the words "Subordinate Judge, Gorakhpur" and the evidence is taken at considerable length. The argument which has been put forward for the applicant is that under S. 16, Provincial Small Cause Courts Act, the trial by the Subordinate Judge was illegal because there was a Court of Small Causes in Gorakhpur, at the time by which the suit was triable. It was necessary for the applicant in revision to show that there was a Small Cause Court in Gorakhpur at the time by which the suit was triable, that is, that there was an officer in Gorakhpur who had Small Cause Court powers to try a suit of the amount of Rupees 759-14-11. It is a fact that Gorakhpur is one of the places where a Small Cause Court Judge is usually posted, but it does not follow that there was an officer with these powers posted on the date of transfer, 11th July 1934, and it was necessary for the applicant in revision to show this from a reference to not only civil lists, but also gazettes. This has not been done. If the assumption were made in favour of the applicant the argument would then proceed as follows: Under S. 16, Provincial Small Cause Courts Act, no other Court has jurisdiction to try a suit of a Small Cause Court nature in a judgeship where there is a Small Cause Court Judge having jurisdiction to try a suit. S. 24, Civil P. C., (1) (b) (2) states that the District Judge may withdraw any suit pending in any Court subordinate to him and transfer the same for trial or disposal to any Court subordinate to him and competent to try or dispose of the same. It is alleged that the Subordinate Judge was not competent to try or dispose of the suit because of S. 16, Provincial Small Cause Courts Act. There is a further provision in S. 24 (4) as follows:

"The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes."

In regard to this sub-section the argument is that the transfer must be made to a Court which has Small Cause Court powers. This argument is supported by a ruling reported in 1918 Oudh 160 (1). That ruling however was of the Court of a Judicial Commissioner and not of a High Court.

1. Baijoo v. Tulsha, 1918 Oudh 160=43 I C 314 =20 O C 350.

In this High Court the question has arisen in similar cases in three rulings mentioned for the opposite party, namely, 1917 All 62 (2), 1918 All 290 (3) and 1929 All 50 (4). In these cases the question was where a case had been transferred under S. 24 to an officer not having Small Cause Court powers and it had been tried as a regular suit whether an appeal lay or whether the case should have been deemed to be one tried by a Court of Small Causes. This Court held in all the cases that no appeal lay because under S. 24 (4) the Court trying the suit must be deemed to be a Court of Small Causes. No question arose before this Court as to whether such a transfer would be invalid and this suggestion has never been put forward in any reported ruling shown of this Court.

One of the difficulties in the way of the interpretation of S. 24 (4) put forward by the applicant in revision is that the sub-section would appear to be superfluous and meaningless on that view. The argument is that the transfer must be made to a Court having Small Cause Court powers. If that be so, why is a sub-section enacted which explains that that Court shall be deemed to be a Court of Small Causes. Clearly the sub-section refers to a Court which is not a Court of Small Causes and which is only deemed to be a Court of Small Causes by virtue of the sub-section. I note that the Oudh ruling to which reference has been made did not attempt to deal with this difficulty. I consider that the argument for the applicant is unsound and as already noted he has not established his point by reference to gazettes which would show that there was on the date in question a Small Cause Court in Gorakhpur by which the suit was triable. Some distinction was alleged by learned counsel for the applicant to exist between a Small Cause Court Judge and a Court which had Small Cause Court powers. In S. 4 of the Act, it is stated that a Court of Small Causes includes any person exercising jurisdiction under the Act in any such Court. This shows no such distinction can be drawn.

The remaining two grounds deal with the merits of the case and allege that the lower Court was wrong in its finding of fact. I consider that it is not open to this Court in a revision under S. 25 from a Small Cause Court to consider the findings of fact on their merits. For these reasons I dismiss this application in revision with costs.

K.S. *Application dismissed.*

2. Sukha v. Raghunath Das, 1917 All 62=37 I C 809=39 All 214.
3. Chaturi Singh v. Mst. Rania, 1918 All 290=46 I C 893=40 All 525.
4. Ram Charan Banwari Lal v. Kishori Lal Ram Sarup, 1929 All 50=115 I C 127=50 All 810.

A. I. R. 1935 Allahabad 691

KENDALL, J.

Raja Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 54 of 1935, Decided on 22nd March 1935, from order of Sess. Judge, Meerut, D/- 30th October 1934.

Criminal P. C. (1898), S. 288 — Evidence admitted under S. 288 may be treated as evidence for all purposes—It does not invariably require some independent corroboration.

Obitor.

Under S. 288. Criminal P. C., evidence admitted under that section may be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act. It will not be proper to limit the use of such evidence that unless there is clearly present besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of a conviction. Nor can it be said that such evidence admitted under S. 288 requires invariably some independent corroboration in the same manner as a statement of an accomplice: 1927 *All* 479, *Rel on*; 1925 *Pat* 51, *Not Foll.* [P 692 C 1]

K. D. Malaviya—for Applicant.

Asst. Govt. Advocate—for the Crown.

Order.—This application has been argued by Mr. Kapildev Malaviya on the ground that the trial Court and the lower appellate Court have both given a value to two statements admitted under S. 288, Criminal P. C., to which they are not entitled by law. The facts of the case are given fully in the judgment of the lower appellate Court.

The principal evidence for the prosecution was that of the complainant, Suggan, who was poisoned and the two bakers Ram Chander and Khazan, who were attracted to the dharamshala by the cries of the poisoned man, and who testified to finding the present applicant Raja Ram, who is a boy of 16, in the dhasamshala, together with the complainant Suggan, while the other person who had accompanied the applicant to the dharamshala ran away. The case for the prosecution was that the applicant was in league with this person who had escaped to administer

poison to Suggan in order to rob him. The argument is that if the statements admitted under S. 288, Criminal P. C., are ignored, there is no evidence to prove that the applicant himself had any guilty knowledge.

The case on which Mr. Malaviya has relied is that of 3 Pat 781 (1), in which it was remarked (p. 794):

"I think therefore that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of a conviction."

If the meaning of this sentence is that evidence admitted under S. 288, Criminal P. C., invariably require some independent corroboration in the same manner as the statement of an accomplice, I am with due respect not yet satisfied that the general practice of the Courts substantiates the principle laid down. Under S. 288, Criminal P. C., evidence admitted under that section may be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act, of 1872, and a Bench of this Court in the case of 1927 All 479 (2), has discussed the meaning of this section without giving any indication that it would be proper to limit the use of such evidence in the manner laid down by the Patna High Court.

It is not however necessary for me to come to a decision on the wider question, for in the present case it appears to be quite clear that there was other evidence on which the Court relied and which proved the guilt of the applicant in addition to the statements admitted under S. 288. The learned Judge has remarked that the two bakers Ram Chander and Khazan appeared to have altered their statements in the Sessions Court in favour of the applicant on three points: They said that they found the applicant sitting down, whereas one of them at any rate said in the Magistrate's Court that he was ready to run away, but was arrested. (2) One of them, Ram Chander, was ambiguous as to whether the purse was found in the bundle or on the person of the sweeper. (3) They said that the bundle which contained some of the poisoned sweetmeats was lying on the ground whereas in the Magistrate's Court both had said that the bundle was in possession of the applicant.

The appellate Court has found however that according to the Urdu record Khazan Singh said in the trial Court not that the bundle was lying on the ground near the applicant, but that the applicant had it in his possession while the English record of the trial Court shows that Ram Chander said that the applicant had a bundle and that crushed sweets were found in that bundle. It appears therefore that there was sufficient evidence given by these witnesses in the trial Court to corroborate the statements made before the Magistrate, though in some details their statements in the two places were not consistent. I have examined the evidence and I find that there are circumstances in the case that justified the Courts in giving preference to the statements of these two witnesses which were made in the Magistrate's Court to their statements in the Sessions Court, where the two differ, and I am therefore not satisfied that the Courts were wrong in relying on the statements admitted under section 288, Criminal P. C., or that they acted illegally in convicting the applicant.

The application therefore is dismissed. The applicant is on bail and must surrender to his sureties.

K.S. *Application dismissed.*

1. Emperor v. Jehal Teli, 1925 Pat 51=84 I C 334=3 Pat 781=26 Cr L J 270.
2. Emperor v. Behari, 1927 All 479=98 I C 485 =49 All 251=27 Cr L J 1365.

A. I. R. 1935 Allahabad 692

NIAMATULLAH AND RACHHPAL SINGH, JJ.

Ramji Lal and *others* — Plaintiffs — Appellants.

v.

Roshan Singh and *others*—Defendants —Respondents.

First Appeal No. 321 of 1930, Decided on 18th January 1935, from decree of Sub-Judge, Bulandshahr, D/- 29th April 1930.

Mortgage — Redemption — Suit by prior mortgagee on his mortgage and property purchased by him in execution of decree—Puisne mortgagee not made party—As between mortgagor and mortgagee it is effective — But puisne mortgagee can exercise his right of redemption—He must pay principal and interest to prior mortgagee—Prior mortgagee auction purchaser in possession of property should account for usufruct received by him.

Where a prior mortgagee obtains a decree on foot of his mortgage and purchases the mortgaged property in execution of his own decree, to which the puisne mortgagee was not a party,

the sale cannot be considered to be of no effect at all. If effectively transfers the mortgagor's right to the prior mortgagee (auction-purchaser) as between the mortgagor and the prior mortgagee, though the sale is not bindlng on the subsequent mortgagee, who can, in spite of it, exercise his right of redemptlcn. In the exercise of his right of redemption he is entitled to treat the prior mortgages as still subsisting. Not being bound by the decree he can ignore it. The necessary corollary to this is that account of the mortgage money is to be made up on the basis of the stipulations contained in the mortgage-deeds. In redeeming the mortgages, he must pay the principal and interest calculated upto date; at the same time, the prior mortgagees who have been in possession of the mortgaged property by virtue of the auction sale held in execution of their own mortgage decree, should account for the usufruct received by them: 1931 *All* 277, *Rel on*; *Case Law Ref.* [P 694 C 1]

S. K. Dar and *S. B. L. Gour*—for Appellants.

Nanak Chand—for Respondents.

Judgment.—A Bench of this Court, of which one of us was a member, remitted the following issue to the lower Court for finding:

"what amount, if any, is due to the defendant-mortgagee from the mortgagors on the basis of the mortgage deeds dated 21st July 1880 and 27th July 1882."

For the detailed circumstances in which it was found necessary to have a finding on the above issue the remand order should be seen. For the purposes of our decision on the issue remitted to the lower Court whose finding is before us, it is necessary to state the facts very briefly. The defendant-respondents were mortgagees of a 12½ biswansi share in a certain village under the deeds, one of 21st July 1880, and the other of 27th July 1882. The plaintiffs took a mortgage of the same share together with another share under a deed of a subsequent date. The defendant obtained a decree for sale on foot of their mortgages in 1886, and purchased the share themselves in execution of their decree. They obtained possession of the property and have been in possession ever since. They had omitted to implead the plaintiffs as a party, and the latter therefore were not bound by the result of that suit. The plaintiffs subsequently brought a suit on foot of their mortgage and had the same property sold. They were themelves declared to be the auction-purchasers in 1916. The suit, which has given rise to this appeal, was brought by the plaintiffs on 15th May 1928, for redemption of the mortgages in favour of the defendants, to which reference has already been made. It was alleged that the mortgage money due under the aforesaid deeds has been fully satisfied by the usufruct of the share which has been in possession of the defendant since 1886. The defendants denied this allegation and claimed a certain sum as a condition of redemption. They alleged that they were entitled to the entire decretal amount with interest up to date. This Court held by its remand order that the plaintiffs were bound to pay to the defendants the amount due under the two mortgages. The issue remitted to the lower Court accordingly mentioned the question arising between the parties.

The lower Court has returned a finding which is not quite definite. It is pointed out that the defendants claimed by their written statement Rs. 1,926-2-6 which represent the mortgage money due under the two deeds on the date of the decree passed in their favour They claimed no interest subsequent to the date on which possession was delivered to them. They seem to imply that the plaintiffs should pay the same amount for redemption now as they would have had to pay if they had been impleaded and desired to redeem. The lower Court is however of opinion that, but for this defence the defendants would have been entitled to a larger sum of money representing the decretal amount above referred to and interest thereon up to date, the total of which comes to Rs. 6,457-12. Apparently the lower Court has left it to us to decide whether one or the other of the two figures should be considered to be the sum due under the two mortgages.

The learned Advocate for the plaintiff-appellants has raised a question which does not appear to have been considered by the lower Court. He argues that the account between the parties should be made up by giving credit to the defendants for interest accruing on the mortgages, but the profits derived from the property purchased by them should be set off each year against the interest, and that so far as the profits were in excess of the interest each year, they should be set off against part of the principal. It is contended that if account be made on this footing, the entire mortgage money due under the mortgage deeds in question will be found to have been paid off and that some surplus is due to the plaintiff-appellants. Unfortunately the defendant-respondents are not represented before us. Their learned Counsel, Mr. Nanak Chand has

stated that he has no instructions. From the pleadings and from the attitude they adopted when the order of remand was passed it is clear that they contested the appellant's right to have the profits set off against interest each year; and we cannot give effect to the plaintiff appellants' contention as if there is no contest on the point. The first question, therefore, which we have to decide is whether the plaintiff-appellants are in law, entitled to have the profits of the property purchased by the defendant-respondents in execution of their mortgage decree set off against the interest and, so far as it was in excess of the interest against the principal.

Where a prior mortgagee obtains a decree on foot of his mortgage and purchases the mortgaged property in execution of his own decree, to which the puisne mortgagee was not a party, the sale cannot be considered to be of no effect at all. It effectively transfers the mortgagor's right to the prior mortgagee (auction-purchaser), as between the mortgagor and the prior mortgagee, though the sale is not binding on the subsequent mortgagee, who can, in spite of it, exercise his right of redemption. This has been held by a Full Bench of this Court in 1931 All 277 (1). Applying that rule to the facts of the present case we have to accept the position that the mortgagors' rights were transferred to the defendant-respondents in 1886; but the plaintiff-appellants, who were no party, are entitled to redeem. In the exercise of their right of redemption they are entitled to treat the prior mortgages as still subsisting. Not being bound by the decree they can ignore it. The necessary corollary to this is that account of the mortgage money is to be made up on the basis of the stipulations contained in the mortgage-deeds. In redeeming the mortgages they must pay the principal and interest calculated up to date. At the same time, the prior mortgagees who have been in possession of the mortgaged property by virtue of the auction-sale held in execution of their own mortgage decree, should account for the usufruct received by them. They have to do this, not because their possession can be traced to anything in the mortgages in their favour, which were simple, but to the fact that the usufruct received by them should be considered to be tantamount to payments made by the mortgagors. In this connexion it should not be overlooked that as between the prior mortgagees and the mortgagors the latter's rights were assigned to the prior mortgagees under the auction-sale in lieu of the mortgage money. The prior mortgagees have been in receipt of the usufruct as against the mortgagor in consideration of the whole or part of the mortgage money which as against the mortgagors should be considered to have been wiped out. Any payments which the mortgagor makes to the prior mortgagee enures for the benefit of the puisne mortgagee also. If the prior mortgagees be considered to be in possession of the mortgaged property under an arrangement made by the Court in the auction-sale on behalf of the mortgagor to the effect that the prior mortgagees may take possession of the mortgaged property and retain it as the owners thereof in full or part satisfaction of the mortgage money subject to the right of the puisne mortgagee's right to redeem, there can be no doubt that the usufruct received by the prior mortgagees under such arrangement should, in relation to the puisne mortgagee, be considered to be payments made by the mortgagor. Otherwise the prior mortgagees would have it both ways. On the one hand they insist on payment of the mortgage money consisting of the principal and interest calculated up to date, and on the other hand they are allowed to appropriate the usufruct which, but for the auction-sale in their own suit, would have been taken by the mortgagor. This view was taken by a Division Bench of this Court to which one of us was a party in 1930 All 485 (2). To the same effect is the view of the Madras High Court in 1918 Mad 103 (3), which was followed by this Court in the case referred to above. The Calcutta High Court has taken the same view in 1922 Cal 23 (4). There is a passage in 1933 All 905 (5), which is relied on in support of the contrary view. The question which the learned Judges were called upon to decide was not quite similar to the one before us. In repelling the contention that interest should cease from the date the prior

1. Nannu Mal v. Ram Chander, 1931 All 277=132 I C 401=53 All 334 (F B).

2. Nannu Mal v. Ram Charan Lal, 1930 All 485=126 I C 824=52 All 331.
3. Muthammal v. Razu Pillai, 1918 Mad 103=44 I C 753=41 Mad 513.
4. Jnanendra Nath Singh v. Shoreshi Charan Mitra, 1922 Cal 23=69 I C 759=49 Cal 626.
5. Lalta Prasad v. Kafayat Husain, 1933 All 905=148 I C 2.

mortgagee obtained possession under the auction-sale in his favour held in a suit on foot of his own mortgage, to which the puisne mortgagee was not a party, the learned Judges observed:

"It is argued that as Lalta Prasad has obtained possession of the property, no interest should be allowed to him from the date of his obtaining possession. We think there is no force in this contention, as Lalta Prasad obtained possession of the property not as mortgagee but as an auction purchaser in execution of his own mortgage decree."

The view herein expressed is right so far as it goes. It is not open to the puisne mortgagee to say that, though he treats the prior mortgage as still subsisting, yet interest should be calculated only up to the date on which the prior mortgagee obtained possession after his purchase in his own suit against the mortgagor. The very hypothesis on which the puisne mortgagee claims redemption precludes the possibility of interest being calculated only up to the date when possession was obtained by the prior mortgagee under the sale in his favour. The puisne mortgagee must pay interest up to date since he treats the mortgages as still subsisting. The learned Judges do not go further than this. They did not hold that the usufruct received by the prior mortgagee in his capacity as auction-purchaser should not be set off against the mortgage money. They were not called upon to consider this question, the only argument before them being that interest should cease from the date of the auction-purchase by the prior mortgagee. It is true that the learned Judges allowed the entire principal and interest without making any allowance for the usufruct for which no claim had been made and which had probably not been proved. As already stated, the question which has been raised was not considered by the learned Judges in that case. The passage quoted above is therefore no authority for the proposition contrary to that recognized in 1930 All 485 (2), and in the Madras and Calcutta cases, to which reference has already been made. The conclusion which we have arrived at is that while the defendant-respondents are, on the one hand, entitled to have an account taken of what is due to them under the mortgage-deeds of 1880 and 1882, they are, on the other hand, liable to give credit for the net profit received by them every year after they entered into possession.

The plaintiff-appellants are faced with a peculiar difficulty in showing that the mortgage money has been satisfied out of the usufruct. The mortgage-deed carries interest at the rate of Re. 0-14-0 per cent per mensem compoundable every year. The defendant-respondents obtained possession in 1886. It is not known what amount of principal, interest and compound interest was due to the prior mortgagees in 1886, nor is there any evidence to show whether in the years which followed the auction-sale the profits of the property were sufficient to pay the interest each year on the aggregate amount on which the interest was running. It is quite possible that for many years after 1886 the net profit was not equal to the interest which went on accumulating till it reached an unknown high figure. All that the plaintiff-appellants have been able to establish in the present case is that during the years ranging from 1327 Fasli (1920) to 1338 Fasli (1931), the profits of the property were in excess of the interest calculated on the original principal amount at the contractual rate. We cannot however assume that in 1920 (1327 Fasli) interest for all preceding years had been paid off, so that interest was running only on the original principal. As already pointed out, it is possible that the aggregate amount on which interest was running had swelled to a figure on which interest at the contractual rate exceeded the annual profit accruing between 1920 and 1931. In these circumstances, we cannot accept the contention put forward on behalf of the plaintiff-appellants that the entire mortgage money was satisfied by the usufruct and the next best thing that can be done for the plaintiff-appellants is to accept the defendants case that redemption may be allowed to the plaintiff on payment of Rupees 1,926-2-6 due under the two mortgages on the date when the defendants obtained possession.

The result is that we pass a decree, in supersession of the decree of the lower Court, for redemption on payment of Rs. 1,926-2-6. Parties shall receive and pay costs in proportion to success and failure. Three months' time is allowed for payment.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 696

SULAIMAN, C. J. AND BENNET, J.

Shiva Prasad—Plaintiff—Applicant.

v.

Pahlad Singh—Defendant—Opposite Party.

Civil Revn. No. 443 of 1934, Decided on 27th March 1935, against order of 1st Sub-Judge, Meerut D/- 15th March 1934.

(a) Civil P. C. (1908), S. 115—Munsif making complaint after deciding case—Criminal P. C., S. 439 does not apply but S. 115 applies—Criminal P. C. (1898), S. 439.

Where a munsif makes a complaint after deciding the case, revision from an order in such proceedings lies under S. 115 and not under S. 439, Criminal P. C.: 26 *All* 249 (*F B*) and 28 *All* 554, *Rel on*. [P 696 C 2]

(b) Civil P. C. (1908), S. 24—District Judge cannot transfer case to Sub-Judge unless latter is competent to try suit.

The District Judge cannot transfer cases to Sub-Judge unless the latter is competent to try or dispose of same. [P 696 C 2]

(c) Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 22 (4)—Munsif making complaint under S. 476, Criminal P. C.—Sub-Judge has no jurisdiction to hear appeal—Criminal P. C. (1898), S. 476.

A Munsif in making a complainant under S. 476, Criminal P. C., is not passing an order within the meaning of S. 22 Bengal, Agra and Assam Civil Courts Act. Hence the Subordinate Judge has no jurisdiction to hear the appeal; and as such if an appeal is filed in the District Court, the District Judge cannot transfer the same to the Subordinate Judge: 1929 *All* 774, *Diss from*; *Case law Ref.* [P 697 C 1]

Saila Nath Mukerji and *K. D. Malaviya*—for Applicant.

Kumuda Prasad—for Opposlte Party.

Sulaiman, C. J.—This is an application in revision from orders passed by the First Subordinate Judge of Meerut. After deciding a civil suit the Munsif had made a complaint against the defendant in respect of suspected forgery committed by him and as also certain false statements made in the course of the suit, but had refused to make any complaint against the witnesses for the defendant. The defendant appealed to the District Judge in respect of the complaint made against him and the plaintiff filed appeals to that Court against the witnesses against whom no complaint had been made. The learned District Judge transferred all these appeals to the Court of the First Subordinate Judge to dispose of them. He declined to make any complaint against the witnesses and also directed the withdrawal of the complaint against the defendant. In revision the plaintiff-applicant prays that the orders be set aside as having passed without jurisdiction.

No doubt inasmuch as the proceeding has arisen out of a suit decided by a Munsif, it is a matter of a civil nature and S. 439, Criminal P. C., would not be applicable, but S. 115, Civil P. C., only applies: See 26 All 249 (1) and 28 All 554 (2). The Subordinate Judge has entertained the appeals filed in the Court of the District Judge which were transferred to his Court and has certainly disposed of them finally and they are no longer pending in his Court. There can be no doubt that there is a case decided by him within the meaning of S. 115, Civil P. C. It is contended on behalf of the respondent that the District Judge had jurisdiction under S. 24, Civil P. C., to transfer these cases to the Court of the Subordinate Judge. But it is quite obvious that even if S. 24, Civil P. C., was applicable, the District Judge could not transfer these cases to the Sub-Judge unless the latter was competent to try or dispose of the same. There has been some conflict of opinion in this Court as to whether a Subordinate Judge is competent to dispose of such matter on appeal or not. The cases of 1921 All 211 (3) and 1927 All 555 (4) are both distinguishable inasmuch as there the appeal had been transferred to the Court of the Additional District Judge and not to a Subordinate Judge. S. 8, Sub-S. (2), Bengal, Agra and Assam Civil Courts Act (Act 12 of 1887) might well have been applied to such a case, because under that section, Additional Judges can discharge any of the functions of a District Judge which the District Judge may assign to them and when discharging such functions they exercise the same powers as the District Judge. The word "function" is wide enough to include the hearing of appeals under S. 476 B.

As regards the transfer to a Subordinate Judge, there is the case of 1929 All 774 (5) decided by Mukerji, J., in which it was distinctly held that a District Judge is competent to transfer to a Subordinate Judge an appeal from "an order" passed by a Mun-

1. In the matter of Bhup Kunwar, (1904) 26 All 249 (F B).
2. Salig Ram v. Ramji Lai, (1906) 28 All 554=3 A L J 394.
3. Ram Charan v. Mewa Ram, 1921 All 211=61 I C 513=43 All 409=22 Cr L J 385.
4. Narain Das v. Emperor, 1927 All 555=102 I C 485=49 All 792=28 Cr L J 549.
5. Karim Ullah v. Rameshwar Prasad, 1929 All 774=111 I C 595=51 All 344.

sif under S. 476, Criminal P. C. In that case it was taken for granted that the proceeding in the Munsif's Court terminated is "an order." It does not appear to have been argued before the learned Judge that the proceedings did not terminate in "an order" within the meaning of S. 22, Bengal, Agra and Assam Civil Courts Act. The case relied upon as authority, namely, 1927 All 555 (4) was, as already pointed out distinguishable. On the other hand, it has been held in the case of 1935 All 440 (6) by one of us that it is not open to a District Judge in whose Court an appeal under S. 476 B, Criminal P. C., is pending to transfer that appeal to the Court of a Subordinate Judge as the Subordinate Judge has not got jurisdiction to hear such an appeal. Similarly Bajpai, J., has held in the case of 1935 All 212 (7) that the District Judge has no jurisdiction under the Criminal Procedure Code to transfer such an appeal to the Subordinate Judge.

The main question for considertion, is whether a Subordinate Judge has such jurisdiction under S. 22, Sub-S. (1), Bengal, Agra and Assam Civil Courts Act. The sub-section provides that a District Judge may transfer to any Subordinate Judge under his administrative capacity any appeals pending before him from the decrees or orders of Munsifs. It is therefore quite obvious that unless the proceeding in the Court of the Munsif terminated in "an order" within the meaning of this sub-section, the Subordinate Judge would not have any jurisdiction to hear the appeal. The word "order" has not been defined in the Act, but it occurs just after the word "decrees" and an indication as to what it connotes can to some extent be gathered from the definition of "order" in S. 2, Sub-S. (14), Civil P. C., by way of analogy. According to that definition an order means the formal expression of any decision of a civil Court which is not a decree. Now S. 476, Criminal P. C., does not anywhere say that the Munsif in making the complaint has to pass an order to that effect. It requires the civil Court to make a complaint in writing signed by the presiding officer of the Court and to forward the same to a Magistrate having jurisdiction. S. 476 which permits an appeal to be preferred by the aggrieved party does not say that the appeal is from any "order" passed by the original Court. Again the appellate Court is not required to make any "order" on appeal, but has authority either to make complaint itself or to direct the withdrawal of the complaint as the case may be. One may in a loose way call it an order but strictly speaking it is not so.

It seems that the mere fact that an appeal is provided to the same forum to which appeals ordinarily lie from the appealable decrees or sentences of the original Court does not in any way show that the appeal is from the Munsif's "order." When we come to examine the nature of the proceeding, it is quite obvious that the Court being satisfied prima facie that there is a fit case for enquiry simply makes a complaint; it does not and cannot decide any matter finally against the persons against whom the complaint is made nor is there any adjudication of any rights of the parties at all. Ss. 18 to 21, Civil Courts Act, deal with the ordinary jurisdiction of District Judges, Subordinate Judges and Munsifs which is declared to extend to all original suits for the time being cognizable by civil Courts and provision is made as to which Court appeals would lie. S. 22 uses the same words "decrees or orders" as occur in S. 20 and S. 21. It seems to follow that the words "decrees and orders" were meant to refer to decrees and orders passed by a Munsif in a civil proceeding pending before him to which the Code of Civil Procedure would apply; whereas the making of a complaint under S. 476 is an act done by the Munsif under the authority conferred upon him by S. 476, Criminal P. C.

In these circumstances it seems that it is difficult to say that the Munsif in making the complaint is passing an order within the meaning of S. 22, Bengal, Agra and Assam Civil Courts Act. With respect we are unable to agree with the view expressed in 1929 All 774 (5). Following the view expressed in two later cases quoted above, we hold that the Subordinate Judge had no jurisdiction whatsoever to hear these appeals.

We may however point out that where by the special notification mentioned in S. 21, Sub-S. (4), Civil Courts Act, appeals from decrees and orders of Munsifs are directed to be preferred to the Court of such a Subordinate Judge, he would become the Court to which appeals ordinarily lie from the appealable decrees of the

6. Manphool v. Budhu, 1935 All 440=1935 Cr C 531.
7. Mehdi Hasan v. Emperor, 1935 All 212=1935 Cr C 255.

former Court under S. 195, Sub-S. (2) and therefore an appeal would lie to him under S. 476 B. In such a case there will be no question of the appeal being transferred by the District Judge to the Court of the Subordinate Judge, as the appeal would be filed in his Court direct.

The revision is accordingly allowed and the order of the Subordinate Judge withdrawing the complaint against the defendant Pahlad Singh is set aside and the case is sent back to the Court of the District Judge for disposal according to law. As the transfer of the appeal was by the District Judge suo motu we direct that the parties should bear their own costs of this revision.

K.S. *Application allowed.*

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* A. I. R. 1935 Allahabad 698

(Full Bench)

SULAIMAN, C. J., HARRIES AND RACHHPAL SINGH, JJ

Mt. Nand Rani—Defendant—Appellant.

v.

Krishna Sahai and *others*—Plaintiffs —Respondents.

Second Appeal No. 285 of 1931, Decided on 11th March 1935, from decision of Sub-Judge, Bareilly, D/- 18th November 1930.

(a) Hindu Law— Maintenance — Widow's right arises by marriage and not by contract.

The widow's right of maintenance arises by marriage. It is not a matter of contract. It exists during the husband's lifetime and continues after his death. It is an obligation attached upon his person and remains the same after his death. [P 700 C 1]

*** (b) Hindu Law — Mitakshara — Funeral expenses of mother of last male-holder are in nature of legal charge—Estate of male-holder is liable for same.**

The funeral expenses as well as the expenses of sradh ceremonies of the mother and the widow of the deceased last male-holder, are in the nature of legal charges, and if a person is obliged to defray those charges then the estate of the last male-holder is liable for them: *Case law discussed.* [P 701 C 2]

*** (c) Hindu Law—Mitakshara—Person in unlawful possession of estate spending money on funeral charges of mother of last holder—He is not entitled to retain possession until such expenses are paid—He is no better than an unsecured creditor.**

If a person is in lawful possession and during that possession he is compelled to incur a liability binding on the estate, then, possibly, he might claim a lien. But a person in unlawful possession of the estate cannot claim a lien in respect of funeral charges which he might have incurred of his own accord for mother of last male-holder. He is no better than an unsecured creditor. It is open to him to sue the heirs and obtain a decree: *Case law reviewed.* [P 701 C 2, P 703 C 1]

Benod Behari Lal—for Appellant.

G. S. Pathak and *Lakshmi Narain Gupta*—for Respondents.

Rachhpal Singh, J.—This is a defendant's second appeal arising out of a suit for possession. The facts which have given rise to the second appeal may briefly be stated as follows: Babu Ram Narain was the owner of two-thirds share in the house in suit. Mt. Ganga Dei was his widow. They had a son, Babu Parshotam Nath, and one daughter, Mt. Nand Rani. Parshotam Nath's wife was Mt. Shama Kunwar. The family was a joint family governed by Mitakshara Law. On the death of Babu Ram Narain, his son Babu Parshotam Nath succeeded to the family estate by right of survivorship. He died in the month of June 1922 when his widow Mt. Shama Kunwar succeeded to the estate as a Hindu female. She died soon after her husband in the month of December 1922, when Mt. Ganga Dei, the mother of Parshotam Nath, the last male-holder of the estate, succeeded as a Hindu female.

On 13th April 1923 Mt. Ganga Dei, made a will in favour of her daughter, Mt. Nand Rani. The plaintiffs alleging themselves to be the reversioners of Parshotam Nath, instituted a suit in 1923, and in 1924 they obtained a declaration that the will was invalid. On 17th September 1928, Mt. Ganga Dei died.

A few months after her death in December 1928, the plaintiffs instituted a suit against Mt. Nand Rani and her son claiming possession over the estate as the nearest reversioners of Parshotam Nath. The claim was resisted by the daughter on several grounds, but was decreed by both the Courts below. Mt. Nand Rani has come up in second appeal before this Court. The two pleas with which we are mainly concerned in this appeal were raised by Mt. Nand Rani in her defence. One was that she had defrayed the expenses of the funeral of Mt. Bhagwan Dei, and the other was that Mt. Bhagwan Dei before her death had been ailing for a number of years and a certain sum of money was spent by defendant 1 on her treatment. It was contended that the reversioners could not get the estate without paying the defendant No. 1 the amount spent by her on account of the aforesaid two

items. Both the Courts below held that the defendant was not entitled to claim either of the two items. The two important points which we are asked to decide are: (1) Whether a person who has expended money on funeral expenses of the mother of the last male-holder is entitled to retain possession over the estate of the last male-holder till the funeral expenses have been paid. (2) Whether a person who has advanced money for medical treatment to the mother of the last male-holder in possession of his estate can claim to hold the estate as against the reversioners till those charges have been paid. The first thing which we have to bear in mind is that we are dealing with the case of a mother of a deceased Hindu, governed by Mitakshara Law, and whose estate was in possession of his mother as a Hindu female. According to the provisions of S. 320, Succession Act (39 of 1925):

"Funeral expenses to a reasonable amount according to the degree and quality of the deceased and death bed charges including fees for medical attendance, and board and lodging for one month previous to his death shall be paid previous to his debts."

This section makes it perfectly clear that reasonable funeral charges including fee for medical attendance and for board and lodging for one month prior to the death of the owner of the estate are, under the law of the country, to be paid before any other debt. The question as to whether a person spending money on these items can claim a lien over the estate however stands on a different footing. The provisions of the Indian Succession Act however cannot help in this case. The plaintiffs in the present case are not claiming the estate of Mt. Bhagwan Dei but they are asking for possession over the estate of Parshotam Nath, who was the last male-holder of it. The learned counsel appearing for the defendant-appellant relied on observations made in Sarvadhikari's Hindu Law, Edn. 2, p. 10, where the learned author remarks thus:

"The Hindu system went further, and laid it down as an imperative rule, that the right to inherit a dead man's property is exactly coextensive without the duty of performing his obsequies. The devolution of property depends upon the competence to perform the obsequial rites of the deceased. They cannot be separated. He who is entitled to celebrate these rites, is also entitled to inherit the property; and he who gets the property must perform the funeral rits of the last owner."

It would however appear that the learned author was quoting here the rule of Dayabhaga Law, because we find that at another place in the same book at p. 453 when dealing with the principle of succession under Mitakshara Law the learned author says:

"It should be distinctly understood, says Mitra Misra, in another place, that the title to present exequial pindas is not the sole ground of taking the inheritance, for the younger brothers are equally entitled to the inheritance, although in presence of the eldest brother the younger brothers are not entitled to present those offerings. The younger brother's share with the eldest, because the competence to present those offerings is not extinct in them. Far it be from us, he seems to say, that the title to present pindas and the title to inheritance are co extensive terms. One is not the effect of the other. The former does not necessarily imply the latter. What we simply mean to say is, that the competence to present pindas is a test a measure of the degree of propinquity in which a given relative stands to the deceased. 'Where there are many claimants amongst the gotrajas and the like, then the fact of conferring benefits on the deceased merely settles the question of precedence among heirs.'. In other words, the competence to present exequial cakes does not create the heritable right, but determines only the preferable right. It simply furnishes the principle of selection founded on superior efficacy of oblations. It determines the priority among heirs. It shows the nearer heirs who exclude the more remote. The conferring of spiritual benefits must never be accepted as the sole ground of taking the inheritance."

It will therefore be seen that the question before us cannot be decided with reference to the obligation about performing the funeral rites of the last owner. It is also doubtful whether in the passage at p. 10 of the Sarvadhikari's Law of Inheritance relied upon by the counsel for appellants, the words "the last owner" can be said to refer to a female holder of the estate. It can be argued that the words "the last owner" refer to the person whose estate the reversioners are claiming and not to the widow. The first important question we have to consider is whether according to Hindu Law the estate of the last male owner is, or is not liable for defraying the expenses of the funeral ceremonies of the last male holder's mother. There does not appear to be any direct authority in the ancient texts of Hindu Law on this point. The legal liability of the estate for the funeral expenses of the mother of the last male-holder cannot be decided with reference to the offering of funeral cakes. The reason is that the reversioners succeeded on the ground that they are the reversioners of the last male-holder and not on the ground of offering funeral oblations to the mother. They succeed because they are

the nearst reversioners of the last male-holder.

The position of the mother in a joint Hindu family governed by Mitakshara Law is a very important one. First stage of Hindu Law affords complete evidence of a state in which the property belonged to a family and not to any individual member thereof. The property was held in perpetuity by the family and the members of the family were only entitled to maintenance out of the family property. The karta of the family managed the family estate. The second stage was reached when individual ownership was recognised and then it became necessary to distinguish between right of ownership and mere right of maintenance. Females and certain other members such as deaf and dumb were held entitled to maintenance while other members were held to be owners. The law went on changing slowly and a stage arrived when in the absence of a male owner the widow in the family in modification of her previous right of maintenance became entitled to hold the family estate with certain limitations. The importance of the position of a mother in a joint Hindu family is recognised in this manner that if there is a partition between a son and her husband then she is allotted a share equal to that of a son. In a joint family the mother and the widow of a deceased coparcener are both entitled to claim maintenance out of the family estate which has gone to other male members by right of survivorship.

In all civilised countries the funeral expenses of the deceased owner of an estate are first charges on the estate left by him. The difficulty which arises in the case before us is that it is not the estate of the deceased which is asked to pay the funeral charges. The widow's right of maintenance arises by marriage. It is not a matter of contract. It exists during the husband's lifetime and continues after his death. It is an obligation attached upon his person and remains the same after his death. As regards funeral charges one way of looking at the things is this: If the husband is alive then it will be certainly his moral obligation to defray the funeral expenses of his wife. But the question is whether he was under any legal liability to pay the funeral expenses of his wife. If he was not legally liable for these expenses, it is difficult to see how his estate could be held liable for funeral expenses when his wife dies after him and the estate goes into the possession of his reversionary heirs. On this point the old Hindu Law texts do not give us any help. In Stoke's Hindu Law Books, p. 91, the rule of law is described as follows:

"The funeral rites of the deceased, as far as the 10th days rites inclusive, must be performed by that person (among the heirs) who takes the estate, whoever it may be, from the wife downward even as far as the king himself. Even thus Vishnu says: 'He who is the heir of the estate is the giver of the funeral oblations'."

At p. 435 it is stated:

"It is said by Katyayana 'Heirless property goes to the King deducting, however a subsistence for the females as well as the funeral charges. . . . . '"

But these texts however do not refer to the case of a female limited owner. It appears to have been however held in several cases that the sradh of a female is a legal necessity according to Hindu Law. The first reported case on the point is 7 W R 146 (1) where it was held that according to Hindu Law the sradh of a mother was a legal necessity. This view was followed in a later ruling of the Calcutta High Court in 36 Cal 753 (2). The next Calcutta case on the point is 21 I C 716 (3). In this case it was held that the reasonable expenses on the sradh of the widow of a deceased Hindu should be paid out of the estate in the hands of the reversioners and the reversioners who inherit the estate should contribute towards such expenses. It will thus be seen that the view is that the expenses of the sradh of the widow are a legal obligation on the estate which the reversioners get. The Madras High Court in 32 Mad 191 (4) has taken a similar view. It was laid down that the funeral expenses of mother are defrayable out of the family funds. The Bombay High Court has adopted a similar view. The first case on the point is 5 Bom 450 (5). The observations as regards the point in question are to be found at p. 460. It is stated:

"Then as to sum alleged to have been expended by the first and second defendants in and about Chandrabhaga Bai's funeral, I find no case in which a question whether a Hindu widow can charge her husband's estate with the payment of a sum of money raised for the pay-

1. Raj Chunder Deb Biswas v. Sheeshoo Ram Deb, (1867) 7 W R 146.
2. Srimohun Jha v. Brijbehary Misser, (1909) 36 Cal 753=2 I C 152.
3. Rama Dhari v. Parma, (1913) 21 I C 716.
4. Vaidyanatha Aiyar v. Aiyasamy Aiyar, (1909) 32 Mad 191=1 I C 408.
5. Sadashiv Bhaskar Joshi v. Dhakubai, (1880) 5 Bom 450.

ment of her funeral expenses has been decided. But it has been held that a Hindu widow may validly charge her husband's estate with the payment of money received for her maintenance, if the income of the estate be insufficient; and I see no reason why she should not likewise be able to charge the estate with a reasonable amount for the purpose of her proper and necessary funeral expenses, according to her station in life."

No authority is cited by the learned Judge for this proposition. The next case is 22 Bom 818 (6). In that case the reversioner of the husband of one Mt. Diwali sued for possession. The defendant claimed the estate under a will executed by her, which was held to be invalid. The defendant further claimed funeral expenses incurred in connection with the death of Mt. Diwali. The learned Judges in their judgment remarked that they could find no authority on the Hindu Law texts on the point but relied on 5 Bom 450 (5). It was held that a widow could charge an estate with the liability to pay her funeral expenses. 32 Bom 26 (7) is the next case. In that case it was held that a reversioner could not recover the estate in possession of a Hindu mother without paying the funeral expenses incurred by the person in possession under a will executed by the widow and it was further held that these expenses were charged on the estate. The learned Judge observed:

"that the duty of performing the funeral ceremonies of a mother that is, pinda dan or offering the funeral oblations, is laid down as a religious injunction binding on her son in absolute terms by the Hindu Law. The duty is independent of any assets left by her. The expenses of performing funeral ceremony are a charge on the son's estate."

Coming to our own High Court I may refer to 1930 All 529 (8). In that case it was held that a Hindu daughter was justified in selling property inherited by her from her mother to pay off a prior mortgage deed under which the money has been borrowed for the barkhi (annual death ceremony) of her mother. One of us (My Lord the Chief Justice) was a party to that decision and it was clearly laid down that the performance of such a ceremony would be the duty on the person who inherits the estate and the expenses could be met out of such property. Having regard to the view which has prevailed in most of the High Courts since several years, I do not see any reason for taking a different view in the case before us. It appears to me that according to the case-law the rule is well established that the funeral expenses as well as the expenses of sradh ceremonies of the mother and the widow of the deceased last male-holder, are in the nature of legal charges and if a person is obliged to defray those charges then the estate of the last male-holder is liable for them.

The next question which arises for consideration is whether a person spending money on funeral charges is entitled to retain possession of the estate until the expenses incurred by him are paid. In considering this question we have to differentiate between the case of a person who was lawfully in possession of an estate and a person who is in wrongful possession. Suppose, that a Hindu widow of the last male-holder or his mother makes a gift of the estate to a relation, the gift is certainly valid for her life. And further suppose that the donee is living with the doner at the time of her death. The donee who was in lawful possession of the estate incurs funeral expenses because the reversioners were not or could not be present at the time when the widow or mother died. The question may arise whether in these circumstances, a person who is in lawful possession of the estate, may or may not claim a lien in respect of the funeral charges which he or she has been compelled to defray. If a person is in lawful possession and during that possession he is compelled to incur a liability binding on the estate then, possibly, he might claim a lien but that would be, as observed in 13 I C 191 (9) because being lawfully in possession under the deed of gift during the lifetime of the lady, he discharged a liability which was binding on the reversionary heirs. The case before us however stands on a different footing altogether. Here, the mother of the last male-holder of the estate was herself in possession. She had executed a will in favour of defendant 1 and it was held that it was not binding. On the death of the mother defendant 1 was not entitled to get possession over the estate.

It must therefore be held that her possession was unlawful. So the question which we have to decide is whether a trespasser who has obtained possession over her estate unlawfully

6. Ratanchand v. Javherchand, (1898) 22 Bom 818.
7. Vrijbhunandas Dwarkadas v. Bai Parvati, (1908) 32 Bom 26=9 Bom L R 1187.
8. Maqbul Ahmad v. Baijdeo Tewari, 1930 All 529=122 I C 751.
9. Ghansham Singh v. Tej Bahadur Singh, (1912) 13 I C 191.

and illegally, can claim a lien in respect of the funeral charges which he might have incurred of his or her own accord. It appears that the question must be answered in the negative. The position which has to be accepted is this: The mother of the last male-holder who was in possession died and defendant 1 as mere volunteer, defrayed the expenses of the funeral ceremony. The pleadings do not show that it was ever asserted that the plaintiffs refused to perform those ceremonies and on account of that refusal defendant 1 was forced to spend money on funeral expenses. Under these circumstances it cannot be said that defendant 1 can claim a lien over the property in respect of the funeral expenses. On the death of the widow there was no legal liability imposed upon defendant 1 to defray the funeral expenses. It was the estate of the son of the deceased lady which was legally liable for the funeral expenses. If defendant 1 defrayed the funeral expenses, she did so as a mere volunteer. All that can be said is that she performed a moral obligation. But it is clear that a relation of the deceased mother cannot improve his position in any manner by performing a moral obligation which he or she was not legally bound to perform. A trespasser cannot take possession of the estate and claim to retain it on the ground that he has a right to do so until the amount expended by him or her on funeral expenses is repaid. All the three Bombay rulings: 5 Bom 450 (5), 22 Bom 818 (6) and 32 Bom 26 (7), are certainly in favour of the contention of the appellant. These cases were decided on the analogy of the widow's right of maintenance. It was held that as the estate in the hands of the reversioners was charged with the maintenance of the widow, so on the same analogy the funeral expenses were also a charge on the estate. It appears to have been assumed that the widow's charges in respect of her maintenance stood on the same footing as a charge as defined in S. 100, T. P. Act.

With the utmost possible respect to the learned Judges, I myself find unable to agree with the broad proposition laid by them. It is well settled now that the right of maintenance is not a charge unless it is so declared. The right however can be converted into a charge either by an agreement, by decree, or under a will. If the property out of which the maintenance is to be paid to the widow is transferred for family necessity, then the widow cannot get maintenance from the alienee. The law makes the position of the widow safe by declaring that a transfer of the family estate liable for widow's maintenance if made fraudulently, will be ineffective against her. But a widow who is entitled to maintenance cannot contend that her maintenance is a charge which may be enforced against the third person. When we say that the widow has a charge in respect of her maintenance over the family estate, all that we mean is that the family estate, if not transferred for legal necessity, remains liable for the maintenance of the widow. Charge as understood under the provisions of S. 100, T. P. Act, can only arise either by operation of law or by the act of parties. And unless there is an agreement or a decree declaring a charge, it cannot be held that the maintenance is a charge on the family estate. D. F. Mulla in his Hindu Law, Edn.7, p. 587, defines the position as regards the maintenance of a widow thus:

"The claim even of a widow for maintenance is not a charge upon the estate, whether it is joint family property in the hands of the surviving co-parceners of the husband or the separate property of the husband in the hands of his sons until the amount of maintenance is fixed and made a charge upon specific property."

In 1920 Bom 219 (10), it was held:

"That a claim for maintenance by a female member of a joint family is a personal claim against members of the family and can only be made a charge on the family property by an order of the Court or by a properly executed document."

An estate of a deceased Hindu may be under an obligation for the maintenance of the widow, but it does not follow from this that a simple creditor of a widow, who has paid her money for maintenance, can insist on getting possession and on retaining the property of the family till the amount due to him is paid. It appears to me that the position of a person advancing money to a widow for her maintenance or spending money on her funeral expenses is no better than that of an unsecured creditor. I do not think that he has lien. In a very old case 1 N. W. P. 71 (11), it was held that:

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10. Parvati Devanna Jagadal v. Shrinivas Ramchandra Patil, 1920 Bom 219=55 I C 531.
11. Zubburdust Khan v. Indurmusi, 1 N W P H C R 71 (F B).

"the creditor of a deceased Hindu does not on the death of his debtor obtain any better position as against the debtor's estate, than that which he enjoyed during the debtor's lifetime."

A creditor cannot be permitted to take possession over the estate and then claim a lien. Similarly if a person is obliged to spend money on the funeral expenses of the mother of the last male owner of the estate, then it is open to him to sue the heirs and obtain a decree. He will get a decree because the funeral expenses are defrayable out of the estate. But he cannot improve his position by getting possession over the estate. The Transfer of Property Act is applicable to Hindus. Under the provisions of S. 100, T. P. Act:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far may be, apply to such charge."

Even if we suppose for a moment, without conceding the point, that the funeral charges were a charge on the estate in the terms of S. 100, T. P. Act, the position of defendant 1 is no way improved. Her position will be something akin to that of a simple mortgagee. Now, a simple mortgagee cannot go and take possession over the mortgaged property. The same rule will be applicable to the case of a person who has a charge, as understood by the Transfer of Property Act, over a particular property. He can enforce his charge by instituting a suit, but has no right to go and take possession over the estate which may be subject to a charge, and which the law enables him to treat for the repayment of his loan. Now charges are created either by act of parties or by operation of law. In the case before us it cannot be said that a charge in respect of the funeral charges incurred by defendant 1 was created by act of parties, and there is no warrant for holding that it is a case in which a charge was created by operation of law. Some of the instances in which a charge is created by operation of law are to be found in the Transfer of Property Act. Under S. 55 (b) there is a charge in the case of an unpaid vendor; under S. 55 (6) (b) there is a charge for the purchase money paid in advance; under S. 73 there is a charge in favour of a mortgagee on surplus sale proceeds of a revenue sale. Other instances of statutory charges are to be found in S. 92, T. P. Act. For the reasons given above, I am clearly of opinion that defendant 1 cannot claim any charge in respect of the funeral expenses of the mother of the last male-holder.

The real question for the determination in the case before us is whether defendant 1 can claim a lien in respect of the funeral charges of the mother of the last male-holder over his estate, which has come in possession of his reversioners. In Hindu Law the term "lien" was unknown. I have consulted various books of Hindu Law, and I can find no reference to the doctrine of "lien" anywhere. The learned counsel appearing for the appellant was unable to cite any rule of Hindu Law under which such a lien as claimed by his client could be asserted. There may be two kinds of liens known to the law. They are: (1) "Liens affecting moveable properties (chattels)." (2) "Liens affecting immovable properties." Generally in both cases the right of the person claiming a lien would arise out of a contract between the parties, either express or implied. As regards chattels, one of the liens which is well-known is a bailee's lien. In the case before us we have nothing to do with the liens affecting moveables or chattels. We are here concerned with a lien claimed in respect of immovable property:

"Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. A lien is a right of defence not a right of action ..... Halsbury's Laws of England, Vol. 19, 1st Edition, pp. 2 and 3."

At p. 4 of the same book the learned author observed that no lien can be obtained by wrongful possession. In the case before us on the death of the widow, the estate vests in the reversioners of the last male-holder and defendant 1 who obtained wrongful possession over it, cannot claim a right of lien in respect of the estate. Section 69, Contract Act, enacts that:

"a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

But it is significant that no right of lien is given to such a person. I would therefore hold that in the present suit the defendant cannot resist the claim of the reversioners for possession even if it be assumed that defendant 1 defrayed the funeral expenses. She got the possession over the estate unlawfully, and therefore cannot claim any lien. As regards the claim about the money alleged to

have been spent on the medical treatment of the mother of the last male-holder, defendant 1 has no case. She had, if her allegations be true, advanced money to the mother of the last male-holder for expenses in connection with her illness. Her position is like that of an ordinary creditor. She may sue for the expenses which she has incurred in regard to her mother's illness and obtain a decree. But she has no lien over the estate. For the reason given above, I would dismiss the appeal with costs.

Sulaiman, C. J.—I agree.

Harries, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 704

ALLSOP, J.

Ashfaq Ali Khan—Plaintiff—Appellant.

v.

Inayat Beg—Defendant—Respondent.

Second Appeal No. 545 of 1933, Decided on 22nd March 1935, from decision of Dist. Judge, Agra, D/- 9th January 1933.

U. P. Land Revenue Act (3 of 1901), S. 34—Suit for property by assignee from co-sharer—No report under S. 34 is necessary—Suit lies in Revenue Court.

Where an assignee from a co-sharer sued for rent, no report under S. 34 is necessary. Such a suit lies only in the Revenue Court: 1934 *All* 155, *Rel on.* [P 704 C 2]

N. P. Asthana and *B. N. Sahai*—for Appellant.

G. Agarwala and *K. N. Agarwala*—for Respondent.

Judgment.—This is a second appeal arising out of a suit for profits by an assignee from the cosharer. The suit was decreed by the trial Court but was dismissed by the lower appellate Court. The only point argued in the lower appellate Court was that the plaintiff was not entitled to institute a suit until he had made a report under S. 34, Land Revenue Act, asking for mutation of the register. Other grounds of appeal were mentioned in the memorandum to the Court below but they were not argued. This may have been due to the fact that the Court below made it clear that it was with the appellant on the point on which the appellant succeeded.

The first question is whether the learned District Judge was right in holding that the plaintiff had no right to sue until he had made the report required under S. 34. I have no doubt that the learned Judge was not right. The suit was in respect of the profits for the years 1333 to 1335 Fasli. These profits were transferred to the plaintiff after they had accrued. It is quite obvious that the plaintiff could make no report under S. 34, Land Revenue Act. He had obtained no right either in the mahal or in any share of it or in the profits of it in respect of the year in which the transfer was made or in respect of any subsequent year. There was no right subsisting in him which could be entered in the register. The fallacy in the argument addressed to the Court below arises out of a misunderstanding of the meaning of the word "profits" as used in S. 34. What was transferred in this case was not a right to the profits in a mahal at any time after the transfer but it was a transfer of a sum of money or a debt or any actionable claim which had already accrued to the transferor. There could certainly be no entry in any register of proprietors in respect of this amount and consequently no report could be required and the right to sue could not be based on the making of any such report.

The only question which might possibly have arisen was whether an assignee of the right to recover, in a Court of Law, profits which had already accrued to the assignor was entitled to bring a suit in the Revenue Court. This question has been set at rest by the decision in 1934 All 155 (1), where it was held that a suit in these circumstances was one which would lie in the Revenue Court.

The appeal must succeed. It has been urged that the respondent might have argued other points in the Court below on the basis of the memorandum in that Court if he had not succeeded on the preliminary point. There is force in this argument. The case must be remanded. I allow the appeal and set aside the decree of the lower appellate Court. That Court will dispose of the appeal upon its merits. The costs in this Court will abide the result. This amounts to a remand under O. 41, R. 23.

K.S. *Appeal allowed.*

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1. Lallu Singh v. Chander Sen, 1934 All 155=147 I C 937=56 All 624 (F B).

A. I. R. 1935 Allahahad 705

THOM AND IQBAL AHMAD, JJ.

Surendra Narain Singh and *others*—Applicants.

v.

Lal Bahadur Singh—Opposite Party.

Civil Revn. No. 11 of 1934, Decided on 18th December 1934, against order of Sess. and Sub-Judge, Jaunpur, D/- 17th February 1933.

Civil P. C. (1908), S. 115 — Matter judicially considered by lower Court—High Court will not interfere in revision with its exercise of discretion—Failure to consider application judicially is material irregularity in exercise of jurisdiction.

If the lower Court has judicially considered the matter in controversy between the parties, the High Court will have no jurisdiction to interfere with the exercise of his discretion howmuchsoever it may have disapproved of the manner in which he exercised his discretion; but the omission of the lower Court to consider the terms of the security bond is tantamount to a refusal by the lower Court to consider the application filed by the applicants judicially. Indeed it is a material irregularity in the exercise of his jurisdiction to refuse to look into the bond that he is asked to assign. The irregular exercise of jurisdiction vests the High Court with discretion to revise his order. [P 706 C 1, 2]

B. Mallik—for Applicants.

Haribans Sahai—for Opposite Party.

Order.—This is an application in revision against an order of the Subordinate Judge of Jaunpur, rejecting an application filed by the applicants for the assignment of a security bond. The facts so far as they are material for the purposes of the present application are as follows:

One Sarup Kunwar held a decree for a sum of Rs. 5,435-3-9. She died leaving two sons Raja Lal Bahadur Singh and Rajendra Narain Singh. Raja Lal Bahadur Singh applied for a succession certificate with a view to realize the decretal amount. Rajendra Narain Singh objected to the grant of the succession certificate to Raja Lal Bahadur Singh on the ground that he (Rajendra Narain) was also entitled to a half-share in the decretal amount. The learned Judge called upon Raja Lal Bahadur Singh to file security of immovable property with respect to the half-share of Rajendra Narain Singh in the decretal amount as a condition precedent to a succession certificate being granted to him (Raja Lal Bahadur). Raja Lal Bahadur filed a security bond in terms of the order passed by the learned Judge and a succession certificate was granted to him. It was recited in the security bond that Raja Lal Bahadur's application for succession certificate was granted subject to the condition that he should furnish security for half of the decretal amount and that after realization of the amount he will pay half of the amount realized by him to Rajendra Narain Singh. The bond went on to provide that if Raja Lal Bahadur failed to pay half of the amount to Rajendra Narain Singh the amount may be realized by enforcement of the security bond as against the immovable property hypothecated by the bond. After the security bond was furnished, succession certificate was granted to Raja Lal Bahadur and he realized the entire decretal amount so far back as in the year 1928.

Rajendra Narain Singh died in the year 1929 leaving a widow and three sons. On 21st January 1932, the widow applied to the Judge for assignment of the security bond in her favour with a view to realize half of the amount from Raja Lal Bahadur. She impleaded Raja Lal Bahadur and her three sons as opposite parties in the application. In her application she alleged that Rajendra Narain Singh, had before his death, orally gifted or devised his half-share in the decretal amount to her. Raja Lal Bahadur objected to the assignment of the bond in favour of the widow mainly on the allegation that the oral gift or will put forward by the widow was never made by Rajendra Narain Singh. The sons of Rajendra Narain Singh did not appear and did not contest the application. The learned Judge after going through the evidence produced by the widow in support of her allegation as regards the oral gift or will by her husband came to the conclusion that the alleged gift or will was not proved. He also observed that the widow could not be the heir of Rajendra Narain Singh under the Hindu law as Rajendra Narain Singh had left sons. In view of these findings the learned Judge rejected the application filed by the widow. He proceeded further to make the following observations in the course of his order:

"Let the sons take proper steps to get themselves declared heirs and then assignment can be made by an order of the Court."

The sons then filed an application for the assignment of the security bond in their favour and the learned Judge rejected the application on the ground that his order directing the sons to get themselves declared heirs had not been complied with.

The present application is against this order of the learned Judge. In our judgment the order cannot be sus-

tained and ought to be reversed. It appears that during the pendency of the application for the grant of succession certificate the right of Rajendra Narain Singh to a half share in the decretal amount was not denied by Raja Lal Bahadur. Indeed the latter agreed to take the succession certificate subject to the liability to pay half of the decretal amount realised by him to Rajendra Narain Singh. This fact is abundantly borne out by the security bond given by Raja Lal Bahadur. The learned Judge of the Court below does not appear to have perused the security bond before deciding the application for assignment of that bond filed by the present applicants. If he had read the bond it would have been clear to him that the right of Rajendra Narain to a half share in the decretal amount could not, in view of the recitals in the bond, be disputed by Raja Lal Bahadur. That being so, there could be no escape from the conclusion that Rajendra Narain was entitled to a half share in the amount realized by Raja Lal Bahadur, and as such, either his widow or his sons were entitled to that half share. The widow's application for assignment having already been rejected, the only persons who could be entitled to the amount were the sons of Rajendra Narain. What the learned Judge was asked to assign was the security bond and it cannot be denied that the recitals in that bond were of cardinal importance in the case. The learned Judge however as already observed, does not appear to have perused the bond. By omitting to do so he exercised the jurisdiction vested in him with material irregularity. It was his duty to have looked into the bond that he was requested to assign to the applicants. He however failed to discharge that duty and this was a material irregularity committed by him.

Mr. Haribans Sahai, the learned Counsel for the opposite party, has argued that as the learned Judge of the Court below had a discretion in the matter, and as he has exercised the discretion, we ought not to interfere with the same in the exercise of our revisional jurisdiction howsoever erroneously the discretion may have been exercised by the learned Judge. If the learned Judge had judicially considered the matter in controversy between the parties, we would have had no jurisdiction to interfere with the exercise of his discretion howmuchsoever we may have disapproved of the matter in which he exercised his discretion, but the omission of the learned Judge to consider the terms of the security bond was tantamount to a refusal by the learned Judge to consider the application filed by the applicants judicially. Indeed it was a material irregularity in the exercise of his jurisdiction by the learned Judge to refuse to look into the bond that he was asked to assign. The irregular exercise of jurisdiction by the learned Judge vests us with discretion to revise his order, and as the discretion vested in the learned Judge was exercised by him capriciously, we have no other alternative but to reverse the order of the learned Judge.

Mr. Haribans Sahai further expressed the apprehension that if the bond is assigned in favour of the sons and they realize the amount from Raja Lal Bahadur Singh, the widow of Rajendra Narain Singh may thereafter file a claim against Raja Lal Bahadur Singh for the realization of the amount on the basis of an alleged oral gift or will by her husband. In order to set at rest this apprehension, we have decided to direct that the bond be assigned not only in favour of the sons of Rajendra Narain Singh but also in favour of his widow and Mr. Malik, the learned counsel for the applicants, has agreed to this decision.

For the reasons given above, we allow this application, set aside the order of the learned Judge of the Court below and direct that the security bond furnished by Raja Lal Bahadur Singh be assigned in favour of the applicants and their mother, the widow of Rajendra Narain Singh, provided she is alive. The applicants are entitled to their costs both here and below. Let the record be sent to the Court below at an early date with the direction that the bond should be assigned immediately in favour of the persons mentioned above.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 706

(Full Bench)

SULAIMAN, C. J., KENDALL AND NIAMAT ULLAH, JJ.

Haidar Husain — Plaintiff — Appellant.

v.

Puran Mal and *others*—Defendants—Respondents.

Second Appeal No. 359 of 1932, Decided on 27th March 1935, from decision of Addl. Sub-Judge, Bulandshar, D/- 14th December 1931.

(a) Agra Pre-emption Act (1922 as amended in 1929), S. 19—Amending Act comes into force from date of publication in Gazette—U. P. General Clauses Act (1924), S. 5.

The Amending Act comes into force on 15th February 1930 on the date when it was published in the Gazette and not on 27th January 1930 when it received the assent of the Governor-General, because being a local Act it is governed by S. 5, U. P. General Clauses Act, 1924, and not by the General Clauses Act (Imperial Act No. 10 of 1897). [P 709 C 1]

(b) Interpretation of Statutes—Retrospective effect is not to be given so as to impair existing right.

No rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. [P 710 C 1]

*** (c) Agra Pre-emption Act 1922 (as amended in 1929), S. 19, Proviso—Proviso is not retrospective—Suit for pre-emption—Defendant's acquisition of right pending suit—Subsequent passing of amendment—Plaintiff's right is lost and does not revive.**

Per *Sulaiman, C. J.* and *Kendall J.* (*Niamat Ullah, J.*, holding contra.) — The proviso to S. 19 added by the Amending Act of 1930 is not retrospective. Hence where subsequent to the filing of a suit for pre-emption, the defendant acquires a substantive right and subsequently the Amending Act comes into force, the new amendment does not revive plaintiff's right which is extinguished on account of defendant's acquisition: *Case law referred.* [P 711 C 1, 2]

Per *Niamat Ullah, J.*—The proviso read with S. 19 is a direction to the Court to pass or not to pass a decree in certain cases. If the Court finds that a right of pre-emption had accrued to the plaintiff and the vendee did not acquire an equal right before the institution of the suit but acquired it by a voluntary transfer afterwards, it must proceed to pass a decree. The crucial date is the date of the decree and as the Amending Act had come into force before the Court of first instance passed its decree, it should be applied and no retrospective effect is implied by its application to such a case.' [P 715 C 1, 2]

(d) Interpretation of Statutes—Enactment which provides procedure applies to pending suit.

Per *Niamat Ullah, J.*—An enactment which provides procedure applies to suits pending at its date. [P 716 C 1]

Shabd Saran—for Appellant.

Chandra Bhan Agarwalla—for Respondents.

Order of Reference.—This is a plaintiff's appeal arising out of a suit for preemption of a sale deed dated 9th November 1928. The suit was filed on the 8th of November 1929. On the 6th of February 1930, the defendants-vendees obtained a deed of gift in their favour which the present plaintiff also sought to preempt by a second suit. It has now been finally held that it was a transaction of gift and was not preemptible. On 20th December 1930, the Court of first instance decreed the plaintiff's claim for preemption, holding that the second transaction was a sale and not a gift. But on 14th December 1931 the lower appellate Court came to the conclusion that the second transaction was one of gift and accordingly dismissed not only the plaintiff's claim to pre-empt the second transaction but also his claim to preempt the first sale deed. The finding that the second transaction was a gift has been upheld by the High Court in second appeal.

The question that arises for consideration in this case is whether the defendants-vendees, by having taken a deed of gift on 6th February 1930, during the pendency of the suit in the trial Court, are entitled to defeat the plaintiff's claim.

The Amending Act (9 of 1929) received the assent of the Governor-General on 27th January 1930, and it was published in the Gazette on 15th February 1930. According to S. 5, U. P. General Clauses Act (1 of 1924), which applies to the Local Acts, an Act, when it is not expressed on which particular day it has to come into operation, comes into force on the day on which it is first published in the Gazette after having received the assent of the Governor-General. Accordingly the Amending Act came into force on 15th February 1930. It may be noted that there is a distinction as regards the Imperial Acts which are governed by the General Clauses Act (Imperial Act No. 10 of 1897), under S. 5 of which an Imperial Act comes into force on the day on which it receives the assent of the Governor-General.

The question is whether the Amending Act, having come into force before the passing of the first Court's decree, it applies to this case, and the defendants-vendees cannot avail themselves of the gift taken during the pendency of the suit. The learned counsel for the defendants-vendees strongly relies on 1933 All 217 (1). In that case the exchange was taken on 16th October 1929, and the first Court's decree had been passed on 14th February 1930, so that the assent of the Governor-General had been obtained after the exchange; but the Act had been published after the first

1. Baldeo Singh v. Hargayan Singh, 1933 All 217 =145 I C 396.

Court's decree. The Bench assuming that the Act came into force on the day when it received the assent of the Governor-General, held that the Act applied and the deed of exchange conferred no advantage on the defendants-vendees. Unfortunately it was not brought to the notice of the Bench that the Local Amendment Act came into force not on the day when the Act received the assent, but on the day when it was published. There is however the further observation made by the Bench that it is the date of the decree which is the crucial date and any rule or change in the law which came into existence before that date would be the law that governed the suit. The learned Advocate strongly relies on this remark and contends that, inasmuch as the Amending Act on having been published came into force before the first Court's decree, it was applicable.

The learned counsel for the respondents relies on 1930 All 706 (2) in which there are certain observations which go to suggest that on the taking of a deed of gift a vendee defeats the plaintiff's right of preference immediately and acquires a substantive right to defeat the claim, so that the passing of the Amending Act subsequent to that date would not revive the plaintiff's right of pre-emption. But in that case the Amending Act came into force after the passing of the first Court's decree and during the pendency of the second appeal. In 1933 All 788 (3) it was held that the effect of obtaining an exchange is to put the defendant on the same footing as the plaintiff on that day and a subsequent passing of the Amending Act would not improve the position of the plaintiff.

I may however point out that the remark in the course of the judgment made by me that the Amending Act (9 of 1929) came into force on 27th January 1930, when the assent of the Governor-General was received, was not correct. The slip was due to overlooking the fact that under S. 5, U. P. General Clauses Act, such an Act comes into operation on the date when it is first published in the Gazette. As a matter of fact in a previous case 1927 All 545 (4) it had been laid down by a Bench of which I was a member that the Agra Pre-emption Act (2 of 1922) came into force on 17th February 1923, when it was published in the Gazette. Fortunately, it was not necessary for the purpose of that case to fix the date on which the Act came into force for, whether it came into force on the date of the assent or on the date of its publication in the Gazette, both the dates were subsequent to the deed of exchange and prior to the date of the first Court's decree.

The learned advocate for the respondents further relies on the observations made in 51 All 411 (5) by Boys, J., on pp. 419-20 and by King, J., on p. 429, but the point was not before the Full Bench in the direct form in which it has been raised before me. I think this case raises a substantial question of law and should be disposed of by a larger Bench. Let it be referred to a Bench of two Judges.

Opinion.

Sulaiman, C. J.—This case has been referred to the Full Bench on certain observations in some cases, which are not prima facie reconcilable. On 9th November 1928 the defendant, who was a stranger to the mahal, purchased a share in village Sunehra. On 8th November 1929, the plaintiff instituted a suit for preemption of that share. At that time the plaintiff was a cosharer and the defendant being a stranger, the plaintiff had a preferential right as against him and was entitled to be substituted in his place. On 6th February 1930, the defendant acquired a small share in the same mahal by virtue of a deed of gift and became a cosharer. The plaintiff challenged this transaction as one of sale, but it has now been held against him that it was, in reality, a transaction of gift and not of sale. On 15th February 1930 the Amending Act (Act 9 of 1929) came into force. On 20th December 1930, the first Court decreed the suit, but on appeal the lower appellate Court has dismissed it.

The question for consideration before us is whether the amendment of S. 19, Agra Preemption Act, which came into force on 15th February 1930, after the deed of gift in favour of the defendant but before the passing of the first Court's decree, prevents the latter from defeating the plaintiff's claim. In the referring order it has been pointed out that the Amending Act came into force on 15th February

2. Sheopujan Rai v. Bishnath Rai, 1930 All 706 =128 I C 390=52 All 886.
3. Sheobalak v. Ram Saran, 1933 All 788=146 I C 775.
4. Muhammad Bashir Khan v. Kulsum Bibi, 1927 All 545=103 I C 308.
5. Ramsaran Das v. Bhagwat Prasad, 1929 All 53 =113 I C 442=51 All 411 (F B).

1930 on the date when it was published in the Gazette and not on 27th January 1930 when it received the assent of the Governor-General, because being a Local Act it was governed by S. 5, U. P. General Clauses Act of 1924, and not by the General Clauses Act (Imperial Act No. 10 of 1897). Before the passing of the Agra Preemption Act of 1922, the view which invariably prevailed in this Court was that the plaintiff may lose his right of preemption in two ways: (1) either by losing his own status as a cosharer, or (2) by losing his right of preemption on account of the defendant acquiring a share in the village and placing himself on the same footing as the plaintiff. See 21 All 441 (6) and 1920 All 159 (7).

Under the Agra Preemption Act of 1922 also it was held that an acquisition of a share by the defendant in the village destroys the plaintiff's right of preemption, although the share is acquired during the pendency of the suit. See the case of 1926 All 661 (8). The question came up finally for consideration before a Full Bench of this Court in 1929 All 53 (5). All the three learned Judges came to the conclusion that when a share is acquired by a defendant during the pendency of the suit, S. 20 of the Act, as it stood unamended, was inapplicable, but that the case was governed by S. 19, Pre-emption Act. Boys, J., on pp. 419-420 remarked:

"If the law has not been altered, then the plaintiff pre-emptor had no 'subsisting right' at the date of the decree; his right had been defeated by the gift of the vendee prior to the decree. How then can he be said to have lost his 'subsisting right' by anything appearing from the Act?"

The learned Judge then went on to remark that he agreed that the legislature did not intend to amend the law and that the plaintiff-preemptor's subsisting right must be held to have been defeated by the acquisition. King, J., on p. 429 remarked, that S. 19 defeated the plaintiff's right to a decree, because at the time of the passing of the decree, the plaintiff had no subsisting right of pre-emption, inasmuch as the purchaser had by that time acquired a pre-emptive status equal or superior to that of the plaintiff. The learned Judge remarked:

"The plaintiff may lose his right in a variety of ways, and one way is by the purchaser's acquisition of an interest which puts him on the same level as the plaintiff in respect of the right of pre-emption."

Kendall, J., agreed with the view expressed by the other learned Judges. There is therefore no doubt that the ratio decidendi of the judgments in the Full Bench case was that a plaintiff's right of preemption is lost either by plaintiff himself losing his status as a cosharer or by the plaintiff losing his right of preference and therefore ceasing to have a subsisting right on account of the defendant acquiring a share in the village.

The legislature has amended S. 19, Agra Preemption Act by adding a proviso thereto. The question before us is not whether the section as amended is retrospective, but whether the proviso added to the section is so. It is noteworthy that the proviso has not been added to S. 20, but has been added to S. 19 and is in the nature of an exception, because it is confined to cases of voluntary transfer in favour of a vendee after the institution of a suit for pre-emption, and lays down that such a voluntary transfer shall not defeat any right which the plaintiff had at the date of such institution. It seems to me that the legislature by borrowing the words from the judgments of the learned Judges in the Full Bench case and by adding the proviso to S. 19 has, by necessary implication, assumed that the interpretation of S. 19 as put by the Full Bench was correct, and that under that section a plaintiff's right of preemption can be defeated where a defendant acquires a share in the village during the pendency of the suit; but the legislature has thought it fit to lay down that in the special case of a voluntary transfer such a defeasance of the plaintiff's right should not take place. The proviso therefore is in the nature of an exception to the general rule and should ordinarily be construed to affect transactions which come into existence after the passing of the Amending Act. It is also to be noted that in the earlier Amending Act of 1923 (Act No. 8 of 1923), the legislature took care to add S. 3 specifically providing that the Act shall have a retrospective effect from 1922. There is no such section in the later Amending Act (Act 9 of 1929). On the other hand, the Act is professedly not a declaratory or an explanatory Act but is an Amending Act, and it is not only called the Agra Preemption

6. Ram Gopal v. Piare Lal, (1899) 21 All 441= 1899 A W N 163.
7. Bihari Lal v. Mohan Singh, 1920 All 159=55 I C 71=42 All 268.
8. Qudratunnissa Bibi v. Abdul Rashid, 1926 All 661=96 I C 549=48 All 616.

(Amendment) Act; the preamble to the Act makes it clear that the legislature considered it expedient further to amend the Agra Preemption Act of 1922 and it was therefore necessary to enact certain provisions. Many alterations have been made in the Act and various sections have been amended, all of which cannot possibly be held to be merely explanatory of the previous provisions. There is therefore nothing in the Act, which would indicate that it was intended to have a retrospective effect. It seems to be that:

"no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment: Maxwell's Interpretation of Statutes, 6th Edn., p. 391."

Various cases are quoted therein in which even where the Act had laid down that no such suit shall be brought or maintained, etc., on account of some transaction, the Courts declined to give it a retrospective effect so as to make it applicable to suits brought after the Act in respect of transactions which had taken place before the Act was passed:

"Every statute which prima facie takes away or impairs vested rights acquired under existing laws or creates new obligations, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed to be intended not to have a retrospective operation": p. 187.

Similarly Craies in his Statute Law, pp. 330-331 has quoted numerous authorities in support of the view that:

"in the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed": p. 330.

In (1905) A C 369 (9) their Lordships of the Privy Council at p. 372 laid down that:

"on the one hand, it was not in dispute that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches the right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed."

The test laid down by their Lordships was that if the new Act touches a right in existence at the passing of the Act, then it should not be held to be applicable to a pending action.

9. Colonial Sugar Refining Co. Ltd. v. Irving, (1905) A C 369=74 L J P C 77=21 T L R 513 =92 L T 738.

In 1930 All 706 (2), a Bench of this Court held that the Amending Act (Act 9 of 1929) was not a declaratory Act with retrospective effect and that it could not affect the right of pre-emption which was a substantive right and not a mere rule of procedure. No doubt the question in that case was whether the second appeal in the High Court should be decided in view of the amendment which had in the meantime, come into effect; but the ratio decidendi of the case was that the defendant by acquiring a share in the village has a right to defeat the plaintiff's claim for preemption because he acquires the same status, and that a right to defeat the plaintiff's claim was a substantive right which could not be taken away by an Act passed after the right had accrued and while the action was still pending.

On the other hand, in 1933 All 217 (1) another Bench of this Court came to the conclusion that the amendment would apply to a case where the Amending Act came into force before the first Court's decree was passed. In point of fact, the Act had come into force after the suit in that case had been actually decided by the Court below. But unfortunately the attention of the Bench was not drawn to the U. P. General Clauses Act, otherwise the appeal would have been decided in a different way and the question of the applicability of the Amending Act would not have arisen. But the decision, as it stands, is certainly in favour of the plaintiff-appellant. In 1933 All 788 (3), decided by a Bench of which one of the learned Judges who decided 1933 All 217 (1) was also a party, it was remarked in the course of the judgment on p. 1627 that:

"this right acquired by the vendees was a substantive right and extinguished the preferential right as against them."

It seems to me that the right of preemption of a plaintiff as defined in S. 4 (9), is a right to be substituted in place of the transferee by reason of his right. If therefore the vendee becomes a cosharer in the village and acquires an equal or superior status with the plaintiff, the plaintiff's right to be substituted in place of the transferee disappears. It altogether ceases to exist and is utterly destroyed, though, of course, not by any act of the plaintiff himself but on account of the circumstances that the defendant has acquired an equal right. The right of preemption is a right of preference only and as soon as the posi-

tion of both parties becomes identical and equal, the preference disappears. It also seems equally clear that in order that the plaintiff should be able to pre-empt successfully, he must have a continuing and subsisting right of preference and should, at no interval of time, have lost his right either owing to his own act or owing to an acquisition of the interest by the defendant, for at the moment when both the parties come on the same footing, the right of preference is gone and therefore the right of preemption of the plaintiff ceases to subsist. It cannot be disputed that if the plaintiff had a right of preemption at the time of the sale, but lost it for a short time and then by virtue of a fresh purchase became a cosharer, he could not maintain the suit. Similarly if after having filed the suit, he lost his right voluntarily and then reacquired it, he would not be able to get a decree, the reason being that he has not a subsisting right at all, because his right has not continuously subsisted from the time of the original date of the cause of action in his favour.

It appears to me that the right of defendant to defeat the plaintiff's right is a substantive right and not a mere matter of procedure which can be regarded as a plea in defence like the bar of limitation. The defendant by virtue of the deed of gift becomes a cosharer in the village, who has a right to preempt other sales and he has an equal right to defeat the plaintiff's claim. This is a substantive right and is in no sense inferior to a right which a plaintiff may have to go in appeal to a particular forum. Their Lordships in 1905 A C 369 (9) held that a right to go up in appeal to a particular forum was a substantive right, but not a mere matter of procedure. It seems to me that the right of a defendant to defeat the claim of the plaintiff on account of the defendant having himself become a cosharer and acquired an equal status under a registered deed is much more so a substantive right based on that document than a matter of procedure. That being so, the proviso in the Amending Act which obviously deals with voluntary transfers and is intended to deprive a defendant from successfully setting up his right under the transfer under S. 19 should not be so construed as to affect the defendant who had taken a transfer before the passing of the Act. By virtue of the transfer, the defendant acquired a substantive right which became vested in him and such right should not be deemed to have been taken away by an Act, which came into force subsequent to such an acquisition. I do not read the proviso as merely removing a prohibition to the Courts from passing a decree against a defendant. I rather take it that the legislature thought it fit to provide for an exception in cases of voluntary transfers, because it felt that the absence of such a provision opened a wide door for fraud and enabled defendants to defeat claims for pre-emption after suits had been instituted. The intention therefore seems to be that voluntary transfers should not be of any avail to defendants when they have been taken during the suit; but that involuntary transfers, e. g., purchase at auction, or succession by operation of law, e. g., by inheritance, would not deprive the defendant of his right to defeat the preemptor. The transfers which were taken before the Amending Act was passed are not at all governed by this Amending Act.

It seems to me that when the legislature by amending Ss. 19 and 20 has obviously accepted the interpretation put upon them by this High Court, it is now too late in the day to say that the Full Bench ruling was wrong and that the legislature wrongly supposed that it was right and has made changes accordingly. I cannot possibly imagine that the Full Bench, could in any way have over-looked Ss. 10 and 11, Preemption Act. They have not discussed those sections because in their opinion they did not, in any way, alter their interpretation of Ss. 19 and 20. Now to try to interpret S. 19 so that it should apply only to cases where a vendee acquires an equal right of preemption before the institution of the suit would be to cause further confusion and would certainly nullify the intention of the legislature as disclosed by the limited scope of the proviso. The very fact that the legislature by the proviso has not altered the whole law, but had made a provision by way of an exception, indicates that the proviso could not have been intended to have a retrospective effect. The legislature would have said so clearly, if that had been the intention. Such an interpretation would make all transfers pendente lite utterly useless for vendees, whereas the proviso is deliberately confined to voluntary transfers only and

leaves the interpretation put upon Section 19 by the Full Bench unaffected as regards involuntary transfers, e. g., purchases at auctions, and inheritance. If an interpretation contrary to that put upon it by the Full Bench were to be put on S. 19, the result would be that even where a vendee acquires an interest in the mahal by an auction purchase or by inheritance, he would not be able to defeat the plaintiffs' claim. Such a result is directly opposed to the intention of the legislature. I do not see how the word "defeat" (which has probably the same root as "defeasance") used in the proviso can, in any way, suggest that the right was intended to be held in abeyance or in suspense only and not annulled, destroyed or extinguished. The position is similar to the case where a defendant after the sale deed has become a cosharer of an equal status with the plaintiff in which case the plaintiff's right to sue against him is gone. The mere fact that the defendant at a subsequent stage but before the expiry of one year loses his status as a cosharer would not revive the plaintiff's right of preemption so as to enable him to bring a suit. On the same reasoning, I am of the opinion that the plaintiff's right of preemption, having been once lost on account of the defendant's acquisition, cannot be revived by the subsequent passing of the Amending Act and that the new amendment does not revive extinguished rights. I would therefore dismiss the appeal.

Kendall, J.—I agree throughout with the judgment of the learned Chief Justice. One of the arguments addressed to us was that even if it be held that the Amending Act of 1929 has no retrospective effect generally, yet the wording of the proviso that has been added to S. 19 by the amending Act shows that it ought to be applied in the present case. That proviso is as follows:

"Provided that no voluntary transfer made in favour of the vendee after the institution of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution."

The argument is, if I understand it aright, that the words in the proviso "after the institution of a suit for preemption" must be held to apply to any suit which was pending when the enactment came into force. The general rule of law however is that the status of the parties to a litigation must be considered to be the status which they possessed at the date of the institution of the suit:

"In general when the law is altered pending an action the rights of the parties are decided according to the law as it existed when the Act was begun unless the new status shows a clear intention to vary such rights": Maxwell on the Interpretation of Statutes, 6th Edn., p. 395.

and again:

"in the absence of anything in an Act to show that, it is to have a retrospective effect, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed": Craies on Statute Law. 3rd Edn., p. 330.

This being the general rule, it must follow that nothing in the proviso will affect the status of the parties in the litigation which was pending when the proviso came into force, unless the proviso itself or the enactment of which it is a part has a retrospective effect. It is true that in the present case the plaintiff's status was changed after the institution of the suit, but that was brought about by a deed of gift executed in the defendant's favour, and not by an enactment. The enactment itself not being retrospective for the reasons given very fully by the learned Chief Justice, it follows that the defendant's status was not changed by it during the litigation, and I would therefore agree in dismissing the appeal.

Niamatullah, J.—I regret I have arrived at a different conclusion from the one reached by my learned brothers. The facts of the case are fully set out in the order of the Hon'ble Chief Justice, dated 14th November 1933, referring the case to a Division Bench, which in its turn referred it to this Full Bench. I would repeat such of them as are necessary for explaining my own views on the questions involved in the case.

The sale deed, which is sought to be preempted by the plaintiff-appellant, was executed on 9th November 1928. He filed his suit for preemption on the last day but one, i. e., 8th November 1929. On the facts as they existed on the date of suit, he had an unanswerable claim. The vendees set about to find a good defence, and managed to obtain a deed of gift on 6th February 1930, during the pendency of the preemption suit, conferring proprietary right which placed them on the same footing as the plaintiff in the matter of preemption. They pleaded that, by virtue of their latest acquisition the plaintiff had no preferential claim to pre-empt and his suit was therefore liable to be dismissed. The plaintiff attempted to

checkmate this move on the part of the vendees by instituting a suit for preemption in respect of the gifted property on the allegation that the transaction was not of gift but of sale. The first Court decreed both the suits, holding that the transaction of gift was a sale in disguise. That Court passed a decree for preemption on 20th December 1930, which is an important date. The plaintiff's suit for preemption in respect of the gifted property was eventually dismissed by the High Court on the finding that the transaction had not been established to be otherwise than gift. The position then was that the vendees had acquired proprietary rights during the pendency of the first instituted preemption suit, and the question was whether the suit was liable to be dismissed on that account.

Before the passing of the Preemption Act, the case law of this Court had laid down definitely that, where the preemptor and the vendee have equal rights in the matter of preemption, no suit for preemption can lie. The view was based on the broad ground that the object of preemption is to exclude strangers; and where the vendee is not a stranger, no preemption should be allowed. This rule opened a door for devices to defeat preemption, and the Courts were called upon to decide as to what is the effect of the vendee, who was a stranger at the time of sale deed, acquiring proprietary right after the sale and even after the institution of a suit for preemption. It was consistently held in this Court that no decree for preemption could be passed, unless the preemptor showed his preferential right not only at the dates of sales and the institution of the suit but also at the time of the decree, so that, if the vendee acquired the requisite status during the pendency of the suit for preemption, he could successfully prevent a decree for preemption being passed. See, for example, the case of 1920 All 159 (7).

These propositions are not disputed in this case, which is governed by a statute, viz., the Preemption Act, which was passed in 1922 and came into force on 17th February 1923. The question whether the vendee could defeat preemption by acquiring proprietary right during the pendency of the preemption suit based on the Preemption Act arose in 1929 All 53 (5). It was held by a Full Bench of this Court that the Act did not introduce any change in this respect. This view is based on S. 19, Pre-emption Act, which provides that:

"No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree."

It was held that the right of preemption does not subsist if the vendee obtained a proprietary right during the pendency of the suit. If the question had been res integra, I would have examined the various sections of the Preemption Act in order to answer it. I may however take leave to point out, with great respect that the learned Judges did not consider the scheme of the Act and other relevant sections, and confined their attention to Ss. 19 and 20, and attached too great importance to the view taken in decided cases before the law of pre-emption was embodied in a statute. The essence of a Code is to be exhaustive on matters it provides for, except so far that it lets in extrinsic rules. Where the language of a statute makes two views equally possible, the rule of cursus curiae may be applied to harmonise the statute with pre-existing law. Where however the meaning of a statute is clear, interpretation thereof as does not fit in with the general scheme of the statute or is inconsistent with other provisions therein embodied is not justified by the excuse that the cursus curiae should be maintained. Ss. 10 and 11, Preemption Act, to which the attention of the Full Bench was not drawn, have, in my opinion, an important bearing on the question before us. They run as follows:

"10. On a sale to, or foreclosure by, any of the persons named in S. 12, no right of pre-emption shall accrue to any person who has an equal or inferior right of pre-emption.

11. Subject to the foregoing provisions, a right of pre-emption shall accrue to the persons mentioned in S. 12 whenever a cosharer or petty proprietor sells any proprietary interest in land forming part of any mahal or village in which a right of pre-emption exists, or when any such interest is foreclosed."

The effect of a vendee possessing an equal right of preemption is declared by S. 10 to be to prevent the accrual of a right of pre-emption. It is quite clear that a right of preemption accrues to persons named in another section if the vendee has no equal or inferior right of pre-emption. S. 16 permits a suit for preemption by the person entitled to preempt. If there had been nothing in the Act, a right of pre-emption accruing under S. 11, could be enforced in spite of

the vendee acquiring an equal or inferior right of preemption after the date of sale; but the legislature thought it fit to extend protection to the vendee who obtains such right after the date of sale, and provided in S. 20:

"No suit for pre-emption shall lie where prior to the institution of such suit the purchaser has transferred the property in dispute to a person having a right of pre-emption equal or superior to that of the plaintiff, or has acquired an indefeasible interest in the mahal which. if existing at the date of the sale or foreclosure, would have barred the suit."

There is room for argument that this section affords protection not only to a vendee acquiring an equal right of preemption before the institution of the suit, but also after it. This argument was dealt with by the Full Bench above referred to and negatived. We must therefore accept S. 20 as laying down in express terms that no suit for preemption shall lie where the vendee has acquired an equal right of preemption before the institution of the suit. If it was the intention of the legislature to afford protection to a vendee acquiring such right after the institution of the suit, it is inconceivable to me that no express provision was made in that behalf. It was pointed out by one of the learned Judges composing the Full Bench that S. 20 does not deal with the case of a vendee acquiring an equal right of preemption during the pendency of the suit, as its language will not fit in with such a case in view of the opening words of the section that "no suit for pre-emption shall lie." It is said that, if a suit has already been instituted, the words "shall lie" are wholly inapplicable to the case of a vendee acquiring an equal right of pre-emption during the pendency of a suit. With all respects, I am unable to appreciate this reasoning. The legislature could easily have altered the language. Moreover, a suit may lie in its inception, but may cease to be maintainable during the pendency thereof. As soon as the vendee acquires an equal right, the suit would cease to be maintainable. Be that as it may, we have to take it that Section 20 was not the proper place for giving protection to a vendee acquiring an equal right of preemption during the pendency of a suit, and the Full Bench thought that that matter had been provided for by S. 19, which, originally ran as follows:

"No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree; but where a decree for pre-emption has been passed in favour of a plaintiff whether by a Court of first instance or of appeal, the right of such plaintiff shall not be affected by any transfer or loss of his interest occurring after the date of such decree."

The Full Bench imported into the interpretation of S. 19 the case law in which it had been held before the Act that a preemptor must show a subsisting cause of action at the date of the decree. They held accordingly that the preemptor's right does not subsist within the meaning of S. 19. if the vendee has acquired before the decree an equal right of preemption. It is conceded that there is nothing in the Act which lays down that the preemptor's right ceases to subsist on the vendee acquiring during the pendency of the suit an equal right of preemption. On the contrary, I am of opinion that there are clear indications in the Act which show otherwise. I have already referred to Ss. 10 and 11, and the intention of the legislature underlying them. Consistently with that rule, S. 20 merely creates a bar against the preemptor if the vendee acquires an equal right after the sale, but before the suit. It is to be noted that the right of preemption, which previously accrued under S. 11, is not destroyed, by Section 20, which merely creates a bar by providing that no suit for preemption shall lie and does not lay down that the preemptor's right has ceased to exist. The law makes a clear distinction between the extinguishment of a right and a bar to the exercise of it. S. 20 clearly recognises the existence of the right which accrued under S. 11 but bars the enforcement thereof. To hold that under S. 19 the right of preemption is extinguished by the vendee acquiring a right after the institution of the suit is to put him on a different, if not a higher, footing than a vendee acquiring such right before the suit. There is no reason to suppose that the framers of the Act had any such distinction in their mind.

I have ventured to offer some observations on the view taken by the Full Bench because their judgment is silent on the points indicated above. In interpreting the Full Bench ruling I would take its effect to be that the case law, as it stood before the Preemption Act, is applicable so far as the vendee acquiring a right of preemption pendente lite is concerned. Though in different cases dif-

ferent languages have been employed, I have not been able to find any case which has gone to the length of holding that the right of preemption is extinguished. In most cases it has been said that the right of preemption is "defeated." In theory, at any rate, and as will presently appear, the distinction is important, there is a difference between a right being "extinguished" and a right being "defeated. In one case the right itself vanishes, while in the other the right exists but cannot be effectively exercised. A creditor, whose right is defeated by an alienation by his debtor, cannot be said to have lost his right. The word "defeat" occurs in S. 53, T. P. Act: but it cannot be suggested that any extinction of the creditor's right is implied in that term. Similarly lapse of limitation defeats a right but does not destroy it, except within the limits of S. 28, T. P. Act. This distinction assumes some importance in applying the proviso which was added to S. 19 by the Amending Act 9 of 1929, passed not long after the Full Bench decision in 1928. That proviso runs as follows:

"Provided that no voluntary transfer made in favour of the vendee after the institution of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution."

If the proviso is applicable to the circumstances of this case, there can be no difficulty in decreeing the plaintiff's suit, but the Amending Act was published in the official gazette on 15th February 1930, and it became operative from that date under S. 5, U. P. General Clauses Act 1 of 1924, that is to say, after the institution of the suit for preemption but before the suit was decided by the first Court on 20th December 1930. It is argued that retrospective effect cannot be given to the proviso which can apply only to suits instituted after the Amending Act came into force. This contention has found favour with my learned brethren; but I am unable to accept it for two reasons: The first is that the proviso must be read with the section to which it is appended. It should not be taken as a rule standing apart from S. 19. If we read the section and the proviso together, it seems to me that the crucial date is the date of the decree; and as the Amending Act had come into force before the Court of first instance passed its decree, it should be applied, and no retrospective effect is implied in its application to the present case. To make myself clear, I would reproduce the section with the proviso. They now run as follows:

"No decree for pre-emption shall be passed in favour of any person, unless he has a subsisting right of pre-emption at the time of the decree . . . provided that no voluntary transfer made in favour of the vendee after the institution of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution."

The section is a direction to a Court. If the Court finds, when it proceeds to pass a decree, that there is a certain rule of law laid down for its guidance, it must follow it in passing its decree. If the Amending Act had come into force after the first Court passed its decree, and the proviso is applied at the stage of the appeal, retrospective effect would be given to it but not if it was on the statute but when the decree is to be passed. The proviso does not create any right, nor does it divest anyone of his right. The right of pre-emption, which it is its object to protect accrued long before the institution of the suit; it did so under S. 11, when the sale-deed was executed. Nothing happened after the accrual of that right which might have had the effect of extinguishing it. As already observed, the acquisition of an equal right by the vendee operates as a bar to the Court passing a decree for pre-emption. S. 19, or any other section of the Pre-emption Act, or the case law before it. did not lay down that the right of pre-emption is destroyed in those circumstances. I emphasise this point, because it was mentioned in course of the arguments that the proviso could not revive a right which had been extinguished by the vendee acquiring an equal right by gift. This contention is based on an assumption which is wholly unwarranted. The right was neither extinguished, nor was in abeyance. It was a right which S. 19 as it stood before the Amending Act, did not allow the Court to give effect to. The proviso having been added before the Court proceeded to pass the decree must be given effect to.

The second ground, on which I base my conclusion, is that S. 19 is so worded as to make the rule therein contained as a rule of procedure rather than a rule of substantive law. Mark the similarity between the opening words of S. 11, Civil P. C., and S. 19. Both sections embody directions to the Court and have no reference to the substantive rights of the parties. Similarly, S. 3, Indian Limitation Act,

directs Courts not to entertain a suit instituted after the expiry of limitation provided therefor. None of these is a rule of substantive law. All of them provide the manner in which the Court is to act. To my mind, S. 19, read with the proviso, lays down how the Court is to act in passing a decree for pre-emption. It a well settled rule of law that an enactment which provides procedure applies to suits pending at its date. The proviso read with S. 19 is a direction to the Court to pass or not to pass a decree in certain cases. If the Court finds that a right of pre-emption had accrued to the plaintiff and the vendee did not acquire an equal right before the institutiion of the suit but acquired it by a voluntary transfer afterwards it must proceed to pass a decree. In the result, I would allow the appeal, set aside the decree of the lower appellate Court, and restore that of the Court of first instance.

By the Court.—The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 716

BENNET, J.

Gajadhar Prasad—Defendant — Applicant.

v.

Dharma Nand—Plaintiff — Opposite Party.

Civil Revn. No. 515 of 1934, Decided on 21st December 1934, against decree of Sm. C. C. Judge, Dehra Dun, D/- 31st July 1934.

(a) Limitation Act (1908), Art. 102—Wages not otherwise provided—Time begins to run from time when wages accrue due.

Under the present Limitation Act, Art. 102 lays down that wages not otherwise expressly provided for in the schedule must be taken to be subject to a time which begins to run from the time when the wages accrue due. [P 716 C2]

Where the wages are monthly wages they accrue and become due on the final day of the month. [P 716 C 2]

(b) Civil P. C. (1908), S. 115—Facts admitted—Question of limitation thereon is one of law—There can be interference.

Where the facts in a case are admitted the question of limitation thereon is one of law and there can be interference in revision: 17 *All* 422, *Dist.* [P 717 C 1]

(c) Civil P. C. (1908), S. 115—Substantial injustice done to party by decreeing wages barred by time—High Court can interfere in revision.

Where there was substantial injustice to the defendant by decreeing three months' wages which was barred by limitation:

Held: that the High Court could interfere in revision. [P 717 C 1]

G. S. Pathak—for Applicant.

Chandra Bhan Agarwala—for Opposite Party.

Order.—This is an application in civil revision by a defendant against a Small Cause Court decree. The plaintiff sued for arrears of salary at Rupees 20 per mensem from 10th April 1930 to 31st August 1931. The defendant admitted that the plaintiff was in his service for this period at this salary, but he pleaded payment to the plaintiff, and further that the claim would be time-barred. The lower Court held that payment had not been made and that the suit was not time-barred. It held that the suit was governed by Art. 102, Limitation Act, that the period of limitation ran from the date when the wages accrued, that the plaintiff was not paid regularly, hence it cannot be said that the wages accrued on any particular date, and that following a ruling in 19 W R 159 (1), plaintiff's wages would be due on the date on which he left the defendant's service, and that the period of limitation—three years—ran from that date. That ruling was given at a time when a former Limitation Act (9 of 1871) was in force. In the schedule of that Act there is no article corresponding to Art. 102. Consequently the Court had to go to other consideration for limitation. The suit was in regard to various matters for partnership and accounts and at the end of the judgment there was the observation:

"Any wages that might be due by MacCorkindale to the plaintiff would be due to him when he left the service on 15th May 1868, and any suit for these wages must, in the absence of any subsequent accounts stated and settled between the parties, have been brought within three years from 15th May 1868. Therefore, taking it that the plaint was presented, and properly presented, on 29th July 1871, we still think that the suit is barred by limitation."

This ruling did not hold that the claim for wages was within time, but it held that it was time-barred in any case because the service had terminated more than three years before the suit. I am clearly of opinion that under the present Limitation Act, Art. 102 lays down that wages not otherwise expressly provided for in the schedule must be taken to be subject to a time which begins to run from the time when the wages accrue due. In the present case the plaint admits that the wages are monthly wages and therefore in law the wages accrue and become due on the final day of the

1. E. Young v. D. MacCorkindale, (1871) 19 W R 159.

month. The suit was brought on 30th June 1934. The earliest period within limitation would be 30th June 1931, and and wages for the month of June 1931 are within time, but not any previous wages. Similarly the wages for July due on 31st July, and the wages for August due on 31st August 1931, are within time. A period therefore of three months' wages at Rs. 20 per mensem total Rs. 60 is within time. The remainder of the claim of Rs. 120 wages was not within time. The argument was made that as the point urged in revision is one of limitation there should be no interference by this Court. For the plaintiff reference was made to 17 All 422 (2), where the head-note says:

"It is no ground for revision under S. 25 of Act 9 of 1887, that the Court whose order it is sought to revise may have come to an erroneous decision on a point of limitation."

But the final sentence in the ruling is:

"We therefore in our discretion refuse to try in revision, and to re-open the questions of law and fact which have in the exercise of its jurisdiction been decided upon evidence by a Court whose decision upon such a point has been made final by law."

This shows that in that case the point of revision had been decided as a mixed question of law and fact. In the present case the point of revision is one of law only as the facts are not in dispute. I consider that the principle of this ruling does not bar the revision in the present case. Reference was also made to 13 All 277 (3), in which it was held that revisional powers should not be exercised unless there was substantial injustice to a party. I consider that in the present case there was substantial injustice to the defendant by decreeing three months' wages which was barred by limitation. For these reasons I allow this revision in part to the extent of the claim for Rs. 60 wages instead of Rs. 120, and proportionate interest will be allowed on the amount which is within time. Proportionate costs are allowed on the result and proportionate costs in the Court below.

K.S. *Revision allowed.*

2. Sarman Lal v. Khuban, (1895) 17 All 422= 1895 A W N 112.
3. Muhammad Bakar v. Bahal Singh, (1891) 13 All 277.

A. I. R. 1935 Allahabad 717

KENDALL, AG. C. J. AND HARRIES, J.

Bhagwan Das and *others* —Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 788 of 1934, Decided on 13th December 1934, from order of Sessions Judge, Budaun, D/- 12th September 1934.

(a) Penal Code (1860), Ss. 302, 304 and 149—Accused without premeditation—Blows struck in heat of passion and on sudden quarrel—Accused's party beating complainant's party and death caused—Person causing fatal injury not known—Offence held to be culpable homicide and all are liable.

Where without premeditation blows were struck in heat of passion and on sudden quarrel by the accused's party against the complainant's party in the course of which death was caused and the person who gave the fatal blow was not known:

Held: that all the accused were liable and that the offence was culpable homicide and not murder. [P 719 C 1, 2]

(b) Criminal P. C (1898), S. 162—Sessions Judge should not cross-examine accused to confront them with statements made to investigating officer.

The Sessions Judge should not cross-examine the accused or some of them with a view to confronting them with the statements which they made to the Investigating Officer. Statements made even by witnesses to a Police Officer in the course of an investigation are not permitted to be used in evidence for any purpose, except as provided in S. 162, Criminal P. C., that is to say, on the request of the accused the Court shall refer to the written statement and direct that the accused be furnished with a copy of it in order that the witness may be contradicted by the use of this statement. It was certainly never intended that an accused person when being examined by the Court for the purpose of explaining anything in evidence against him should be confronted with the statement which he had made to the Police for the purpose of being discredited on account of any contradiction. [P 719 C 2]

L. N. Gupta—for Appellants.

Govt Advocate—for the Crown.

Judgment. — The seven appellants have been convicted by the learned Sessions Judge of Budaun of an offence under S. 302, Penal Code, and Bhagwan Das has been sentenced to death and the other six appellants to transportation for life. They have also been convicted of offences under Ss. 147, 325 and 323, Penal Code, and sentenced to rigorous imprisonment for two years and one year, respectively, under those sections. They have all appealed against their convictions and sentences, and the record has been forwarded by the Sessions Judge for confirmation of the sentence of death passed on Bhagwan Das. The incident in the course

of which Chhote Lal was killed on 26th May 1934, has been described by the witnesses as follows: Chet Ram, in the course of executing a decree against Kallu, his judgment-debtor, attached a house, and Mullu filed an objection to this attachment which was to have been heard in the Court of the Munsif of Budaun on 26th May. On that date the decree-holder, Chet Ram, Chhote Lal, the deceased, Ram Chander and Kallu Ahir with a Civil Court peon. Gulzari, and the Patwari, Ram Chander, were going from their village to Court. All of them were seated in a bullock cart, except the Patwari who is said to have been walking behind the cart. It was early in the morning, and as they went along they saw a bullock cart on the road in front of them and eight persons standing beside it. The bullock cart is described as going along very slowly. Among the persons who were with the bullock cart in front of them were Mullu, the objector in the execution case, and Kallu, the judgment-debtor.

As to what happened after this, we have two different accounts from the prosecution witnesses: the story told by Chet Ram, Ram Chander Brahman and Kallu Ahir, which is the least favourable to the defence, and the story told by Nur Muhammad and Rafi Uddin, who were undoubtedly in the bullock cart which was accompanied by the accused persons, and who have given a version of the story which in most respects supports the story for the prosecution. According to Chet Ram's story, when he saw the bullock cart of the opposite party in the way he told the driver, Kallu Ahir, to give that cart a wide margin in passing. When his cart drew abreast of the other cart, the appellant Bhagwan Das without any provocation whatever struck a lathi blow on Chhote Lal's head, on which the other accused persons attacked all those who were in Chet Ram's bullock cart. The Patwari and the peon ran away, but Chet Ram, Kallu Ahir and Ram Chander, son of Moti, were all beaten. Chhote Lal was killed on the spot, and a report was made in the thana some five miles away at 9 a. m. This report was made by Chet Ram, and agrees with the evidence which he afterwards gave in Court. The story told by Nur Muhammad and Rafi Uddin however is that when Chet Ram's cart drew abreast of the other cart, Chhote Lal told his servant, Kallu Ahir, to give that cart a wide berth, and he also told the accused with an abusive implication to get out of the way, on which Kallu Brahman, appellant, also abused Chhote Lal. Chet Ram and Chhote Lal then told their driver, Kallu Ahir, to beat the accused, and a lathi fight started. Neither Nur Muhammad nor Rafi Uddin stated in examination-in-chief in the Sessions Court that Kallu Ahir actually struck the accused when Chhote Lal told him to do so; but in cross-examination each of them stated that the first blow in the fight was delivered by Kallu Ahir.

As regards the fight that followed, we have already stated that Chhote Lal appears to have been killed on the spot. The evidence of the Civil Surgeon who conducted the post mortem examination on the evening of the same day shows that Chhote Lal had received eleven injuries and that his skull had been smashed to pieces. Chet Ram and Ram Chander Brahman had received seven and six injuries respectively, Chet Ram having had one of his fingers broken, but all the other injuries were simple, and evidently caused by lathis. On the other side we only find that three slight injuries were caused. The fight therefore was a very one-sided one, and in fact as Chet Ram's party consisted of only four inside the cart, including the driver, after the Patwari and peon had run away, while the accused party consisted of seven or eight excluding Nur Muhammad and Rafi Uddin, who were with the party, but who did not join in the fight, it is somewhat curious that Chet Ram adopted such an aggressive attitude. Even if Chet Ram's statement is to be accepted, it is clear that Chet Ram's party had to pass the other cart and had every intention of pushing past it, and they must have known that the cart was accompanied by the opposite party, the judgment-debtor and the objector and their friends, but they made no attempt to steer clear of this formidable party, as they might easily have done if they had wished to avoid an encounter. According to the statements of Nur Muhammad and Rafi Uddin, Chhote Lal was decidedly aggressive, and must be held responsible for having started the fight. The learned Sessions Judge has accepted the more extreme version of the prosecution evidence, that is to say, he has believed the statement of Chet Ram rather than the statement of Nur Muhammad, and he has discussed the incidents of the fight from

that point of view, and consequently he has come to the conclusion that all the appellants are guilty of murder and that Bhagwan Das, who started the fight by striking Chhote Lal on the head, must be hanged. We have been through the whole of the evidence and we have come to the conclusion that the account of the incident which has been given by Nur Muhammad and Rafi Uddin, is much more likely to represent the true course of events. We have already mentioned that Chhote Lal and his party evidently had no idea of avoiding the others and were quite determined to push past them, and it is also certain that as they pushed past them, Chhote Lal made some remark to his driver. As to this, both Nur Muhammad and Chet Ram agree.

It is true that the party of Chhote Lal was not so strong in numbers as that of their enemies. They had however had the best of matters in the Courts, and they represented the decree-holder's party. They also had authority on their side, in the persons of the Patwari with his papers and the peon of the Court. We think it to be far more probable that they adopted or that Chhote Lal adopted the more aggressive tone, which has been described by Nur Muhammad, and there is no reason for supposing that either Nur Muhammad or Rafi Uddin is a prejudiced witness. We regard it as certain that Chhote Lal did direct Kallu to strike the accused or some of the accused, and we have the evidence of two of these witnesses to prove that Kallu Ahir did actually strike the first blow. As to what happened after that, there can, we think, be little doubt from the account that has been given by all the witnesses for the prosecution. The appellants party were naturally incensed by the abuse and by the blow or blows struck by Kallu, and they surrounded the cart and belaboured Chhote Lal and his friends, with the result that Chhote Lal received a mortal injury and was killed. In these circumstances, we have to consider whether all the appellants have been properly convicted of murder. In our opinion, the offence is not one of murder, but the appellants cannot escape conviction for culpable homicide. Exception No. 1 or Exception No. 4 to S. 300, Penal Code, might be applied in the circumstances that we have described above, but Exception No.4 is the more suitable. The fight arose, without premeditation on the part of the appellants, and the blows were struck in the heat of passion upon a sudden quarrel and, so far as we are able to judge, without their having taken undue advantage or acting in a cruel or unusual manner. The case would no doubt have been different if they, being a party in overwhelming strength had themselves taken the aggressive and attacked the party of Chet Ram without giving them a chance to defend themselves. They were themselves provoked, and though it would be difficult to say that they were acting in self-defence when they surrounded the cart, we are very strongly of opinion that they had received grave and sudden provocation and that they acted without premeditation and must receive the benefit either of Exception No. 1 or Exception No. 4. We do not consider it to be proved by whose hand the blow or blows that were fatal to Chhote Lal were struck. We consider that the evidence of Chet Ram, even though it is supported by the first report, is not to be relied on because this is an entirely partial account of the manner in which the quarrel broke out and we have decided that it must be discarded.

Our attention has been drawn in the course of the arguments to the very irregular proceeding of the Sessions Judge in cross-examining the appellants or some of the appellants with a view to confronting them with the statements which they made to the Investigating Officer. Statements made even by witnesses to a Police Officer in the course of an investigation are not permitted to be used in evidence for any purpose, except as provided in S. 162, Criminal P. C., that is to say, on the request of the accused the Court shall refer to the written statement and direct that the accused be furnished with a copy of it in order that the witness may be contradicted by the use of this statement. It was certainly never intended that an accused person when being examined by the Court for the purpose of explaining anything in evidence against him should be confronted with the statement which he had made to the police for the purpose of being discredited on account of any contradiction. This is however the way in which the Court has proceeded, and has come to the conclusion that the appellant Mullu is a liar. But so far as the defence in general is concerned, the only result of this irregularity has been that one

of the persons put on trial, Lochan, has been acquitted.

We consider that the evidence proves that all the seven appellants took part in this fight, and that, for the reasons we have given above, they are guilty not of murder, but of culpable homicide. We consider that they must all be held to be responsible for the injuries inflicted on Chhote Lal and the others because when they surrounded the cart, though they acted under provocation, their assembly became an unlawful one as their common object was to inflict a beating on Chhote Lal and the others in the cart. They were not then acting in self-defence, but had passed into the aggressive and every member of their assembly became, under S. 149, Penal Code, guilty of the offence that was committed by one or more of them of killing Chhote Lal and of injuring Chet Ram and Ram Chander.

In the circumstances, we do not consider that a very severe punishment is necessary. Chhote Lal was really very largely to blame for the beating which he had invited, and the offence of beating him has to be distributed over a large number of appellants. Of these Mullu is described as an old man of 70 years, and cannot have taken a leading part in the fight. We therefore allow the appeal to this extent, that we set aside the convictions under S. 302, Penal Code, and the sentences passed under that section, and substitute therefor orders of conviction against all the appellants under S. 304-149, Penal Code, and we reduce the sentence in the case of each of the appellants, except Mullu, from a sentence of death and sentences of transportation for life respectively to sentences of two years' rigorous imprisonment under this section. The sentence of Mullu under these sections is reduced to one of six months' rigorous imprisonment. The other sentences of imprisonment are concurrent and it is not necessary for us to interfere with them, except in the case of Mullu. His sentences under Ss. 325, 323 and 147, Penal Code, are also reduced to six months' rigorous imprisonment, and will be concurrent.

Sentence reduced.

K.S.

A. I. R. 1935 Allahabad 720

HARRIES, J.

Tirkha Ram and *another*—Plaintiffs—Appellants.

v.

Pt. Murari Lal and *others* — Defendants—Respondents.

Second Appeal No. 1328 of 1932, Decided on 1st February 1935, from decision of Addl. Sub-Judge, Meerut, D/- 17th November 1932.

(a) Landlord and Tenant — Agricultural village—Zamindar and Tenant—Presumption is that tenant is owner only of building materials—Sites remain property of zamindar.

In an agricultural village the presumption is that the zamindars own the whole of the village including the sites upon which the tenant's houses have been built. The tenants are only the owners of the materials with which the houses have been constructed and apart from some special custom the sites remain the property of the zamindars. Prima facie, therefore a tenant cannot transfer a dwelling house and the site upon which it is built unless of course there is some custom legally binding on the parties which gives the tenant such a right. The mere production and proof of sale deeds or mortgages is no proof that the zamindars were aware of these transactions and did in fact acquiesce in them. The defendant alleging such a custom must not only establish such transactions but he must establish positively that such sale took place with the knowledge and acquiescence of the zamindars. [P 721 C 2]

(b) Custom - Existence is question of fact —But whether there is proof to support that custom is question of law.

Where a custom is alleged, the existence or non-existence of such a custom is a question of fact, but it is a question of law whether there is proof to support that custom or whether the evidence adduced is legally sufficient to prove such a custom: 30 *All* 311, *Ref.* [P 722 C 2]

(c) Custom — Alienation of house sites — Transfers by themselves may not be sufficient evidence of custom—Landlord and Tenant.

Transfers by themselves may not be sufficient evidence of the existence of a custom, but where a question of fact is at issue, each case must be decided on its own merit, and the finding arrived at on the evidence adduced in one case cannot be used to guide the decision of a kindred issue in another case not heard with it. It may be that the production of 40 sale deeds in one case might legally afford sufficient evidence to establish a custom, whereas the production of a similar number of deeds could not in another village legally establish such a custom. The size of the village, the nature of the transactions and the fact whether the zamindar was or was not resident in the village are all factors which must be taken into account: 30 *All* 311, *Rel. on.* [P 722 C 2]

S. N. Gupta—for Appellants.

Nanak Chand—for Respondents.

Judgment.—This is an appeal against the decision of the lower appellate Court reversing an order of the Court

of first instance decreeing the plaintiffs' claim. The plaintiffs-appellants are zamindars of the village Mahadeo. Tirkha Ram being the zamindar of Mahal Tirkha and Ram Prasad being the zamindar of Mahal Ram Prasad. The defendant-respondent Murari Lal is the vendee of a dwelling house situate in the village of Mahadeo and the defendants-respondents Nos. 2 to 5 were the vendors of this dwelling house.

The claim against Murari Lal and the other defendants-respondents was for possession of this dwelling house on the ground that defendants-respondents Nos. 2 to 5 had no power to sell the house and therefore could transfer no interest in it to the defendant-respondent Murari Lal. The defence to the claim was that in this village of Mahadeo there exists a custom whereby the tenants can transfer their houses to transferees. In other words they could dispose not only of the materials composing the dwelling house but also the site as well. The defendant-respondent Murari Lal relied upon a sale deed dated 12th June 1920 executed by one Har Narain deceased, the father of defendants-respondents Nos. 2 to 5. It was his contention that by reason of this custom existing in the village, Har Narain could and did transfer to him a good title to the premises, the subject-matter of the sale, and that therefore he could not be ejected by the zamindars, the plaintiffs. It should be noted here that the house in question stood partly in mahal Tirkha and partly in mahal Ram Prasad, hence both the zamindars joined to bring this claim. A point was made in the lower Courts that such joinder of the plaintiffs was improper, but no point is taken before me and it is stated that it has been abandoned.

In an agricultural village the presumption is that the zamindars own the whole of the village including the sites upon which the tenants' houses have been built. The tenants are only the owners of the materials with which the houses have been constructed and apart from some special custom the sites remain the property of the zamindars. Prima facie therefore a tenant cannot transfer a dwelling house and the site upon which it is built unless of course there is some custom legally binding on the parties which gives the tenant such a right. The allegation in this case is that in the village of Mahadeo there is such a custom, but clearly the onus of establishing that custom rests upon the tenant.

To establish this custom a number of sale deeds and mortgages were filed and proved by the defendants-respondents. The documents numbered 30, but out of these, 14, were actually executed within twelve years of action brought. This left 16 sale deeds and mortgages which were in fact executed at a time more than 12 years before action brought. These documents show that the tenants in this village can transfer their dwelling houses together with the sites as if they were the owners. They transfer them to other tenants and strangers as if the zamindars had no right whatsoever in them. The fact that in a village of the size of Mahadeo such a number of transfers had taken place is some evidence that a custom such as that alleged by the defendants exists. It is however contended by counsel for the appellants that no evidentiary value can be given to any transfers made within 12 years of action brought because it is open to the zamindars within such a period of 12 years to bring an action claiming possession in spite of the transfers. The lower appellate Court attached to these transfers some importance relying upon the case of 1921 All 46 (1). In that case 23 sale deeds ranging from 1867 to 1912 were filed and also five sale certificates from 1882 to 1909. The appeal was heard by a Bench of this Court in 1920 and it is clear that some of the sale deeds and sale certificates were of a date within 12 years of action brought, the date of the institution of the suit being 4th December 1916. It is to be noted that in this case the Court did not consider that the transactions which had taken place within 12 years of action brought should not be taken into consideration.

In 1927 All 195 (2) a Single Judge of this Court held that the sale deeds which were executed within 12 years of action brought could not be taken into account in considering whether or not such a custom existed. This case appears to be in conflict with the Bench case previously cited, but such conflict, if any, cannot affect the decision in the present case.

Assuming that the sale deeds and mortgages executed within 12 years of

1. Faiyaz Ali v. Rekhab Das, 1921 All 46=61 I C 24.
2. Ganga Prasad v. Babu Ram, 1927 All 195=98 I C 1064.

the present suit were eliminated, 16 transactions would still be left, but the evidence in support of the custom does not rest there. The mere production and proof of sale deeds or mortgages is no proof that the zamindars were aware of these transactions and did in fact acquiesce in them. The defendant alleging such a custom must not only establish such transactions but he must establish positively that such took place with the knowledge and acquiescence of the zamindars.

There is ample evidence in this case to show that what had occurred in this village for many years had occurred with the full knowledge and acquiescence of the zamindars. In a previous suit decided by the learned Munsif who tried this suit, one of the plaintiffs zamindars, viz., Ram Prasad admitted on oath that such a custom as alleged by the present defendants-respondents did exist in this village. That being so it is difficult at least for Ram Prasad or any person claiming title through him to allege to the contrary now. However such an admission made by Ram Prasad, though not conclusive against his co-plaintiff, is certainly of considerable evidential value against him. Three other zamindars of this village were called by the defendants-respondents to establish this custom and each of them said that such a custom existed. Landlords do not as a rule make admissions of this sort against their interests unless such be true because such admissions are bound to be used against them at some later date as Ram Prasad's admission has been used against him in this present case. The lower appellate Court accepted this evidence and rightly and that being so the defendants-respondents established that these transactions, the documents concerning which had been filed and proved, had taken place with the knowledge and approval of the zamindars because according to the latter there was a custom permitting the tenants to transfer their dwelling houses together with the sites on which they are built and that the zamindars could not interfere. It appears from the judgment of the lower appellate Court that a number of other witnesses, about 16 in number, were called by the defendants-respondents who deposed to this custom. There was therefore before the lower appellate Court 16 transactions which had taken place more than 12 years before the suit was instituted, 14 similar transactions which had taken place within 12 years of the date upon which the suit was instituted and the evidence of three zamindars, the admission of Ram Prasad one of the plaintiffs in the suit and the evidence of about 16 other witnesses. Upon that evidence the lower appellate Court found the custom established and that being so reversed the decree of the Munsif granting the plaintiffs possession.

It has been urged with great force that the evidence before the lower Court was not legally sufficient to establish such a custom. Where a custom such as the present one is alleged the existence or non-existence of such a custom is a question of fact, but it is a question of law whether there is proof to support that custom or whether the evidence adduced is legally sufficient to prove such a custom: see 30 All 311 (3). In that case a Full Bench of this Court held that a custom similar to the one alleged in the present case could not be proved upon the mere production and proof of a number of sale deeds. It is unfortunate that in the report of that case the actual number of sale deeds produced is not given. All that is stated in the judgment of the learned Chief Justice is that instances of sales were given in evidence and a number of documents were produced in which apparently not only the fabrics of the houses but the grounds also upon which they stood was the subject of the sale. This decision is of course binding upon me, but the case before me is clearly distinguished from this Full Bench decision. There the only evidence adduced to prove the custom was a number of sale deeds and no evidence was tendered to show that the zamindars of the village either acquiesced or even knew of such sales. In the present case there is abundant evidence to show that the zamindars were fully aware that such sales were made and did not interfere because they were aware that they had no power to interfere.

In my judgment each case must be decided upon the evidence actually tendered in that particular case. It may be that the production of 40 sale deeds in one case might legally afford sufficient evidence to establish a custom, whereas the production of a similar number of deeds could not in another village legally establish such a custom. The size of the village, the nature

3. Ram Bilas v. Lal Bahadur, (1908) 30 All 311=5 A L J 456=1908 A W N 112 (F B).

of the transactions and the fact whether the zamindar was or was not resident in the village are all factors which must be taken into account. The decision in 30 All 311 (3) does show that transfer by themselves may not be sufficient evidence of the existence of a custom, but where a question of fact is at issue, each case must be decided on its own merits and the finding arrived at on the evidence adduced in one case cannot be used to guide the decision of a kindred issue in another case, not heard with it: see 1926 All 43 (4).

In my judgment, having regard to the documentary evidence of transfers and mortgages which had taken place at a period before 12 years of the institution of the suit, the nature and size of the village, the admission of one of the appellants and the evidence of the zamindars and other persons, I am of opinion that there was legally sufficient evidence to prove this custom and that being so the lower aplate Court was right in holding that the defendants had made out their defence to this claim. In the result this appeal is dismissed with costs. Leave to appeal under the Letters Patent is asked for but refused.

K.S. *Appeal dismissed.*

4. Tajammul Husain v. Banwari Lal, 1926 All 43=88 I C 752=48 All 77.

* A. I. R. 1935 Allahabad 723

(Full Bench)

THOM, IQBAL AHMAD AND RACHHPAL SINGH, JJ.

Shiam Sunder Lal and *others*—Plaintiffs—Appellants.

v.

Mt. Savitri Kunwar — Defendant — Respondent.

Second Appeal No. 682 of 1933, Decided on 17th April 1935, from decision of Dist. Judge, Shahjahanpur, D/- 10th March 1933.

(a) Interpretation of Statutes—Every word must be given its full meaning and effect.

Every word of a statutory enactment must be given its full meaning and effect. [P 725 C 1]

(b) Civil P. C. (1908), O. 33, R. 15—O. 33, R. 15 regulates procedure and is imperative and not directory.

Order 33, R. 15, is a provision in an enactment regulating procedure. Provisions such as O. 33, R. 15, are imperative and not merely directory. [P 725 C 1]

*** (c) Civil P. C. (1908), O. 33, R. 15 —Application for permission to sue in forma pauperis dismissed—If Court has awarded costs to Government and opposite party, these must be paid prior to filing plaint in suit — But if costs are either disallowed or no order made as regards them, suit can be filed without making payment of costs of Government or opposite party—Costs.**

Where a plaintiff has been unsuccessful in an application for permission to sue in forma pauperis and the Court has awarded costs to the Government and the opposite party in their opposition to the application, these costs must be paid prior to the filing of the plaint which commences the suit: and where the costs have not been paid or deposited prior to the institution of a suit a Court is bound to dismiss the suit; but where the Court in dismissing the application has either disallowed costs or made no order as to costs, he is entitled to maintain his suit as an ordinary litigant without making any payment to the Government or to the opposite party in respect of the costs incurred in opposing the application: 1932 *All* 312, *Rel on.* [P 726 C 1; P 727 C 1]

N. P. Asthana and *Baleshwari Prasad* —for Appellants.

Tej Bahadur Sapru, K. N. Katju, N. C. Vaish and *Lakshmi Narain Gupta* —for Respondent.

Order of Reference.—The only point raised in this appeal is whether the plaintiffs not having paid the costs incurred by the Government in opposing an application made by them to sue in forma pauperis were entitled to maintain the present suit.

There is no doubt that before filing the present suit the plaintiffs did not pay the costs of the Government or of the opposite party in opposing their application to sue in forma pauperis. The learned District Judge who decided the case in the lower appellate Court has held that the provisions of O. 33, R. 15, Civil P. C., are mandatory and inasmuch as the plaintiffs had failed to pay the costs incurred by the Government or the opposite party the suit ought to have been dismissed. The learned District Judge felt himself bound in this matter to follow the statement of the law contained in the judgment of a Bench of this Court in a case reported in 1932 All 312 (1). In the course of that judgment their Lordships who decided the case expressed their view that if the provisions of O. 33, R. 15 are not strictly complied with then the suit should be dismissed when the plaint is filed by the plaintiff who has failed to pay the costs of the Government or of the opposite party in opposing his application to sue in forma pauperis. This expression of their view of the law by their Lordships who decided this case is clearly obiter.

1. Mahadeo Sahai v. Secy. of State, 1932 All 312 =140 I C 125=54 All 390.

We have heard counsel for the appellants and for the respondents. There is clearly a difference of opinion in this Court as to what the law is upon this question. In view of this difference of opinion and in view of the obiter dicta of a Bench of this Court in the case already referred to and further of the general importance of the question raised, we are of opinion that it ought to be authoritatively decided by a larger Bench. In the circumstances we direct that this case be laid before the Hon'ble Chief Justice for the constitution of a Full Bench for the decision of the question.

Opinion.

Thom, J.—The question referred to this Bench for decision arises out of plaintiffs' appeal in a suit for redemption. In the trial Court the plaintiffs succeeded. In the lower appellate Court however the decision of the trial Court was reversed. The learned Subordinate Judge whilst finding upon the facts in favour of the plaintiffs, dismissed the suit upon the ground that the plaintiffs had not complied with the provisions of O. 33, R. 15, Civil P. C.

Prior to the institution of the suit the plaintiffs had made an application praying for permission to sue in forma pauperis. This application was rejected, but in rejecting the application the Court made no order as to costs. The plaintiffs filed the present suit without first paying the costs incurred by the defendants or the Government in opposing the application for permission to sue in forma pauperis. The lower appellate Court dismissed the suit upon the ground that the payment of the costs incurred by the defendants and the Government in opposing the application to be permitted to sue in forma pauperis prior to the institution of the suit, was a condition precedent to the institution of the suit and a condition with which the plaintiffs had not complied. The question referred for our decision may be stated as follows:

"On a sound construction of O. 33, R. 15 Civil P. C., is a plaintiff who has been unsuccessful in an application to be permitted to sue in forma pauperis and who has not in fact first paid the costs of the Government and the opposite party in their opposition to the application, entitled to maintain his suit as an ordinary litigant ?"

Order 33, R. 15, Civil P. C., is in the following terms:

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper."

One general question has been submitted for our decision, but in fact two separate and distinct questions are involved, viz: what is the effect of O. 33, R. 15: (1) where costs have been awarded, and (2) where there has been no order as to costs or where costs have been disallowed. By the terms of the reference this Bench is invited to decide both these questions.

Learned counsel for the appellants contended that there has been substantial compliance with the terms of O. 33, R. 15 if the costs incurred by the Government or the opposite party in opposing the application to be permitted to sue in forma pauperis are paid at any time during the pendency of the suit and before the decision thereof. He urged that the legislature by the provision in question did not intend to limit or restrict the right of a litigant to prosecute his claim in the Courts and that it would be contrary to the spirit of the law and of the enactment itself to refuse to entertain a suit merely because prior to its institution the costs of the Government and the opposite party had not been paid or deposited.

It was contended, on the other hand, for the defendants that under O. 33, R. 15 the payment of the costs by the Government or the opposite party was a condition precedent to the institution of the suit and that unless the plaintiff had complied with this condition the Court was bound to dismiss the suit and was not entitled to give the plaintiffs an opportunity after the institution of the suit of paying the costs of the Government or the opposite party incurred in their opposition to the application to be allowed to sue in forma pauperis.

Learned counsel for the appellants in support of his contention relied upon the decision of the Calcutta High Court in 14 I C 297 (2). The decision clearly supports the plaintiffs' contention. We find ourselves however unable to agree with the view of the law approved in that decision.

Quite clearly the interpretation for which the appellants contend would involve the reading out of the provision

2. Mrinalinee Debi v. Tinkori Debi, (1912) 14 I C 297.

under consideration of the word "first." Now it is trite law that every word of a statutory enactment must be given its full meaning and effect. It may be contended that it is unreasonable to insist that the plaintiffs should be denied the opportunity of depositing the costs of the Government or the opposite party after the institution of the suit, but where the words of the statute are clear such considerations cannot justify a refusal to give effect to their plain meaning and intent. We would observe in this connection that O. 33, R. 15 is a provision in an enactment regulating procedure. Provisions such as O. 33, R. 15 are imperative and not merely directory. We refer in this connection to Maxwell on the Interpretation of Statutes, Edn. 6, p. 655. The question of the effect of such provisions regulating procedure was considered in a recent case in the Privy Council: 1935 P C 5 (3). In that case it was decided that an appeal is a creature of statute and unless the statutory conditions as to the filing of appeals are fulfilled no jurisdiction is given to any Court of justice to entertain them. Where the statute provided that an appeal would only lie by leave granted by the trial Court and that the said leave was not to be granted unless the costs in the trial Court shall have been paid in such Court or shall have been deposited therein or in the Court to which the appeal was being taken, and the trial Court in granting leave by an oversight overlooked this provision of the statute with the result that the costs of the trial Court were not paid in cash either in the trial Court or in in the appellate Court, it was held that the appeal was incompetent and the appellate Court had no jurisdiction to entertain it and could not allow the costs to be deposited at a later date. The principle approved in this decision, clearly covers the question which we have to decide.

Learned counsel for the appellants contended that there was a clear distinction in principle between the provisions of O. 33, R. 15 and the provisions which the Privy Council was considering in the case above noted. He urged that in the latter case the statutory provision under consideration was to the effect that "leave to appeal.... shall not be granted unless and until a certain condition is complied with," whereas O. 33, R. 15 merely enjoins that:

"the applicant shall be at liberty to institute a suit in the ordinary manner ..... provided that he first pays the costs etc."

It is true that in these ipsissima verbal, O. 33, R. 15 does not enjoin that no suit shall be maintainable unless the costs are first paid, but this distinction is of no importance. We fail to see any real distinction between a provision denying a litigant a right to sue unless he complies with a certain condition and a provision which grants a litigant a right to sue, provided he first complies with that condition. Order 33, R. 15 is to the effect that the litigant may sue provided he first pays certain costs and this must mean that he will not enjoy the right to sue unless he first pays those costs. No other interpretation in our judgment would do justice to the plain provisions of the enactment.

Learned counsel for the appellants attempted to distinguish the present case from the one referred to above upon another ground. He contended that in the latter case the Privy Council was considering the right of a litigant to appeal and not the right of a litigant to maintain a suit. His argument was that the right to maintain the suit in the Courts of justice was not merely a creature of statute but was inherent in the status of citizenship; it was a privilege of every citizen to resort to the Courts of law for the vindication of his rights. We are unable to see any real distinction in principle between the right to appeal and the right to institute a suit when the question is one of the effect of a statutory restriction. Learned counsel was unable to point to any authority justifying the distinction which he attempted to draw. Furthermore the right to institute a suit is just as much governed by statute as the right to appeal. The right to institute a suit is governed by Ss. 9 and 80, Civil P. C., and the right to appeal by S. 96. Both rights are regulated in the same statute and we can see no reason for placing the right to institute a suit upon a different plane from the right to prefer an appeal.

We would observe in this connection that O. 33, R. 15 is not the only provision which imposes a condition precedent to the institution of a suit. There is statutory provision for example that in certain instances two months' notice must first be given by the plaintiff before he may institute

3. Ohene Moore v. Akesseh Tayee, 1935 P C 5= 153 I C 896 (PC).

a suit against a public authority. This provision imposes a condition precedent to the institution of the suit and it is well settled that the provision must be complied with prior to the institution of the suit and omission to comply with it cannot be rectified subsequent to the institution of the suit.

The question we have discussed was considered by a Bench of this Court in 1932 All 312 (1). In the judgment in that case it was observed that:

"We have already seen that the plaintiff had attempted to sue in forma pauperis but that his application had been dismissed with costs. Before instituting the present suit he had not paid the costs incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper. The provision of O. 33, R. 15, Civil P. C., was imperative. The Court below was therefore bound to dismiss the suit as being barred by O. 33, R. 15."

These observations were clearly obiter and unnecessary for the decision of the case. We find ourselves in full agreement however with the principle enunciated. In the result we hold that where a plaintiff has been unsuccessful in an application for permission to sue in forma pauperis and the Court has awarded costs to the Government and the opposite party in their opposition to the application, these costs must be paid prior to the filing of the plaint which commences the suit and that where the costs have not been paid or deposited prior to the institution of a suit a Court is bound to dismiss the suit.

We now proceed to consider the question of the effect of O. 33, R. 15 where there has been no order as to costs. In such circumstances clearly different considerations arise. Under the provision the costs which the plaintiff has to pay are the "costs (if any) incurred by the Government and the opposite party." It is conceded by learned counsel for the respondents' that the words "costs incurred" could not be interpreted and applied in their ordinary literal sense. It was never the intention of the legislature to saddle a plaintiff, who had filed an application to be permitted to sue in forma pauperis, with the entire costs which the Government and the opposite party might in every case incur. Where the opposite party or the Government for example incurred costs in opposing the application quite unreasonable in amount and disproportionate to the importance of the occasion, it would be manifestly absurd to insist that before he could institute a suit the plaintiff should pay such sum in name of costs. In interpreting the words "costs (if any) incurred," therefore, the Court must insist upon some limitation. The question we have to decide is what limitation should be.

Learned counsel for the respondent contended that the costs which the plaintiff must pay before he is permitted to maintain his suit should be the ordinary taxable part and party costs. He argued that this view was supported by the general scheme of orders. In support of this argument he referred to Rr. 7 and 16, O. 33. Under R. 16 where the applicant has been successful and permission to sue as pauper has been granted, the costs of the applicant shall be costs in the suit. There being no reference to an order of the Court fixing the amount of costs in S. 18 learned counsel contended that it must be assumed that the intention of the legislature was that the amount payable by the plaintiff prior to the institution of the suit should be the amount of costs taxable as between party and party. We are unable to accept this contention. The question of the costs is one which is entirely in the discretion of the Court under S. 35, Civil P. C. It is for the Court to say upon consideration of the entire circumstances whether full costs or modified costs should be awarded. If the contention of learned counsel for the respondents be accepted then the somewhat startling result would follow that where the Court deemed it just and expedient to make no order as to costs, that is, not to call upon the plaintiff to pay the costs of the Government or the opposite party, by the operation of O. 33, R. 15 the plaintiff would be mulcted in the full amount of taxable costs incurred by the Government and the opposite party. Learned counsel for the respondents pointed out that the fee of the Government Pleader in opposing the application to sue in forma pauperis was regulated by the rules of Court and further that so far as the costs of the opposite party were concerned there is provision regulating the fees chargeable by the legal practitioners. But the fees payable to the Government Pleader or to the legal practitioner are not the only "costs" within the meaning of O. 33, R. 15. In opposing an application to sue in forma pauperis the Government may incur costs other than the fee of the Government Pleader and would be entitled to recover such costs under an order

from the Court; so also the costs incurred by the opposite party and which he may be entitled to recover are not confined merely to the fee of the vakil or the pleader.

There appears to be only one reasonable interpretation which can be placed on the provision regulating the costs payable by a plaintiff who has failed in an application for permission to sue in forma pauperis. In our judgment costs incurred must be taken as meaning costs incurred for which the plaintiff is liable. Now the plaintiff cannot be liable for the costs of the Government or the opposite party except by an order of the Court. As already observed it is entirely within the discretion of the Court to allow or disallow costs and in this connection we would observe that there is no real distinction between the case where the Court makes no order as to costs and where the Court specifically disallows costs. The successful party in a proceeding in Court is not entitled to call upon the unsuccessful party to pay his costs except under the order of the Court. If there is no order of the Court awarding the successful party his costs against the unsuccessful party or if costs have been expressly disallowed quite clearly, in no sense, is the unsuccessful party liable for these costs. S. 35, Civil P. C., is clear and specific in its terms:

"Costs of and incident to all suits shall be in the discretion of the Court and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid."

We can find no justification for holding that the legislature intended by O. 33, R. 15 to saddle a litigant with costs which the Court refused to award against him in virtue of its powers under S. 35. Our decision is therefore that where a litigant has made an unsuccessful application to be permitted to sue in forma pauperis, but where the Court in dismissing the application has either disallowed costs or made no order as to costs he is entitled to maintain his suit as an ordinary litigant without making any payment to the Government or to the opposite party in respect of the costs incurred in opposing the application.

K.S. *Reference answered.*

A. I. R. 1935 Allahadad 727

SULAIMAN C. J. AND BENNET, J.

Official Receiver, Aligarh and *others*—Decree-holders—Appellants.

v.

Hira Lal — Judgment-debtor and *another*—Respondents.

Letters Patent Appeal No. 73 of 1934, Decided on 28th February 1935, against judgment of Bajpai, J., D/- 26th February 1934.

(a) Limitation Act (1908), Sch. 1, Art. 182 —Application for substitution and execution signed by pleader and accompanied by vakalatnama— Place in vakalatnama for pleader's name left blank and no signature of pleader in it—It is not in accordance with law and does not save limitation.

Where an application for substitution and for execution of decree was signed by a pleader and was accompanied by a vakalatnama in which however the place meant for the name of the pleader was left blank, and the vakalatnama did not bear any signature of the pleader showing that he had accepted it:

Held: that the application as filed had not been filed by a duly authorised person and was not in accordance with law and does not save limitation: 1931 *All* 767, *Foll.* [P 728 C 1]

(b) Execution—Notice of execution—Judgment-debtor not appearing — Court should order execution without considering possible objections—Such order does not operate as res judicata by implication—Res Judicata.

When after notice has been issued, the judgment-debtor does not appear and does not file objections, the Court is not called upon to make any further investigation into the matter, but it is its duty to order the decree to be executed. The order has to be passed automatically and there is no occasion for the Court to exercise its judgment as to the merits of any possible objection that might have been raised if the judgment-debtor had appeared. In such circumstances it is difficult to say that when the Court has no discretion in the matter, its order directing the decree to be executed is an adjudication of the dispute between the parties which operates as res judicata by implication. [P 729 C 1, 2]

(c) Limitation Act (1908), Sch. 1, Art. 182 —Defective application for substitution and execution—Substitution ordered ex parte—Subsequent execution application — Judgment-debtor can raise objection that former application is not according to law and does not save limitation.

Where an application for substitution and for execution was defective in form, but the Court, without noticing the defects ordered substitution and the execution to proceed and the judgment-debtor was absent and the proceedings were struck off and another application for execution was filed:

Held: that it was open to the judgment-debtor to raise the objection that the defective application did not save limitation as not being in accordance with law: 8 *Cal* 51, 1925 *All* 117, 1926 *All* 71 and 1921 *P. C.* 23, *Dist.* [P 729 C 2]

Kamta Prasad—for Appellant.

L. W. Clarke—for Respondent.

Judgment.—This is an appeal by the decree-holder arising out of an execution proceeding. A simple money decree was passed on 1st August 1924, and an application, which was in accordance with law, was made on 23rd July 1927, for execution, but had become infructuous because the decree-holder was unfortunately murdered. On 18th June 1930, an application was made on behalf of his three sons for substitution of their names and for execution of the decree. The application was signed by a pleader and was accompanied by a vakalatnama in which however the place meant for the name of the pleader was left blank, and the vakalatnama did not bear any signature of the pleader showing that he had accepted it. The facts were overlooked by the office, and the Court ordered notices to issue to the judgment-debtors. They did not appear to show cause or raise objections. The Court accordingly ordered that the names of the sons of the deceased decree-holder should be brought on the record in his place and that execution should proceed. The proceeding however did not fructify and the execution case was ultimately struck off.

On 14th November 1930, a fresh application for execution of the same decree was made and notice ordered to issue. The judgment-debtor on this occasion appeared and objected that the present application was barred by time inasmuch as the previous application of 18th June 1930, was not an application in accordance with law. The Courts below disallowed the objection on the ground that it was no longer open to the judgment-debtor to raise any such plea. In second appeal a learned Judge of this Court has come to the conclusion that the judgment-debtor is not prevented from raising this matter.

So far as the defect in the vakalatnama is concerned, the point is covered by the authorities of this Court, namely, 19 I C 674 (1) and 1931 All 767 (2). The application as filed had not been filed by a duly authorised person and was not in accordance with law.

The only question that remains for consideration is whether it is open to the judgment-debtor to raise this objection now when he failed to appear on the previous occasion. Four cases have been referred to in this connection. The case of 8 Cal 51 (3) was a case under the corresponding section of Act 9 of 1871, but in that case, as pointed out by their Lordships of the Privy Council at p. 60, the attachment of the property in pursuance of the order in execution was continuing and the judgment-debtor had consented to such continuance. The second application was to give effect to that continuing attachment. Accordingly it was laid down that the judgment-debtor was estopped from contesting that the attachment itself was invalid because the order for attachment had been made on an application which itself had been barred by time. The case is accordingly clearly distinguishable. Similarly the case of 1925 All 117 (4) was a case where the Court had actually ordered the substitution of the name of the transferee of the decree-holder, and it was held that at a subsequent stage the judgment-debtor could not be allowed to say that the order directing substitution of names was invalid because no valid transfer had in fact taken place. There the judgment-debtor was impugning the validity of the order directing substitution of names itself. Again in the case of 1926 All 71 (5) the order passed for execution was fully carried out and the platforms which the decree-holder wanted to have demolished was actually demolished by the Amin of the Court in pursuance of the order. The judgment-debtor was therefore not allowed to come up at a later stage and claim compensation on the ground that the previous application on which the order had been made was defective.

In the case of 1921 P C 23 (6), when notice was issued to show cause why the applicant should not be brought on the record as an assignee of a partially executed decree, the judgment-debtors appeared, denied the assignment and objected that the right to execute the decree was barred by limitation and also questioned the liability of certain properties to attachment. These objections were overruled, the assignment was recognised and the decree-holder was allowed to execute the decree and was given permission to

1. Muhammad Ali Khan v. Saktu, (1913) 19 I C 674.
2. Chitta v. Jafo, 1931 All 767=132 I C 566.
3. Mungal Pershad Dichit v. Girja Kant Lahiri (1882) 8 Cal 51=8 I A 123=4 Sar 248 (P C).
4. Dwarka Das v. Mohamed Ashfaqullah, 1925 All 117=80 I C 722=47 All 86.
5. Dip Prakash v. Dwarka Prasad, 1926 All 71=90 I C 83=48 All 201.
6. Raja of Ramnad v. Velusami Tevar, 1921 P C 23=59 I C 680=48 I A 45 (P C).

file a fresh application for attachment. After the order had become final and attachment of some properties was made, the judgment-debtor objected that the execution was barred by time. Their Lordships of the Privy Council overruling the Indian Court held that it was no longer open to the Court subsequently to hold that execution was barred.

It is noteworthy that in the last mentioned case the judgment-debtor had appeared and filed objections. The Court therefore had to proceed under O. 21, R. 23 (2) and had to consider the objection and make such order as it thought fit. Its order was therefore binding on the judgment-debtor and appeared as an estoppel by judgment.

None of these cases was a case where the judgment-debtor had not appeared and the order was passed ex parte. The scheme of the provisions of O 21, seems to be that when an application for execution or for taking a step-in-aid of execution is made, the the Court has to see prima facie, principally on the office report, whether the application is in accordance with law and not barred by time, and is not otherwise improper. In the absence of the judgment-debtor, the Court not finding any apparent defect in the application or such defect not being brought to its notice, orders notice to issue to the judgment-debtor, under R. 22 where the application is made more than three years after the date of the decree or when it is made against the legal representative of a party. In other cases notice is not even issued. O. 21, R. 23, provides that where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the the decree to be executed. It is therefore apparent that when after notice has been issued, the judgment-debtor does not appear and does not file objections, the Court is not called upon to make any further investigation into the matter, but it is its duty to order the decree to be executed. The order has to be passed automatically and there is no occasion for the Court to exercise its judgment as to the merits of any possible objection that might have been raised if the judgment-debtor had appeared. In such circumstances it is difficult to say that when the Court has no discretion in the matter, its order directing the decree to be executed is an adjudication of the dispute between the parties which operates as res judicata by implication.

If the order directing the decree to be executed were continuing and were operative, and proceedings were being taken in pursuance of it, the judgment-debtor would not be allowed to go behind that order and challenge its propriety when he had not appeared. But if the proceedings somehow or other terminated, it would be difficult to say that the ex parte order made by the Court at the time when the notice was issued or the necessary order which had to be made by the Court when he did not appear, operates as res judicata and must be deemed to have finally decided that the application filed before the Court had been in every way proper and valid. In the present proceedings the judgment-debtor is not saying that the order for substitution of names made by the Court was invalid. As a matter of fact under O. 22, R. 12, no application for substitution of names in an execution proceeding is at all necessary. There being no bar of limitation, it would have been open to the execution Court to have the defect in the vakalatnama rectified and order substitution forthwith. But what the judgment-debtor now objects to is that the defective application which had been made on 18th June 1930, cannot serve as a fresh starting point for purposes of limitation. He does not challenge the order directing substitution of names, but urges that the application on which the order was made not being in accordance with law does not save limitation. We find it difficult to hold that the judgment-debtor in this fresh proceeding is barred from raising this objection. The view taken by the learned Judge is correct. We accordingly dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 729

SULAIMAN C. J. AND BENNET J.

Mt. Dhanpatti—Appellant.

v.

Badri Singh—Respondent.

Letters Patent Appeal No. 61 of 1934, Decided on 18th March 1935. against the Judgment of Niamatullah, J.

(a) U. P. Land Revenue Act (3 of 1901), S. 126—Sir land of one co-sharer placed in

share allotted to another on partition—Ex-proprietary tenancy arises.

In partition under the former Revenue Act and under the present Revenue Act, Act 3 of 1901, S. 126, there is a provision that when sir land of one co-sharer is placed in the share allotted to another then an ex-proprietary tenancy arises. [P 732 C 2]

(b) Evidence Act (1872), S. 93—Language of document plain and not ambiguous — Other evidence is not admissible to show that different intention was meant.

Per *Sulaiman, C. J.*—Where the language of a document is plain and there is no ambiguity in it, it is not permissible to produce other evidence to show that there was a different intention on the part of the transferor. [P 734 C 1]

(c) Agra Tenancy Act, S. 14 (2)— Proprietary Interest—Sir land—Transfer of sir land—Proprietary interest passes—Sale exempting transfer of sir land—Proprietary rights do not pass.

When there is a transfer of sir lands the proprietary interest in such lands passes. But when there is a sale-deed which exempts the transfer of sir lands, the proprietary rights in such lands do not pass. [P 734 C 1]

(d) Deed—Construction—Subsequent conduct cannot be taken into account.

So far as the interpretation of a document is concerned the subsequent conduct cannot be taken into account: 1917 *P C* 207 and 22 *All Rel on.* [P 734 C 1]

Haribans Sahai—for Appellants.

A. P. Pandey—for Respondents.

Bennet, J.—This is a Letters Patent appeal by the defendants against the judgment of a learned Single Judge of this Court dismissing their appeal. The defendants have lost their case throughout. The case began as a suit in the Court of the Assistant Collector for enhancement of rent. The plaint set out that the plaintiffs are the recorded zamindars of the whole village of mauza Alupur and that the defendants are exproprietary tenants in the village of an area of 21.71 acres consisting of 64 plots; that the former rent of the land was Rs. 47-1-8 and enhancement is asked. The defence was that the relation of landlord and tenant did not exist between the parties, and that Bandhan Singh, husband of Mt. Dhanpatti, defendant 1, and his brother sold their zamindari property under different sale deeds, but the sir plots, grove, house, pond and pasture were excluded from the sale deeds and the vendors remained in possession and occupation of these items of property as absolute owners and that the vendors remained in possession of the sir plots as "haqiat mutafarriqa" and continued to pay the revenue according to their proportionate shares entered in the khewat, and that the entry in the village papers was wrong, meaning apparently the entry of the defendants in the khatauni as exproprietary tenants of the numbers in suit. It is to be noted that the defendants are not entered in the khewat for "haqiat mutafarriqa" or in any capacity whatever. The Revenue Court referred an issue to the civil Court as to whether the defendants have proprietary rights in the land in question, and the Munsif decided that they have not, and the Revenue Court therefore decreed enhancement from Rs. 40-7-6 to Rupees 50-9-6. The defendants appealed on the ground that they were holders of the proprietary rights in the sir land, and the lower appellate Court on an interpretation of the sale deeds in question held that this was not so and that the defendants were exproprietary tenants of the land in dispute. The sale deeds in question are as follows:

On 19th December 1879, Bandhan Singh, the husband of defendant 1, sold a two-annas share for Rs. 2,000 in favour of Batuk Dayal, and also on the same day sold a one-anna share in favour of Ramsarup for Rs. 1,000. In each of these sale deeds it was stated that the sale was made:

alawa araziat sir wo bagh wo makanat maskunah khud wo pokhri wo charagah maweshian.

There is no clear finding as to what entry was made in the village papers subsequent to 1879 but presumably Bandhan Singh and his brother remained entered as holders of sir in the khatauni as they had still one anna zamindari share in the village. On 16th February 1890, Bandhan Singh and his brother executed a sale deed of their remaining one-anna share in favour of Hira Lal, the predecessor of the plaintiffs. In this sale deed it was stated:

Jis qadar arazi sir ek anna hissa mauza Alupur zila Benares Pargana Kara mobaiya me ham muqir ka waqai hai us par ham muqir bataur asami saqetul milkiatke qabiz rahenge aur lagan uske mutabiq lagan mundarjah jamabandi ke jo us waqt arazi sir par qaem hai hamesha dia karenge.

After this the plaintiffs rely on an entry of 2nd July 1894, in regard to a contested case for correction of jamabandi against Bandhan Singh in which there was an entry of exproprietary tenancy. Plaintiffs further rely on a khatauni which is produced of the year 1307 Fasli, corresponding to 1899-1900 which shows Bandhan Singh as exproprietary tenant of the numbers in suit. On 31st March 1914, Bandhan

Singh executed a deed of relinquishment in which he set out that he was the exproprietary tenant of 26.49 acres at a rent of Rs. 58 and that he relinquished in favour of Hira Lal 4.17 acres of this exproprietary tenancy, the rent of which was Rs. 10-6-0. The numbers were not mentioned in this deed of relinquishment. The situation therefore was that the entries were of the defendants as exproprietary tenants. It is admitted that the defendants were making payments to the plaintiffs' predecessor to the extent of Rs. 47-1-8 per annum. The defendants alleged that this payment was made as their corresponding share of land revenue and the plaintiffs alleged that it was made as exproprietary tenancy rent. The learned Single Judge of this Court considered that the effect of the first two sale deeds of 1879 was to exempt the proprietary interests of Bandhan Singh and his brother in the sir plots and that the sale deed of 16th February 1890 by which the sir plots were not exempted transferred not only the one anna share sold but also whatever proprietary rights the vendors had in all sir numbers. It will thus be seen that this view was materially different from the view of the lower appellate Court, which was that the first two sale deeds transferred the proprietary rights in the two annas and one anna sold and the rights which remained and were reserved in the sir were only the sir rights, that is the right to hold the land in cultivation as sir, and that all those sir rights then appertained to the one anna share which remained with Bandhan Singh, and his brother.

On this view the sale deed of the one anna share on 16th February 1890 naturally transferred all the proprietary rights which were in the vendors and only the exproprietary rights remained in the vendors. Some argument was made on the strength of (1900) A C 260 (1), that subsequent conduct of the parties would not be admissible in the present case. In that case the plaintiff brought a suit on an indenture between the defendant company and the plaintiff and claimed that under the terms of that indenture the defendant company was bound to make certain payments. The defendant company desired to prove that as a matter of fact for 40 years they had not been making those particular payments. Evidence to prove that was excluded as the Court held that the terms of the indenture were clear and unambiguous. The claim therefore is made that in the present case the sale deeds in question are clear and unambiguous and evidence of subsequent conduct should be excluded. In the present case the plaintiffs do not sue on the deed in question as the deed does not set out in what numbers the exproprietary tenancy arose but the plaintiffs sue the defendants as their tenants, and the issue is whether the defendants are tenants or proprietors. On that issue it is relevant for the plaintiffs to prove that the defendants have been paying them rent and that they are entered in the village papers as exproprietary tenants. The cases are not at all parallel and it is not clear that the principle of the ruling would apply in the present case. The next question is whether the lower appellate Court is correct in its interpretation of these deeds. The question is not free from difficulty because the language used by the deeds was not clear. It is no doubt open to a proprietor in a mahal to make a sale of a one anna or a two annas share and to exempt his proprietary interest in certain plots in the village. To do so he might specify those plots and say "Sell a two anna share, but I except plots numbers so and so and so and so." It is however also possible for a proprietor to sell a two anna share and retain a certain share in the village and then make a provision that all his sir plots should remain in his possession as sir. In that case it is not quite so easy to see what precise language he should use and the expression "with the exception of sir land" may well be taken to mean that that was his intention. Some difficulty no doubt arises from the fact that along with the sir lands he mentions other matters such as the house and the grove and the pond and in one case the pasture. He may clearly have meant that in regard to the grove and the house and the pond his proprietary interest in these matters would not pass. Again he may well have meant merely that the grove would remain as a zamindar's grove in his possession. We do not know in the present case whether the grove was or was not his sir land. As regards the house, he may have merely intended that he should retain it as a proprietor's house and he may have been

1. North Eastern Railway v. Hastings, (1900) A C 260=69 L J Ch 516=82 L T 429=16 T L R 325.

indifferent as to whether the purchaser would or would not have an undivided share in the site.

The cases of the pond and the pasture are also not particularly clear and all that he may have intended to say was that he would have a right as a zamindar to use the water of the pond for irrigation and also the pasture for his cattle or to obtain a share of what sums were charged by the zamindar for pasturing cattle. His chief interest in the two deeds of 1879 was to retain the land as his sir, so that it remained in his cultivation as a proprietor, and would go into his kura if there was a partition in the Revenue Court. The suggestion of counsel for appellant that he was interested in the rather abstruse legal conception of also retaining his undivided three annas share as well as his undivided one anna share in these numbers seems farfetched. If this was what the words, "alawa arazi sir" meant, it would not follow that he would retain sir rights in these numbers. Yet from his point of view this must have been of much greater importance. The defendants relied on another point that on 31st January 1890 they had sold two bighas odd of sir land for Rs. 250 and subsequently in 1892 there had been deeds of mortgage by them of their sir plots. Had they disposed of a large quantity of their sir in this manner it would have been some indication of what was meant by the different deeds, but the amount transferred was small in proportion to the property with which we are concerned. The only deed of 31st January 1890 was prior to the sale of the one anna share to the plaintiffs' predecessor on 16th February 1890, and therefore it does not appear to affect the interpretation of that sale deed. At the most that sale deed of 31st January 1890 appears to be a transfer of particular plots and at the time Bandhan Singh and his brother were owners of a share in the mahal and if they desired to transfer particular plots which were in their possession they had as much or as little right to do so before executing the deeds of 1879 as after executing them. Reference has been made to a ruling of this Court reported in 18 All 121 (2).

In that case the plaintiffs were purchasers from the defendants of fourteen annas out of a sixteen annas share in the mahal and subsequently the plaintiffs sued the representatives of their vendor for joint proprietary possession of a certain grove and for damages of fruit appropriated by the defendants. The defendants pleaded that the land in suit was their sir and that the suit was not cognizable by a civil Court. The Munsif held that the suit was not cognizable by the civil Court. The District Judge held that the defendants were either proprietors or exproprietary tenants and that the civil Court had no jurisdiction. The plaintiffs appealed to the High Court and the High Court held that the defendants who had retained the two annas share must be taken to be exproprietary tenants and that S. 7 of Act 12 of 1881 would apply even where the whole share of the zamindar had not been sold. The Board of Revenue had taken the other view and it held that the language of that section showed that the whole share must be sold. The High Court appeared in this ruling to have considered that if the view of the Board of Revenue prevailed the vendor would be reduced to a very unfortunate position and that he might lose all his sir and not obtain any exproprietary tenancy as long as he kept a small portion. It was suggested that this would arise on a partition. This is incorrect. In partition under the former Revenue Act and under the present Revenue Act, Act 3 of 1901, S. 126, there is a provision that when sir land of one cosharer is placed in the share allotted to another then an exproprietary tenancy arises. The basis of the ruling therefore was incorrect. In any case the ruling was given in the year 1895 and cannot have been in the minds of the parties at the time these sale deeds were executed in 1879 and in 1890. It is to be noted that under the law as it stood under S. 7 of Act 12 of 1881 there was no clause that the sale of a part of the proprietary interest would involve an exproprietary tenancy arising in a part of the sir land which pertained to the share sold. Such a clause was introduced into the Tenancy Act of 1902 and into the Tenancy Act of 1926.

It is however a matter of doubt as to what exactly is meant by the expression in those Acts, e. g., in Act 3 of 1926, S. 14 (2): "So much of his sir . . . .as appertains or corresponds to such part of his share." It is quite possible to hold the view that unless the sir which is retained by a vendor

2. Bhawani Prasad v. Ghulam Muhammad, (1896) 18 All 121=1896 A W N 12.

exceeds the area of the mahal proportionate to the share which remains with him none of his sir can be said to appertain or correspond to the share sold. I consider that in the present case the defendants have failed to prove that the deeds clearly allowed them to retain any proprietary rights in the numbers in suit. It appears to me that by the earlier deeds their proprietary rights in the two annas and one anna shares sold were entirely disposed of and that in the remaining deeds of a one anna sale the remaining proprietary rights of the defendants were transferred. The exproprietary rights in these numbers in suit therefore arose with the sale of 16th February 1890. The parties have all along treated the deeds in this manner and the evidence apparently clearly proves that the defendants are no more than exproprietary tenants. Under the circumstances the lower appellate Court was correct in decreeing the suit for enhancement of rent. I would therefore dismiss the Letters Patent Appeal with costs.

Sulaiman, C. J.—I concur with the conclusion of my learned brother though for a slightly different reason. If the question had arisen under the new Tenancy Act, the matter would been simpler because not only S. 14 (2) makes it clear that exproprietary rights accrue even when only a part of a share of a landlord in a mahal is sold, but S. 3 makes a clear distinction between "sir" which is defined as land recorded as sir and "sir rights," which are defined as the sum of all the special rights conferred on the sir holder. Furthermore, there is a distinction drawn between "sir right" and "sir" in S. 7, Agra Tenancy Act.

But the sale deed which has to be interpreted is of the year 1879. On the view which was at one time held by the Board of Revenue that no exproprietary rights accrued on the sale of a part of the share only, it can be contended with force that when a person owns a four annas share in a mahal and has certain sir lands appertaining thereto, and he then sells three annas share, he retains his zamindari share to the extent of one anna and all the sir rights which he held before in the lands but these would now appertain to this one anna. The result would then be that when he sells his entire one anna his sir rights disappear automatically. On the other hand, on the view which was expressed by this High Court in 18 All 121 (2) which I think has been subsequently adopted by the legislature, it was open to a person to acquire exproprietary rights even though he held a fractional share in the mahal. It is wholly unnecessary to consider whether this view was sound or unsound, but there is no doubt that this was the view held by this Court. On that view it would follow that a person could acquire exproprietary rights if he sold three annas out of four annas share which he held, and it was therefore equally obvious that he could very well exempt from the sale any specific plots of land which were held by him as sir lands, with the result that he would not only have the cultivatory rights in these plots, but he would also have exproprietary rights in those plots, and not be compelled to claim exproprietary rights only when the remaining share is sold. It this were not the law, he would get a smaller share in the sir plots at the time of the partition, for less would appertain to one anna than to three annas.

Now under the sale deeds of 1879. three annas share in all were transferred and there was an express exception made as regards the sir lands ("araziat sir") the residential house. the well, the tank, and in one case the pasture lands also. The words "with the exception of sir lands" can have only one meaning, namely, that the sale was not to affect the property which could be described as sir lands. Now, even in Act 18 of 1873 which was then in force, "sir land" was defined as land recorded as sir or continuously held for 12 years or recognised by village custom as the special holding of the cosharer. The words "sir land" mean the land itself and not merely the sir holder's rights, namely, the holding of possession only. If therefore the sale deed expressly stated that the sir lands were excepted, it meant that all the rights which were capable of transfer in those lands were exempted from the sale. The position as regards the sir lands was exactly the same as that in respect of the share in the house, the well, the grove and the tank and the pasture lands. The vendor's shares in these properties could never pass to the vendee.

It has been suggested that there was some ambiguity in the document and therefore extraneous evidence was admissible to show the real intention of the parties and to establish what pro-

perty was being sold. In my opinion, this is not the correct law. If there is any patent ambiguity in the document itself, then extraneous evidence is altogether forbidden under S. 93, Evidence Act. It seems to me that where the language of a document is plain and there is no ambiguity in it, it is not permissible to produce other evidence to show that there was a different intention on the part of the transferor. The words "sir lands" are not in the least ambiguous and therefore fresh evidence cannot be allowed to show that sir lands were not meant but sir rights were meant.

The cases of 7 All 633 (3), 12 All 426 (4) and 1924 All 447 (5), are authorities for the proposition that when there is a transfer of sir lands the proprietary interest in such lands passes. It follows that when there is a sale deed which exempts the transfer of sir lands, the proprietary rights in such lands do not pass. I am therefore of the opinion that the view taken by the learned Judge of this Court that the proprietary interest in the plots held as sir lands by the vendor in 1879 were not transferred by the sale deed of that year, is correct.

The next question is whether the subsequent conduct of the parties can be taken into account. It now seems to be well established that so far as the interpretation of a document is concerned, the subsequent conduct cannot be taken into account: see 1917 P C 207 (6), but the surrounding circumstances can certainly be taken into account: 22 All 149 (7). Now in the sale deed of 1890 the vendor purported to transfer his remaining one anna share. As regards the sir lands he expressly said that his sir rights appertaining to the one anna share would pass. He exempted his interest in the house and the well from the sale. But he did not expressly say that his other sir rights would remain intact and would not be transferred. It is this omission which has been the source of a good deal of trouble. The fact however remains that he does not appear to have asserted his rights as proprietor of these isolated plots and does not appear to have been any steps to have them recorded as miscellaneous properties belonging to him as proprietor. On the other hand, it appears that he allowed his name to be entered by the Revenue Court as an exproprietary tenant in respect of the entire area which had been his sir lands. It might well be that the Revenue Court following the opinion expressed by the Board of Revenue took the view that by the first two sale deeds he had not lost his sir rights in any plot at all and that he became an exproprietary tenant in respect of the entire sir lands when the sale deed of 1890 was executed by him; and it was on that account that they recorded him as an exproprietary tenant. The same vendor in 1914 clearly admitted that he was an exprietary tenant in respect of the entire area out of which he sold 4.78 acres. The reduction in the rent then was also calculated on the basis of the entire area of his exproprietary tenancy.

No doubt the subsequent admission made by him is not conclusive and is not irrebuttable, and it is open to him to explain away his admission. It is also quite clear that it does not operate as an estoppel against him. But the fact remains that for the last 40 years he has been recorded as an exproprietary tenant of these plots. The whole history of the events that have passed during this long interval is not before us. Indeed, there is one litigation between the present plaintiff and the widow Mt. Ramkali in respect of exproprietary tenancies in which there is a strong indication that the principal sale deed of 1890 was in question and was interpreted. There are no doubt certain passages which indicate that Mt. Ramkali was the predecessor of the present defendants but the pleadings which would clinch the matter are not before us. The fact remains that the defendant has merely tried to rebut the presumption arising from the admission of 1914 by the fact that in the year 1879 her predecessor did not transfer her proprietary interest in the three annas share. That is not in itself sufficient to show that she had really not lost her proprietary interest in the plots by 1914. The claim put forward by the defendant is obviously a stale one which she and her predecessor had not asserted for at least two generations, and it cannot be said therefore that she

3. Sital Prasad v. Amtul Bibi, (1885) 7 All 633=1885 A W N 185 (F B).
4. Safdar Ali v. Dost Muhammad, (1890) 12 All 426=1890 A W N 117 (F B).
5. Puran Singh v. Dat Ram, 1924 All 447=79 I C 645=46 All 165.
6. Maung Kyin v. Ma Shwe Law, 1917 P C 207 =42 I C 642=45 Cal 320=44 I A 236=9 L B R 114 (P C).
7. Balkishen Das v. W. F. Legge, (1900) 22 All 149=27 I A 58=7 Sar 601 (P C).

has discharged the burden of proof which lay upon her on account of the previous admission of Bandhan. I accordingly concur with the order proposed.

K.S. *Appeal dismissed.*

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NIAMATULLAH & RACHHPAL SINGH, JJ.

Mt. Ehatishammunnisa and *another* —Applicants.

v,

Mir Hadi Ali and *others*—Opposite Party.

Civil Revn. No. 105 of 1934, Decided on 28th March 1935, from decision of Dist. Judge, Budaun, D/- 19th January 1934.

Succession Act (1925), S. 379—Deposit of sum equal to fee payable on succession certificate is not court-fee on application for succession certificate—Test of pauperism is to see whether applicant can pay court-fee on application and not sum to be deposited —Civil P. C. (1908), O. 33, R. 1.

The deposit under S. 379, Succession Act, of a sum equal to the fee payable on a succession certificate cannot be considered to be court-fee payable on the application for a succession certificate (which corresponds to a plaint in a suit). This deposit is made necessary to ensure payment of Court fee when the succession certificate is to be issued. As a matter of fact, the Court-fee on such certificate is payable under the Court-fees Act, Sch. 1, Art. 12, and is paid when the certificate is issued, i. e. after the termination of the proceedings under the Succession Act. The test of pauperism laid down by the Explanation to R. 1, O. 33. Civil P. C., is therefore not that the applicants have no means of paying the sum required to be deposited under S. 379, Succession Act, but that they have no means of paying the court-fee on the application for a succession certificate, that is, a trifling amount of eight annas: 18 *Bom* 237, *Dist.* [P 736 C 1]

G. S. Pathak—for Applicant.

Shiva Prasad Sinha — for Opposite Party.

Order.—This revision raises a question of a somewhat unusual character. The applicants applied in the Court of the District Judge, Budaun, for a succession certificate in respect of debts due to their deceased mother, Mehdi Begum. It was stated in the application that the petitioners were paupers and had no funds to pay the fee prescribed for the grant of a certificate for collection of the debts of the deceased. In effect, the applicants prayed that they be exempted from the rule contained in S. 379, Succession Act, which requires the deposit of a sum equal to the fee payable under the Court-fees Act, in respect of the certificate on an application being made therefor. The learned District Judge dismissed the application holding that the provisions of the Civil Procedure Code, relating to suits and appeals in forma pauperis do not apply to proceedings for grant of a succession certificate under the Indian Succession Act. The order of the learned District Judge is challenged in revision.

It is argued, on the authority of S. 141, Civil P. C., that the procedure prescribed by the Code of Civil Procedure for suits is applicable to all proceedings in any Court of civil jurisdiction and that therefore O. 33, which provides for pauper suits, is applicable to applications for grant of succession certificates. Assuming that S. 141, Civil P. C., makes every part of the Code applicable to proceedings in a Court of civil jurisdiction, it seems to me that there is an insurmountable difficulty in acceding to the prayer of the applicants. O. 33, R. 1, provides that, subject to certain provisions, any suit may be instituted by a pauper. The explanation appended to that rule defines a pauper as a person who

> is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary apparel and the subject-matter of the suit.

Assuming that proceedings for grant of a succession certificate can be taken to be a suit under O. 33, read with S. 141, the application for a succession certificate is the plaint. The applicants can be considered to be paupers only if they are not possessed of sufficient means to enable them to pay the fee prescribed by law for the application for succession certificate. In other words, unless they can show that they were not possessed of even 8 annas, they cannot be considered to be "paupers" as defined in the Explanation. This is not a case in which no court-fee is payable on the plaint (in this case the application for the certificate) so that they may be treated as paupers because they are not possessed of property worth Rs. 100. It was pointed out that under S. 379, Succession Act:

> every application for a certificate. . . . shall be accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, in respect of the certificate. . . . .

and an attempt was made to argue that if the applicants for a succession certificate are not possessed of sufficient means to enable them to deposit the sum equal to the prescribed Court-

fee, they should be treated as "pauper" in terms of the explanation above referred to. Reference was also made to O. 33, R. 8, which provides that, if the application for permission to sue as a pauper is granted, the plaintiff is not liable to pay any court-fee (other than fee payable for service of process) in respect of any petition, appointment of a pleader or other proceedings connected with the suit. According to Sch. 1, Court-fees Act, ad valorem fes are payable on a number of documents, including succession certificates. It is said that once the applicants are declared paupers, they will be exempt from payment of court-fee on the succession certificate. This contention may be correct; but the initial difficulty is that the applicants cannot be declared paupers, unless the requirements of the Explanation to R. 1, O. 33, are strictly fulfilled. The deposit under S. 379, Succession Act, of a sum equal to the fee payable on a succession certificate cannot be considered to be court-fee payable on the application for a succession certificate (which corresponds to a plaint in a suit). This deposit is made necessary to ensure payment of court-fee when the succession certificate is to be issued. As a matter of fact, the court-fee on such certificate is payable under the Court-fees Act, Sch. 1, Art. 12, and is paid when the certificate is issued, i. e., after the termination of proceedings under the Indian Succession Act. The test of pauperism, laid down by the Explanation to R. 1, O. 33, Civil P. C., is therefore not that the applicants have no means of paying the sum required to be deposited under S. 379, Succession Act, but that they have no means of paying the court-fee on the application for a succession certificate, that is, a trifling amount of eight annas.

The applicants claim as heirs of the deceased lady; and assuming that, for the purposes of succession certificate, their position as heirs alone has to be considered and their own means have to be disregarded, they must show that, as heirs of the deceased, they have no means of paying even eight annas. As a matter of fact, the application for grant of a succession certificate was stamped, as required by the Court-fees Act. It is certainly conceivable that the legal representatives of a deceased person may not be in possession of assets equal to the value of the stamp payable on a mere application. In an ordinary case it will be difficult for an applicant for succession certificate claiming as an heir to satisfy the Court that, as person representing the estate of the deceased, he has no means of paying even that amount. 18 Bom 237 (1) was strongly relied upon by learned advocate for the applicants. That was a case in which a probate had been applied for in forma pauperis. Sterling, J reluctantly admitted the application and was greatly influenced by the equities of the case. He observed as follows:

> **I had, on a previous occasion, refused to accept such a petition, as no precedent was in existence for such a course being pursued, but in the present instance the matter was pressed upon me as one of great hardship, as the deceased had during her lifetime filed a suit to recover the property in question; and as she was a Christian, that suit must now be dismissed unless the applicant could obtain probate of her will. I therefore allowed the petition to be interpreted and affirmed gratis, so that the matter might be set down as a pauper petition and the points at issue be fully discussed.**

The Judge then proceeded to discuss the question whether a person who has been allowed to apply for a probate in forma pauperis is exempt from payment of the court-fee prescribed for a probate, and answered it in the affirmative. He referred to Section 647, Civil P. C., (141 of the present Code), and applied Ch. 26 (Order 33) of the present Code. He then referred to S. 410 (O. 33, R. 8), Civil P. C., which exempts a person allowed to sue in forma pauperis from payment of all court-fees, except those payable for service of process. The essential distinction between that case and the one before us lies in the fact that Sterling, J., accepted the application for probate as one made by a pauper, which implied that permission to prosecute it as a pauper had already been granted. The reasoning which followed on that assumption clearly flows from S. 647 (now S. 141) and from S. 410 (now O. 33, R. 8), which were held to be applicable. In the present case, the learned District Judge had to consider at the threshold of the case whether the applicant could be permitted to apply in forma pauperis. Though he has not referred to the Explanation to O. 33, R. 1, and has thrown out the application on the ground that the provisions of the Civil Procedure Code, relating to pauper suits do not apply to such applications, the operative part of his order

1. In the matter of the will of Dawubai, (1894) 18 Bom 237.

can be supported on the grounds herein stated. It cannot be said that he failed to exercise a jurisdiction vested in him by law.

I have so far assumed that by virtue of S. 141, Civil P. C., all the provisions of that Code apply to proceedings for grant of succession certificates. There is some authority against that general assumption. A Division Bench of this Court held in 1924 All 376 (2), that, except in so far as is expressly provided by the Act itself, the general provisions of the Code of Civil Procedure cannot be deemed to be applicable by virtue of S. 141 of the Code to a Court sitting as a Court administering the Succession Certificate Act. Accordingly it was held that no Receiver could be appointed in proceedings taken for the grant of succession certificates. Some legislative changes have taken place since this decision. The provisions for grant of succession certificates are now embodied in the Indian Succession Act: and it may be that a different view is now permissible. I express no decisive opinion on this point and prefer to rest my decision on the assumption that the entire Civil Procedure Code is applicable, as is contended for by the applicants. As already held, that assumption does not enable the applicants to get over the difficulty created by the definition of "pauper" given in the Explanation to O. 33, R. 1, Civil P. C.

The result is that I would dismiss this application with costs.

Rachhpal Singh, J.—I agree.

K.S. *Application dismissed.*

2. Kanhaiya v. Kanhaiya Lal, 1924 All 376=79 I C 363=46 All 372.

A. I. R. 1935 Allahabad 737

BAJPAI, J.

Siraj Uddin—Applicant.

v.

Syed Haidar Hussain, Decree-holder and *another*, Judgment-debtor — Opposite Party.

Civil Revn. No. 578 of 1934, Decided on 15th January 1935, against order of Sm. C. C. Judge, Agra, D/- 10th February 1934.

Civil P. C. (1908), O. 21, Rr. 122 and 123 (Rules framed by Allahabad High Court)—Commissioner appointed to attach moveables—He appointing supurdar without permission of Court for convenience—Act approved by Court—Supurdar is liable.

Previous permission of the Court is necessary only in the case of a guard or watchman where such guard or watchman is put in special charge of property under R. 123, O. 21, Civil P C.

Where the Commissioner considered that the appointment of supurdar as a custodian was most convenient and econominal and submitted the entire proceedings to the Court and his act was approved by the Court:

Held: that the supurdar was liable and further he cannot be exonerated from responsibility when he in definite and unambiguous terms took upon himself the position of custodian and gave a solemn undertaking to produce the goods when required by the Court: 48 *All* 510=95 *I C* 828=1926 *All* 406, *Held Overruled*; 1931 *All* 567, *Ref.* [P 738 C 1]

R. N. Gurtu—for Applicant.

N. P. Asthana—for Opposite Party.

Order.—The facts of this case are that a conditional order of attachment before judgment was passed in the suit of Hyder Husain v. Latafat Husain on 3rd September 1932 and Pandit Rama Shanker Tewari, a vakil of the Court, was directed to attach the moveable goods in the shop of Latafat Husain. He proceeded to the spot, attached the goods and appointed one Sirajuddin as a supurdar. From the report of the Commissioner, his evidence taken in the present proceedings and the document of supurdnama executed by Sirajuddin, it is clear that the latter was entrusted with the custody of the goods in the shop of Latafat Husain and accepted the liability of producing them when required by the Court. Later on he seems to have represented to the Court that he did not like to remain the custodian because Latafat Husain was removing the goods. The Court instituted an enquiry into the complaint made by Sirajuddin. Finally the Court ordered on 10th February 1934 that the supurdar should produce the property which was entrusted to him, by 14th February 1934 and in default the supurdar was personally liable for money-value of the property.

In revision against this order it is contended before me that the Court below was wrong in making Sirajuddin liable because the Commissioner, Rama Shankar Tewari, had not obtained the permission of the Court to appoint a supurdar and therefore the Commissioner alone is liable. Reliance is placed on 1926 All 406 (1). That case undoubtedly supports the applicant because therein it was held that if a Commissioner in the case of moveable goods appoints a supurdar without the previous permission of the Court the Commissioner remains responsible and is not exonerated nor is the res-

1. Badri Prasad v. Chokhey Lal, 1926 All 406=95 I C 828=48 All 510.

possibility shifted on to the supurdar. This case however was considered by a Full Bench of this Court in 1931 All 567 (2) and definitely overruled. It was said that the previous permission of the Court is necessary only in the case of a guard or watchman where such guard or watchman is put in special charge of property under R. 123, O. 21, Civil P. C. In a case like the present O. 21, R. 122 is applicable which lays down that for the safe custody of moveable property other than live stock while under attachment the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical. In the present case the Commissioner considered that the appointment of Sirajuddin as a custodian was most convenient and economical and submitted the entire proceedings to the Court. This act of the Commissioner was brought to the notice of the Court and it held good until disapproved. In the present case we have further on the record an order dated 17th October 1932 by which the learned Judge on the application of Sirajuddin issued notice to the judgment-debtor and asked for explanations from the plaintiff and the Commissioner. This would go to show that the action taken by Pandit Rama Shanker Tewari met with the approval of the Court.

It was then contended relying on a certain statement made by Latafat Husain that the goods of the shop had prior to the present attachment been attached in the suit of Manzoor Husain v. Latafat Husain and as such the subsequent attachment was illegal. There is no material on the record except the statement contained in an application of Latafat Husain that the goods had been previously attached in other proceedings, and in any event Sirajuddin cannot be exonerated from responsibility when he in definite and unambiguous terms took upon himself the position of a custodian and gave a solemn undertaking to produce the goods when required by the Court. I am of the opinion that the order of the Court below is right and I dismiss this application with costs.

K.S. *Application dismissed.*

2. Shakir Husain v. Chandu Lal, 1931 All 567=134 I C 836 (F B).

A. I. R. 1935 Allahabad 738

GANGA NATH, J.

Mt. Shah Jahan Begam—Defendant—Appellant.

v.

Ghulam Rabani—Plaintiff — Respondent.

Second Appeal No. 429 of 1933, Decided on 27th March 1935, from decision of Sub-Judge, Agra, D/- 19th December 1932.

(a) Civil P. C. (1908), O. 43 (m)—No second appeal lies from order in appeal under O. 43(m).

No second appeal lies from an order in an appeal under O. 43(m). [P 739 C 1]

(b) Civil P. C. (1908), Ss. 99 and 115 — Compromise decree — Omission to record compromise does not affect validity of decree.

The omission to record the compromise is not fatal to the validity of the decree passed on compromise. The defect is cured by S. 99, Civil P. C., and consequently there is no reason for interference even on the revisional side. [P 739 C 1]

M. H. Faruqi—for Appellant.

M. L. Chaturvedi—for Respondent.

Judgment.—This is a defendant's appeal and arises out of a suit brought against her by the plaintiff. The parties entered into a compromise on which a decree was passed. The trial Court's order was:

"The parties have come to terms. Suit is decreed in the terms of the compromise which shall be reproduced in the decree. Costs on parties."

Against this decree an appeal was filed under O. 43 (m), Civil P. C., by the defendant. The chief grounds taken by her in the memorandum of appeal were:

"(1) Because the learned Munsif was wrong in not recording the so-called compromise and in not enquiring whether the compromise was acceptable to the appellant and (2) because the so-called compromise was effected without consent of the appellant and was not binding on her."

The learned Subordinate Judge of Agra found that the trial Court had omitted to order the recording of the compromise but the compromise was made with the consent of the appellant. The learned Subordinate Judge was of the opinion that there was no reason to interfere with the decree of the trial Court. The compromise, as a matter of fact, was verified by the appellant's counsel who had full authority to compromise the suit. The parties had taken one day's time for the compromise and the compromise was filed the next day. The appellant's son, who was living with the appellant, was

looking after the case in the trial Court. The learned Subordinate Judge has observed:

"From the evidence on the record it is clear that the appellant's case in the trial Court was managed by her own son. The son and his mother (the appellant) live together in Agra. One whole day was taken by the parties to consider the compromise, before it was filed on the following day."

The learned Subordinate Judge was of the opinion that the technicality did not vitiate the compromise. The learned Subordinate Judge recorded a finding: "I find, as a matter of fact, that she entered into a compromise." A preliminary objection has been taken by the learned counsel for the respondent that no second appeal lies. As already stated, the appeal in the lower Court was under O. 43 (m), Civil P. C. The heading of the memorandum of appeal also shows that the appeal was filed under O. 43 (m), Civil P. C. S. 104 (2), Civil P. C., lays down that no appeal shall lie from any order passed in appeal under this section. It is evident that no second appeal lies. The learned counsel for the appellant states that the matter may be considered on the revisional side. The question is whether the omission to record the compromise is fatal to the validity of the decree. The defect is cured by S. 99, Civil P. C., which lays down:

"No decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

As already stated, it has been found by the lower appellate Court that the compromise was entered into by the appellant. The omission to record the compromise does not affect the merits of the case or the jurisdiction of the Court. The defect therefore is cured by S. 99, Civil P. C., and consequently, there is no reason for interference even on the revisional side. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 739

ALLSOP, J.

Muhammad Musa—Plaintiff—Appellant.

v.

Qasim Husain and *another* — Defendants—Respondents.

Second Appeal No. 376 of 1933, Decided on 13th March 1935, from decision of First Sub-Judge, Saharanpur, D/- 9th December 1932.

(a) Evidence Act (1872), S. 115—Estoppel by representation—What is necessary for its operation stated.

For an estoppel by representation to come into operation, there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position :

Held : on facts there could not be any estoppel. [P 740 C 1,2]

(b) U. P. Land Revenue Act (3 of 1901), S. 233-K — No partition taking place — S. 233-K does not come into operation.

Although an application for partition was made but the proceedings were afterwards quashed and no partition took place :

Held : the provisions of S. 233-K of the Act cannot come into operation. [P 740 C 2]

K. Masud Hasan—for Appellant.
Akhtar Husain Khan—for Respdts.

Judgment.—This second appeal arises out of a suit for possession over certain property. It apears that the appellant executed a deed of sale on 9th January 1920, in favour of the defendants-respondents. It has been found as a fact by the learned Judge of the lower appellate Court that that deed of sale was intended to transfer and did transfer only certain property. It so happened that the vendor also mentioned in the deed of sale that he was the owner of certain other property and it is in respect of that other property that the suit which has given rise to this appeal was instituted. The vendees applied for mutation of the register not only about the property which is found to have been sold but also about this other disputed property which is the subject of the present appeal. Thereafter the appellant instituted the suit in order to recover possession over this property. One of the defences was that the property in dispute had been included in the deed of sale and had been transferred by it. This defence was negatived by the

lower appellate Court and the appeal before me has been argued on the assumption that this finding was right.

Another defence was that the appellant was estopped from alleging that the disputed property had not been sold. It appears that a sum of Rs. 90, part of the consideration for the sale was not paid at the time when the sale, took place. It was subsequently paid on 17th February 1921, and at that time the appellant executed what he describes as a receipt and what the other side claimed to be an agreement. In this document he admitted that the disputed property was sold by the deed of 9th January 1920. There was also an application made by the vendees, i. e., the respondents, for the partition of the property which they had purchased and when the question of their ownership arose in the partition proceedings the appellant did not raise any objection. It is argued that the appellant's admission in his receipt or agreement of 17th February 1921. and his failure to contest the claim of the respondents in the mutation proceedings when they obtained mutation without any protest on his part and in the partition proceedings, all amount to estoppels by way of acquiescence. Reliance has been placed on 1926 Lah 650 (1). That case was decided by the Lahore High Court and the decision depended in some measure upon the customary law of alienation of ancestral land in that province. The decision was based, it appears, on the provisions of S. 115, Evidence Act, i. e., the Court apparently intended to hold that there was an estoppel by judgment. The decision is no authority for the proposition which has been acted upon by the lower appellate Court in the present case. It has not been suggested that the decision in the mutation case could operate as res judicata. It is obvious that the decision could have no such effect. What the learned Judge of the lower appellate Court has held is that there has been an estoppel by representation. For such an estoppel to come into operation there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position. In the present case the parties were also parties to the deed of sale. It has been held as a fact which is not now contested that the deed of sale was evidence of a transaction by which the parties intended to transfer certain other property but not the property in suit. As the respondent was a party to that transaction, it is difficult to see how he could have been deceived about its true nature by the subsequent conduct of the other party. In the first place it cannot be said that he was deceived and in the second place it is not even alleged that he in any way changed his legal position at any time acting on the belief that he was the owner of the property. In these circumstances no estoppel can come into operation against the appellant.

A further argument has been raised that the partition proceedings prevent the Civil Courts from taking any action in this matter under the provisions of S. 233-K Land Revenue Act. The learned Judge of the lower appellate Court has however pointed out that although an application for partition was made, the proceedings were afterwards quashed and no partition took place. The provisions of S. 233-K Land Revenue Act can therefore not come operation. As it has been held that the property was not transferred by the deed of sale and as I consider that no estoppel and that the suit is not barred by S. 233-K Land Revenue Act, the plaintiff is entitled to a decree for possession. A decree will, be prepared in terms of the relief claimed and the respondents will pay the appellant's costs in all Courts.

K.S. *Order accordingly.*

1. Ram Sarup v. Ram Sarn, 1926 Lah 650=96 I C 915.

A. I. R. 1935 Allahabad 740

KENDALL, J.

B. Raghubir Das—Defendant — Applicant.

v.

B. Sital Prasad and *others*—Opposite Party.

Civil Revn. No. 626 of 1934, Decided on 26th April 1935 against order of Sub-Judge, Gorakhpur, D/- 28th July 1934.

Civil P. C. (1908), O. 23, R. 1, and S. 115 —Order under —High Court is reluctant to interfere in revision—But if lower Court has not exercised discretion in judicial manner, High Court can interfere.

The High Court is very reluctant to interfere in revision with orders passed under O. 23, R. 1.

But the reluctance has been in every case to interfere with the discretion of the Court. Where the Court has not observed the rule and has not had before it the considerations by which it ought to be guided it is certainly proper to exercise the revisional powers of the High Court: 1934 *All* 214; 1935 *All* 284 and 1918 *All* 418, *Expl.* [P 742 C 1]

Shiva Prasad Sinha—for Applicant.

Muhammad Ismail—for Opposite Parties.

Order.—This is an application for the revision of an appellate order passed by the Subordinate Judge of Gorakhpur allowing the opposite parties to withdraw their suit under O. 23, R. 1, Civil P. C. The circumstances briefly are that the plaintiff opposite-parties had brought a suit for a declaration that they alone were entitled to realise the dues from certain shopkeepers, and they also claimed an injunction against interference with this alleged right. The Munsif after taking all the evidence and hearing arguments dismissed the suit. The plaintiffs appealed, but during the course of the appeal they made an application to be allowed to withdraw the suit on the ground that there was a formal defect, namely, that they had not claimed an alternative relief in the event of their being found not to be in possession of the property; and as the trial Court had dismissed the suit in accordance with the provisions of S. 42, Specific Relief Act, this defect was fatal to the suit, and therefore they prayed that they should be allowed to withdraw it with liberty to institute a fresh suit. The appellate Court without discussing the merits of the application remarked that there was a patent defect and that the suit might be withdrawn, but directed that costs should be paid to the respondents; and the order which I am asked to revise is a subsequent one passed in the following words:

Costs of both the Courts paid to respondent. The plaintiff is allowed to withdraw the suit, with liberty to file a fresh separate suit. Appeal disposed of accordingly.

There can be no doubt that permission was given because the plaintiffs had claimed that the provisions of S. 42, Specific Relief Act, were fatal to the suit as it stood, and although the Court has not in so many words given this as the reason for permitting the suit to be withdrawn, it is argued on behalf of the opposite parties that this undoubtedly was the reason, and that it did amount to a formal defect in the suit as it originally stood. I have been referred to the judgment of the trial Court, which has disposed of the plaintiffs' case for a number of reasons and only mentioned S. 42, Specific Relief Act, by the way. There is no issue relating to S. 42 of the Act. and it was not by any means the only reason the Munsif had for dismissing the suit. It is quite clear that the orders passed by the learned Subordinate Judge are defective in that they do not show his reason for allowing the plaintiffs' application. He has not even described what the formal defect was, nor has he discussed the question of whether it was a defect that may be fatal to the suit. All he has done is to remark that there was a "patent" defect.

In support of his order I have been referred to a decision of a Bench of this Court in 1918 All 418 (1) in which it was held that where a Court had given leave to the plaintiff to bring a fresh suit, the fact that the Court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiff's application was not sufficient to bring the case within the purview of S. 115, Civil P. C. This was followed in the case of 1935 All 284 (2). This latter Bench in following the earlier decision remarked that the earlier Bench had held that even if the Court below had exercised a wrong discretion (not merely might have exercised a wrong discretion) in granting leave to withdraw the suit, the case would not come under S. 115, Civil P. C. In another case 1934 All 214 (3) another Bench of this Court remarked that where the Court had exercised its discretion the order should not be interfered with by the High Court in the exercise of its revisional powers. In this case the Bench was clearly of opinion that the lower Court had not exercised a proper discretion.

I cannot however find in any of these decisions which have been quoted on behalf of the opposite-parties that there is any authority for holding that the Court should not interfere if it considers that the lower Court has not applied its mind to the matter before it, or in other words, has not exercised its discretion in a judicial manner. In the present case the question before the Court was whether the

1. Jhunku Lal v. Bisheshar Das, 1918 All 418=46 I C 71=40 All 612.
2. Chiranji Lal v. Irphan Ali, 1935 All 284=153 I C 684.
3. Kali Ram v. Dharmon, 1934 All 214=147 I C 441.

formal defect which undoubtedly existed must necessarily be fatal to the suit That question, the Court has not discussed, and does not appear to have considered. There is nothing to show why the plaintiff should not have applied for an amendment of his plaint as is frequently done in similar suits under the Specific Relief Act. It is true that it was a late stage at which to amend the plaint, because the matter had already come before the appellate Court. But the same objection of course applies to an application to withdraw the suit under R. 1, O. 23. It may be that the plaintiffs believed that the Court would not have granted a prayer for the amendment of the plaint, and the Court may also have been of that opinion. But if the question had been discussed and the Court had decided that it was too late a stage at which to allow the amendment of the plaint, it would also have had to consider whether it was not too late a stage at which to allow the suit to be withdrawn. and in fact the matter would have been fully discussed and the question of whether R. 1, O. 23 could be properly applied would have been satisfactorily decided.

The order of the lower appellate Court appears to be objectionable on two grounds: Firstly, it is in itself defective because it does not disclose that the Court has applied its mind to the matter and exercised its discretion judicially, and secondly, the order appears to be on the face of it a wrong order, in that the defect referred to by the plaintiff in his application as a ground for being allowed to withdraw the suit need not necessarily have been fatal to the success of the suit, so that apparently the Court had not jurisdiction under the provisions of O. 23 to allow the suit to be withdrawn. It is true that the Court has been very reluctant to interfere in revision with orders passed under O. 23, R. 1. But the reluctance has been in every case to interfere with the discretion of the Court. Where the Court has not observed the rule and has not had before it the considerations by which it ought to be guided, it is certainly proper to exercise the revisional powers of this Court. The fact of doing so in the present case will, so far as can be seen, be greatly to accelerate the disposal of the litigation between the parties. I therefore allow the application with costs, set aside the order passed by the lower appellate Court, and direct that the appeal be now readmitted to its original number and disposed of according to law.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 742

GANGA NATH, J.

Ram Deo Kurmi—Plaintiff — Appellant.

v.

Ram Rathi and *others*—Defendants—Respondents.

Second Appeal No. 801 of 1933, Decided on 2nd April 1935, from decision of Second Addl. Sub-Judge, Jaunpur, D/- 28th April 1933.

Hindu law—Father—Alienation by father while no son in existence—Subsequent born son cannot challenge it—But if son is alive at time of alienation, subsequent born son can challenge it unless alienation has been ratified by existing son before birth of subsequent born son—Cause of action for suit arises when alienee takes possession of property irrespective of whether suit is filed by son or subsequent born son.

An alienation of joint family property made by a father, there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of alienation on the ground that it was made without legal necessity. But the alienation made by a father who has sons then living, the alienation not being one for legal necessity or for payment of an antecedent debt, is invalid if made without their consent. Such an alienation may be set aside not only at the instance of those sons but at the instance of any son born after the date of alienation, unless it was ratified by them before his birth. The cause of action in a suit to set aside the father's alienation arises when the alienee takes possession of the property. The period of 12 years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in existence at that date, but also the suit of a son not in existence at that date. The subsequent birth of the latter does not create a fresh cause of action, or a new starting point from which limitation should be reckoned: 1925 *P C* 33, *Ref.* [P 743 C 1]

Lakshmi Saran—for Appellant.

A. P. Bagchi—for Respondent.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by him against the defendants-respondents for a declaration that the sale deed, dated 11th April 1910, executed by Bisheshar Kurmi in favour of Narain Kurmi, father of defendant-respondent No. 1, was invalid. The plaintiff is the grandson of Bisheshar Kurmi. Bisheshar Kurmi had two sons, Budhu and Sidhu living with him at the time of the sale deed. Ramdeo, plaintiff-appellant, was born sometime in

1919, long after the sale deed. The plaintiff's case was that the sale was not for any valid necessity and was invalid. Defendant 1 contended that the sale was for valid necessity, that the plaintiff had no right of suit and that the suit was time-barred. The trial Court found that out of the consideration of Rs. 100, only Rs. 10 were paid for a legal necessity, but it dismissed the suit on the ground that the plaintiff having not been born on the date of the sale was not competent to challenge it. On appeal, the Additional Subordinate Judge found that the plaintiff had a right to challenge the alienation but the suit was time-barred. He dismissed the suit. Against this decision this appeal has been filed. The points for consideration are whether the plaintiff had a right of suit and is his suit within time. There can be no doubt that, if at the time of an alienation there is no son, a son who is born subsequently to the alienation cannot challenge it. An alienation of joint family property made by a father, there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of alienation on the ground that it was made without legal necessity. But an alienation made by a father who has sons then living, the alienation not being one for legal necessity or for payment of an antecedent debt is invalid, if made without their consent. Such an alienation may be set aside not only at the instance of those sons but at the instance of any son born after the date of alienation unless it was ratified by them before this birth.

In this case it has not been shown that the alienation in suit had been ratified by Budhu and Sidhu before the birth of the plaintiff. The plaintiff therefore had a right to challenge the alienation.

The cause of action in a suit to set aside the father's alienation arises when the alienee takes possession of the property. The period of twelve years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in existence at that date, but also the suit of a son not in existence at that date. The subsequent birth of the latter does not create a fresh cause of action, or a new starting point from which limitation should be reckoned. In 1925 P C 33 (1) four sons of a Hindu who with him formed a joint family governed by the Mitakshara, sued in 1920 to recover possession of an ancestral village which had been sold by their father in 1893.

The fourth plaintiff was not born until 1900 and the suit was brought within three years of his reaching his majority. It was held that the suit was not prevented by Ss. 6 and 7, Limitation Act, from being brought under Art. 126, Sch. 1, since the cause of action arose in 1893 when the youngest plaintiff was not in existence and no new cause of action arose upon his birth; the youngest plaintiff was not therefore within S. 6 a "person entitled to institute the suit at the time from which the period of limitation was to be reckoned." The suit is evidently barred by limitation. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal dismissed.*

1. Ranodip Singh v. Parmoahwar Prasad, 1925 P C 33 = 86 I C 249 = 52 I A 69 = 47 All 165 (P C).

A. I. R. 1935 Allahabad 743

KENDALL, J.

Wahid Ullah Ahrari—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 8 of 1935, Decided on 11th March 1935, from order of Sess. Judge, Aligarh, D/- 13th December 1934.

Penal Code (1860), S. 499 — Essence of offence of defamation mentioned — Article alleging girls of certain College guilty of misbehaviour—All girls in College collectively and individually must suffer in reputation—Complaint by some of them is competent.

The essence of the offence of defamation is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed.

Where the articles in question described the girls in a particular College that they were habitually misbehaving:

Held: that the inevitable effect on the reader must be to make him believe that it was habitual with the girls of the College to behave in this way; that being so all the girls in the College individually must suffer in reputation and that a complaint by some of them was competent: 1922 *Pat* 101, *Dist.* [P 744 C 2, P 745 C 1]

Kumuda Prasad—for Applicant.

M. Nasim and *Mrs. Faruqi*—for Opposite Parties.

Asst. Govt. Advocate—for the Crown.

Order.—This is an application for the revision of an order of the Sessions Judge of Aligarh upholding the order of conviction and sentence passed by a First Class Magistrate on the applicant under S. 500, Penal Code. The facts on which the conviction has been

based are given fully in the order of the Magistrate and the essentials have been repeated in that of the Sessions Judge. It is sufficient to state here that the applicant was admittedly responsible for two articles which were published in a paper called the University Punch, Aligarh, containing the most scandalous accusations against the girls of the Girls' Intermediate College of Aligarh. The articles are given in full both in English and Urdu in the order of the Magistrate. The first of them asserts that the girls of the college frequented broad Marris Road, green meadows and canal banks which are frequented by pleasure seeking youths every morning and evening for their solace and enjoyment, and also that Meena Bazar Exhibition was held within the precincts of the college, that university students and professors, Muslim and non-Muslim gentry of the town and gay officers visited the place after obtaining tickets for shopping with these educated Muslim harlots of the Meena Bazar. I should mention that the translation of the word "shahidan" into "harlots" has been objected to by learned Counsel for the applicant, and it is suggested that the word means no more than "beauties" unless it is connected with the word "bazar." This however is a very technical objection, because the implication conveyed by the word in its context is unmistakable. The second article refers to a particular case, namely that of a young girl who is said to have been found unconscious near the Girls' Intermediate Collage, and it was added that it was widely said that she was the victim of repeated brutal assaults. The implication of the article undoubtedly is that owing to the conditions within the college such an incident was quite likely to take place in its neighbourhood.

Both the Courts have agreed that the articles are defamatory. In the lower appellate Court a plea was taken that the person aimed at in the article was not the girls in the college, but the Honorary Secretary, and that he was not the complainant, so that the prosecution ought to fail. This was a purely technical argument and has not been pressed in this Court. The argument that has been pressed in appeal is, firstly, that the articles which contain the defamatory matter do not refer to the "boarder girls" but simply to the girls of the college. It is said that there are over 150 girls in the college of whom 75 are boarders, and of the 67 who joined in making the complaint in the present case one was a minor and her guardian subsequently withdrew from the prosecution. The argument is that if the articles are defamatory, they apply equally to any one of the girls in the college, and that no individual girl is defamed thereby, nor is the college collectively defamed. The case of 1922 Pat 101 (1), has been relied on by Mr. Kumuda Prasad, in which it has been remarked by a Bench of the Patna High Court that:

> **An imputation against an association or collection of persons jointly may amount to defamation within the meaning of S. 499 I P C., but it must be an imputation capable of being brought home to a particular individual or collection of individuals as such,**

and again

> **the rule is that if the words used contain no reflection on a particular individual or individuals, but may equally well apply to others, although belonging to the same class, an action will not lie.**

Explanation No. 2 of S. 499, Penal Code shows that:

> **It may amount to defamation to make an imputation concerning a company or association.**

In the case before the Patna High Court the defamatory words were used in regard to two constables who were said to have committed a particular act on a particular occasion. There was nothing in the article itself to show who the two constables were. They were not even referred to in the article as being constables of a particular thana, though they were taken by the villagers to have been two constables attached to Begunia Police Station. But there is nothing to indicate which were the two in question. The facts are certainly not analogous to those of the present case. Here the defamatory articles relate to the alleged habitual conduct of the girls of the Intermediate College. Those girls may be over 150 in number and it may not have been the intention of the writer of the articles to imply that every girl in the college was guilty of this conduct. The essence of the offence of defamation is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed, and as these articles do beyond question imply that the girls of the college are habitually guilty of the misbehaviour described in the articles, the inevitable effect on the reader must be to make him believe that it is habitual

1. Government Advocate, Bihar and Orissa v. Gopabadhu Das, 1922 Pat 101=67 I C 609=1 Pat 414=23 Cr L J 433.

with the girls of college to behave in this way.

That being so, all the girls in the college collectively and each girl individually must suffer in reputation. The difference between this case and the one before the Patna High Court is obvious. In that case two constables were accused of a particular act, and it did not follow from that that all constables suffered in their individual reputation.

The view that has been taken by the Courts appears to me to be perfectly correct, and there is no reason to interfere with the orders passed. The sentence no doubt is severe, but the offence as has been pointed out, was an extremely serious one and the applicant when on his trial made no attempt to express his regret or make any acknowledgment of the fact that he had done wrong. The application is therefore dismissed.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 745

KENDALL, J.

Bhagwan Das—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 70 of 1935, Decided on 3rd April 1935, from order of Sess. Judge, Meerut, D/- 21st January 1935.

Criminal P. C. (1898), S. 202 (1), Proviso—Magistrate cannot direct investigation by police until he examines complainant on oath—Omission to do so vitiates whole proceeding.

A Magistrate has no jurisdiction to direct an investigation by the Police until he had examined the complainant on oath. His omission to take this necessary step vitiates the whole of the proceeding: 1924 *Bom* 321 and 4 *O C* 127, *Ref.* [P 745 C 2]

A. Sanyal—for Applicant.

Asst. Government Advocate — for the Crown.

Order.—This application for revision arises out of the following circumstance. The applicant filed a complaint under S. 448, Penal Code, against Lala Budh Prakash, an Honorary Magistrate, on 29th October 1934. The Magistrate in whose Court it was filed did not examine the complainant on oath, but ordered an enquiry by the Police, and on November 5, a report was received that the complaint was false and that proceedings ought to be taken to file a complaint under S. 182 Penal Code. The Magistrate, therefore issued notice to the complainant for his appearance to show cause against such a complaint on November 30. Without going into details, it may be said that the record shows that this notice was not served on the present applicant. The Magistrate, however, took up the case on November 30, and in the absence of the applicant, passed an order in which he directed a complaint to be made against the applicant under Ss. 182 and 211 Penal Code.

An appeal was filed by the applicant in the Court of the Sessions Judge, and several arguments were advanced against the legality of the Magistrate's order of complaint. The learned Judge dealt with the matter at some length, but he held that there was no legal defect in passing the order without a notice being served on the applicant, and he further held that the proceedings of the Magistrate were not vitiated by his omission to record the statement of the applicant on oath. The learned Judge remarked:

> Here again under the law, as it now stands, no such recording of the statement of the complainant is necessary. In a case like this what has happened is that the Magistrate has refused to take cognizance. It is only when he actually does take cognizance that the Magistrate is bound to take down the statement of the complainant on oath.

It will be seen that the Magistrate decided to take action against the applicant on the basis of a Police report, but it is clear from the wording of the present proviso to sub-S. (1) of S. 202 Criminal P. C. that he had no jurisdiction to direct an investigation by Police until he had examined the complainant on oath. His omission to take this necessary step therefore vitiated the whole of the proceeding. I have been referred on behalf of the applicant to a decision of a Bench of the Bombay High Court in the case of 1924 Bom 321 (1), in which it was held that it was not permissible for the Magistrate to sanction the prosecution of the applicant under Ss. 182 and 211 Penal Code, where he had not examined him on oath, and the same view was taken in 1901, by the Judicial Commissioner's Court in Oudh in 4 I C 127 (2). Both these decisions, it will be noted, are prior to the amendment to S. 202 Criminal P. C., by which the proviso referred to above was introduced. I have no doubt, that the Magistrate's proceedings in directing a complaint to be made were without jurisdiction. I therefore allow the application, and set

1. In re Ningappa Rayappa Ghotadki, 1924 Bom 321=81 I C 608=25 Cr L J 960=48 Bom 360.
2. Ram Sarup v. Emperor, (1901) 4 O C 127.

aside the order of the Magistrate in which he directed that a compiaint be made against the applicant.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 746 (1)

KENDALL, J.

Ram Krishna—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 40 of 1935, Decided on 2nd April 1935, from order of Sess. Judge, Farrukhabad, D/- 8th December 1934.

Penal Code (1860), Ss. 283 and 290—Obstruction even if caused by negligence is offence—Deliberate intention is not necessary.

A public nuisance may undoubtedly be caused without any deliberate intention of causing it, and S. 283, and indeed S. 290 do not refer to the intention of the accused person. The obstruction may be caused by negligence.

Where the side of the road was occupied by the charpoy of the accused and the Sub-Inspector was obstructed in exercise of his public right:

Held: offence was committed: 17 *I C* 574, *Diss from*. [P 746 C 2]

Asst. Govt. Advacate—for the Crown.

Order.—This is a reference by the learned Sessions Judge of Farrukhabad recommending that the order passed by a Magistrate fining the applicant, Ram Krishna, Rs. 25 under section 283, Penal Code, be set aside. The circumstances are given in the order of reference. I am however by no means satisfied that the Magistrate was wrong in holding that there had been an offence under S. 283, Penal Code. The Sessions Judge has remarked that the placing of a charpoy on a public road does not amount to a public nuisance if there is no intention of obstructing traffic. S. 283 however does not refer either to a public nuisance or to the intention of the accused. It is one of the sections in Ch. 14 of the Code which deals with offences affecting the public health, safety, convenience, decency and morals, and the learned Judge has quoted from Dr. Gour's Penal Law of India, para. 2675:

The act contemplated may be of any kind, but it must be an act of positive commission involving as its result a public nuisance in the right sense of the term.

The learned commentator however goes on to say that if the act or omission has the effect mentioned in the section, that is to say, if it causes danger, obstruction or injury to any person in any public way or public lane, it constitutes a public nuisance. The section is enacted to protect persons in the exercise of their public right. In the present case the Sub-Inspector was exercising his public right to ride along the side of the road, and it was admitted that the side of the road was occupied by the charpoy of the applicant; and the circumstances were such that the Sub-Inspector was undoubtedly obstructed.

The Judge has also quoted the case of 17 I C 574 (1). The question raised there was whether there had been an offence under S. 290, Penal Code, and it was held that placing a charpoy temporarily on the road in the bazar without any intention of obstructing traffic does not amount to the offence of causing a public nuisance. With all respect to the learned Judge who decided that case, I do not feel that I am bound to follow the authority contained in the decision. A public nuisance may undoubtedly be caused without any deliberate intention of causing it, and S. 283, and indeed S. 290, do not refer to the intention of the accused person. The obstruction may be caused by negligence and in nine cases out of ten it is so caused. The offence in the present case does not appear to have been a very serious one, but I have not been persuaded that the Magistrate was wrong in regarding it as an offence, and I therefore reject the reference. Let the papers be returned.

K.S. *Reference rejected.*

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1. Kamla Prasad v. Emperor, (1912) 17 I C 574= 13 Cr L J 830.

A. I. R. 1935 Allahabad 746 (2)

SULAIMAN, C. J. AND BENNET, J.

Anrudh Rai and *another*—Plaintiffs—Appellants.

v.

Sant Prasad Rai and *others*—Defendants—Respondents.

Letters Patent Appeal No. 21 of 1934, Decided on 1st February 1935, against decision of Kendall, J., D/- 28th November 1933.

(a) Limitation Act (1908), S. 7—Dispute between joint Hindu family as one unit and stranger—Limitation runs out against manager—Minority of other member does not save limitation.

A suit brought by one member of a family against a transferee from the manager raises a question as to the authority of the manager, and in that sense, involves a dispute as to the respective rights of the members of the family inter se. The nature of such a suit is obviously distinguishable from that of a suit brought against a person, who is an entire stranger to the family who does not claim title through any member

of the family and who is setting up his adverse possession as a paramount title. In former cases the manager of the joint Hindu family represents the family as one unit, and if time has run out against the manager, limitation is not saved merely because there are some minor members still living. There is plently of authority of the High Court in support of the proposition that limitation is not saved when the dispute is between the joint Hindu family as one unit on the one hand and a stranger on the other: *Case law Ref.* [P 747 C 2]

(b) Landlord and Tenant—Tenant entitled under custom to sell grove with permission of zamindar—Zamindars constituting joint family — Consent of managing member is sufficient.

Where under a custom a tenant is entitled to sell the grove with the permission of the zamindar and the zamindars form a joint family, the consent of the managing member or a karta is enough. [P 748 C 2]

(c) Jurisdiction — Civil Court — Plaintiff filing suit in civil Court—Plea by plaintiff that Civil Court has no jurisdiction to entertain his suit cannot be entertained for first time in second appeal—Civil P. C. (1908), S. 100.

Where plaintiffs filed a suit in civil Court:

Held: that a plea taken by him for the first time in second appeal that the civil Court had no jurisdiction to try the suit could not be entertained. [P 748 C 2]

Shiva Prasad Sinha—for Appellants.

Judgment.—This is a plaintiffs' appeal under the Letters Patent from the judgment of a learned Single Judge of this Court affirming the judgment of the lower appellate Court. The plaintiffs brought a suit in the civil Court in respect of a grove in the possession of defendants 1 and 2, who also are zamindars, on the allegation that they purchased it from a tenant on 12th January 1917, who had no right to sell the grove, without the permission of the zamindars. At the time of the sale deed, the plaintiffs' father was alive, and although he survived till 1925, he did not bring any suit against the defendants. The present suit was filed on 18th April 1919, just over twelve years after the date of the sale. The plaintiff No. 1, the eldest brother is an adult, but the other brother is a minor. The defendants pleaded adverse possession over the grove and the finding on the question of adverse possession is against the plaintiffs. Their contention is that the claim of the plaintiffs is not barred by time, because the suit is brought within three years of their attaining their majority.

No doubt under S. 6, Limitation Act, where a person entitled to institute a suit is a minor at the time from which the period of limitation is to be reckoned, he is allowed to institute the suit within the same period after his disability has ceased, but under S. 8, that period cannot exceed three years. There is however S. 7, Limitation Act, under which where one of several persons jointly entitled to institute a suit is under any such disability but a discharge can be given without his concurrence, time will begin to run against them all. The question for consideration in this case is whether when time begins to run against the father and the manager of the joint Hindu family in favour of a stranger to the family, limitation is still saved if some of the other members are minors.

The learned advocate for the appellants relies on the case of 1930 All 861 (1), which followed the decision of their Lordships of the Privy Council in 1926 P C 16 (2). But that was a case where a suit was brought by a younger brother for setting aside an alienation made by his father when another elder brother was alive and had not brought the suit. It was held that the claim of the younger brother was a distinct claim and was not barred on account of the omission of the other brother, who would not be entitled to give a valid discharge. It is to be noted that a suit brought by one member of a family against a transferee from the manager raises a question as to the authority of the manager, and in that sense, involves a dispute as to the respective rights of the members of the family inter se. The nature of such a suit is obviously distinguishable from that of a suit brought against a person, who is an entire stranger to the family, who does not claim title through any member of the family and who is setting up his adverse possession as a paramount title. In such cases the manager of the joint Hindu family represents the family as one unit and if time has run out against the manager, limitation is not saved merely because there are some minor members still living. There is plenty of authority of this Court in support of the proposition that limitation is not saved when the dispute is between the joint Hindu family as one unit on the one hand and a stranger on the other. In the case of 1924 All 738 (3), a Division Bench of this Court held that

1. Sheonandan Prasad v. Tahiran Bibi, 1930 All 861=130 I C 691=52 All 768.
2. Jawahir Singh v. Udai Parkash, 1926 P C 16 =93 I C 216=53 I A 36=48 All 152 (P C).
3. Baij Nath v. Ram Bilas, 1924 All 738=80 I C 12.

if a suit is brought by a younger brother against a trespasser, then the claim is barred by time if limitation has run out against the elder brother, who is the manager and karta of the family. In 1925 All 672 (4), another Bench of this Court also held that where several Hindu brothers constitute a joint Hindu family, the eldest brother represents the entire family and can give a valid discharge on behalf of his minor brothers to judgment-debtors against whom there is decree in favour of the family. In 94 I C 922 (5), yet another Division Bench came to the conclusion that the manager of a joint Hindu family being a member of a joint Hindu family can give a valid discharge on his own behalf and on that of a minor brother, and although a mortgage decree is obtained in their favour jointly, limitation is not saved if the younger brother remains a minor. All these were cases of dispute arising between the family as a whole on the one side and a stranger on the other and it was held that S. 7 was applicable and the manager and the karta of the family represented the whole family so far as the outside world was concerned. We may also quote the case of 1919 All 209 (6) as well as the Full Bench case of 34 All 549 (7). When the manager and the karta of the family is alive, minor members of the family are not entitled to bring a suit ignoring him, unless it were established that there is any collusion or fraud on the part of the manager. Time would begin to run not only against the manager in his personal capacity but also as against the family. We are therefore of opinion that the learned Judge was right in holding that the present plaintiffs as junior members were not entitled to institute a suit on behalf of the joint family in 1917 when the transfer took place while their father was alive, and that therefore limitation began to run not only against the father but also against the family from that date, and is not now saved simply because a minor member has attained majority within three years of the present suit.

There is an additional reason which could also be invoked against the appellants. They rely on a custom recorded in the wajibulrz under which a tenant's grove can be sold with the permission of the zamindars. It could not possibly have been intended that such a consent cannot be obtained if there is any minor member living among the families of the numerous zamindars in the village. Obviously the consent of the managing member or the karta would be enough, otherwise it would be practically impossible to sanction a transfer.

The last point urged on behalf of the plaintiffs is that the suit was not cognizable by the civil Court and their plaint should be returned to them for presentation to the proper Court. The plaintiff's came to Court on the allegation that this was a grove in the possession of defendants 1 and 2, who were the zamindars. There was no suggestion in the plaint that at the present moment the grove retains the character of a tenant's grove and is not a zamindar's grove. The defendants were pleading adverse possession over this property. Without going into the question of fact, it would be impossible to say that the suit was not cognizable by the civil Court. As the plaintiff chose the forum, it must be assumed against them that they treated the property as if it was not a land within the meaning of the Agra Tenancy Act. We therefore see no reason to entertain this plea for the first time in the Letters Patent appeal, particularly, as it was not urged before the learned Judge who heard the appeal. The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

4. Shiam Lal v. Mool Chand, 1925 All 672=87 I C 177.
5. Radha Kant Shukul v. Butai Misir, (1926) 94 I C 922.
6. Rati Ram v. Nadar, 1919 All 209=49 I C 990 =41 All 435.
7. Hori Lal v. Munman Kunwar, (1912) 34 All 549=15 I C 126 (F B).

A. I. R. 1935 Allahabad 748

NIAMATULLAH AND ALLSOP, JJ.

(*Firm*) *Baijanath-Balmakund*—Plaintiff—Decree-holder—Appellant.

v.

Chedi Lal and *others*—Respondents.

Exn. First Appeal No. 202 of 1933, Decided on 11th December 1934, from decision of Sess. and Sub-Judge, Cawnpore, D/- 21st January 1933.

(a) Compromise—Decree — Construction—Instalments to be paid on specified dates—If 3 instalments fell into arrears, decree-holder would be entitled to recover entire amount—Held fact that 3 instalments fell due was not enough—Payment of any of them should not be made.

Where the compromise decree provided that the instalments shall be paid on specified dates, and if payments were not made on those dates and three instalments were allowed to fall in

arrears, the decree holder would be entitled to recover the entire amount:

Held: that taking the compromise as a whole what the parties meant and the right construction to be pased on it was that the right of the decree-holder to recover the enhanced amount would come into existence if three instalments became overdue and none of them was paid. The fact that three instalments became due alone was not enough. There should be further condition that payment of any of them should not be made. [P 749 C 2]

(b) Execution— Decree payable in instalments—Tender filed in Court on due date and payment made next day—Held tender amounted to payment.

Where the judgment-debtor merely filed a tender in Court on the last day, and the actual payment was made the next day, i. e. one day after the date fixed for the payment:

Held: payment was made in time: 1929 *All* 207, *Dist.* [P 749 C 2]

B. Malik & Dharam Das—for Applt.

P.L. Banerji & S.N. Seth—for Respdts.

Judgment.—This is a decree-holder's appeal from an order passed by the learned Subordinate Judge of Cawnpore, disallowing execution of a decree applied for by the appellant. It appears that a compromise decree was passed in favour of the appellant for Rs. 20,000. The decree, however provided that if a sum of Rs. 13,000 was paid in the manner stated in the compromise it would be fully satisfied. If, on the other hand, payment was not made in the manner agreed on, the decree-holder would be entitled to take out execution for the entire amount. The manner of payment referred to in the compromise was in five instalments. The first instalment of Rs. 2,500 was payable on 22nd December 1929, the second one of the same amount on 22nd June 1930, the third of the same amount on 22nd December 1930, the 4th of the same amount on 22nd June 1931, and the last instalment of Rs. 3,000 was payable on 22nd December 1931. The compromise proceeded to lay down that in case the defendants failed to pay the instalments on due dates and three instalments were allowed to become overdue, or the defendants failed to pay Rs. 13,000 in $2\frac{1}{2}$ years, then in either case, the defendants would be liable to pay the entire decretal amount, namely, Rs. 20,000. No payment was made in respect of the first two instalments. On 22nd December 1930, when the third instalment was payable the judgment-debtors filed a tender of payment of Rs. 2,500, which was actually deposited in the treasury on the next day. The judgment-debtors subsequently paid the remaining part of Rs. 13,000 within the stipulated period of $2\frac{1}{2}$ years. The decree-holder then took out execution for the remaining Rs. 7,000 on the allegation that the judgment-debtors did not comply with the conditions laid down in the compromise and rendered themselves liable to pay the entire sum of Rs. 20,000.

The learned advocate for the decree-holder bases his contention on the stipulation in the compromise that if three instalments are allowed to become due, then the entire sum of Rs. 20,000 would be payable. He argues that in so far as three instalments became due on 22nd December 1930, the judgment-debtors forfeited the concession given to them by the compromise. We have carefully considered the language of the compromise and are of opinion that this contention cannot be accepted. The stipulation preceding the the one relied on should not be ignored. The latter provides that the instalments shall be paid on specified dates, and if payments are not made on those dates and three instalments are allowed to fall in arrears, the decree-holder would be entitled to recover the entire Rs. 20,000. Taking the compromise as a whole we have no doubt what the parties meant and what is the right construction to be placed on it. The right of the decree-holder to recover the enhanced amount would come into existence if three instalments become overdue and none of them is paid. The fact that three instalments became due alone is not enough. There should be the further condition that payment of any of them should not be made. Here though three instalments became due on 21st December 1930, payment of one of them was made. The contigency in which the decree-holder was entitled to recover the entire sum Rs. 20,000 did not therefore arise.

It is next contended that the judgment-debtors could have made the payment to the decree-holder out of the Court and that they merely filed a tender in Court on the last day, the actual payment having been made the next day, i. e., one day after the day fixed for the payment. It has been held in a number of cases that tender amounts to payment if money is deposited within the usual time. It is not suggested that the judgment-debtors had no ready money on 22nd December 1930, and the filing of tender was merely a pretence of payment. It was open to the judgment-debtors to

make payment through Court. Indeed, we think this was a more prudent course. They were justified in paying through Court and the only manner in which they could have done that was by filing a tender in Court and depositing the money in the treasury. We hold, in these circumstances, that the tender made on 22nd December 1930, amounts to payment on that date. The learned Counsel for the decree-holder has referred to 1929 All 207 (1). That case is easily distinguishable. There the tender was filed one day after the date fixed for payment and the actual deposit was made still later. Assuming that tender amounted to payment, it could not be denied in that case that payment was made one day beyond time. In the case before us tender was made in time, and if tender amounts to payment—as we hold it does—payment should be considered to have been made in time in the present instance. The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

1. Kunj Behari Singh v. Bindeshri Prasad Singh 1929 All 207=115 I C 796=51 All 527.

A. I. R. 1935 Allahabad 750 (1)

SULAIMAN, C. J. AND BENNET, J.

(Firm) Khuni Lal-Lachminarain

v.

(Firm) Narain Das-Gopal Das

L. P. A. No. 46 of 1934, D/- 29-3-1935, against order of Iqbal Ahmad, J.

(a) Letters Patent (All.), Cl. 10—Order of Judge transferring suit from one Munsif's Court to another is not judgment.

An order by a Judge, transferring a case from one Munsif's Court to another, directing it to be tried along with another case pending in that Court between the same parties, cannot be regarded as a judgment within the meaning of Cl. 10, Letters Patent, as it does not amount to any decision as to the rights of the parties. [P 750 C 2]

(b) High Court—Judge has jurisdiction to transfer case from one Court to another independently of S. 24, Civil P. C.—Order is not appealable—Letters Patent (All), Cl. 10.

A High Court Judge has perfect jurisdiction even independently of S. 24, Civil P. C., to transfer a suit from one Court to another Court under S. 107 (b), Government of India Act. An order passed under that section has been expressly made non-appealable under Cl. 10, Letters Patent, as now amended. [P 750 C 2]

A. M. Khwaja and *G. S. Pathak*—for Appellant.

B. Malik—for Respondent.

Judgment.—This is an appeal from an order of a learned Judge of this Court transferring a suit from the Court of the Munsif of Bareilly to the Court of the Munsif of Agra, and directing it to be tried along with another case pending in that Court between the same parties. A preliminary objection is taken to the hearing of this appeal that no appeal lies. We are of the opinion that this objection must prevail. The order transferring the case was an order passed in the exercise of the discretion vested in the learned Judge and cannot be regarded as a judgment within the meaning of Cl. 10, Letters Patent, as it did not amount to any decision as to the rights of the parties at all.

The appeal accordingly does not lie. We are further of opinion that the learned Judge had perfect jurisdiction even independently of S. 24, Civil P. C., to transfer a suit from one Court to another Court under S. 107 (b), Government of India Act. An order passed under that section has been expressly made non-appealable under Cl. 10, Letters Patent, as now amended. The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 750 (2)

GANGA NATH, J.

Syed Hakimullah—Appellant.

v.

Md. Samiullah—Respondent.

Second Appeals Nos. 495 and 496 of 1933, Decided on 27th March 1935.

Easements Act, (1882), S. 18—No easement of projecting branches of trees on neighbour's land can be acquired by any number of years.

There can be no customary easement under S. 18 of projecting the branches of trees growing on one's land over the land of another. No prescriptive right to keep the overhanging branches on one's neighbour's land can be acquired by any number of years : 1925 *Bom.* 446; 1929 *Mad.* 815 & 24 *All.* 499, *Rel on.* [P 750 C 2; P 751 C 1]

Mukhtar Ahmad—for Appellant.

S. B. L. Gaur—for Respondent.

Judgment.—Second Appeal No. 496 of 1933, has been heard and disposed of with this appeal. Both are defendants' appeals and arise out of two suits brought by the plaintiff-respondent against the defendants for an injunction requiring the defendants to cut away the branches of their trees overhanging over the plaintiff's land. The defendants contended that the branches of their trees had been overhanging over the plaintiff's land for more than 20 years, that they had acquired a prescriptive right and that the plaintiffs suits were barred by time. Both the Courts have found against the defendants and have decreed the suits.

There can be no customary easement under S. 18, Easements Act of 1882,

of projecting the branches of trees growing on one's land over the land of another. No prescriptive right to keep the overhanging branches on one's neighbour's land can be acquired by any number of years. This view is supported by 1925 Bom 446 (1) and 1929 Mad 815 (2). A similar view was taken in 24 All 499 (3), where the tree had been growing for more than 20 years. It was held:

And it is also found by the learned Subordinate Judge that the branches of this tree have been hanging over the old building for a considerable time. But that fact cannot, in my opinion, override the right of the appellants to occupy their house in comfort and safety. Mr, Malaviya does not attempt to found any argument upon the fact that the tree has been standing there for over 20 years, and indeed no such easement could be claimed.

The judgments of the Court below are unassailable. There is no force in the appeals. It is ordered that the appeals be dismissed with costs and the decrees of the lower Court be confirmed. Permission to file a Letters Patent appeal is rejected.

K.S. *Appeal dismissed.*

1. Keshav Krishna v. Shankar Mahadeo, 1925 Bom 446=89 I C 191.
2. Gurusami Raja v. Perumal Raja, 1929 Mad 815=122 I C 789.
3. Behari Lal v. Ghisa Lal, (1902) 24 All. 499=1902 A W N 169.

A. I. R. 1935 Allahabad 751

GANGA NATH, J.

Kalp Nath Chand—Appellant.

v.

Samar Dhuj Chand—Respondent.

Second Appeal No. 134 of 1933, Decided on 26th March 1935.

(a) U. P. Land Revenue Act (3 of 1901), S. 42—Applicability.

Section 42 of the Act applies where the tenancy is admitted and the dispute relates to the class or tenure of the tenant. [P 752 C 1]

(b) U. P. Land Revenue Act (3 of 1901), Ss. 32, 40, 42 and 44—Defendant not admitting to be tenants of plaintiff—Dispute about proprietary title of land and trees—Order of Revenue Court in case of the correction of jamabandi does not bar declaratory suit in civil Court.

Where the defendants do not themselves admit to be the tenants of the plaintiff nor have they so far got it declared and the dispute between the parties is about the proprietary title of the land and the trees and both the parties allege themselves to be the proprietors, the matter of proprietary title does not relate to the annual register mentioned in Cl. (e), S. 32, Land Revenue Act. It relates to the register mentioned in Cl. (a). Whether the order of the Revenue Court allowing an application for entry for names as grove-holders in a case of correction of jamabandi, be regarded as passed under S. 40 or S. 42, Land Revenue Act, the order of the Revenue Court would not bar a suit in the civil Court in view of the provisions of Cl. (3), S. 40 or S. 44. [P 752 C 2]

Shiva Prasad Sinha—for Appellant.

Haribans Sahai—for Respondent.

Judgment.—This is a defendants' appeal and arises out of a suit brought against them by the plaintiff-respondent for a declaration that he (the plaintiff) was the owner in possession of the plots of land described in the plaint and the trees thereon situated in Mauza Narainpur, Tappa Shahpur, and that the defendants had nothing to do with them. The plaintiff's case was that his predecessors-in-title were cosharers in the village and the land in dispute was allotted to the plaintiff's predecessors in partition. The defendants have got their names entered in the revenue papers against the trees on the land in dispute.

According to the plaintiff's case, the plaintiff's grandfather and his brother had a share in the village. The plaintiff's grandfather's brother sold his share to Murli Manohar from whom it descended to his widow Mt. Param Jot Kuari. After the sale the village was partitioned and the disputed plots were allotted to the share of Mt. Param Jot Kauri. As the plots in dispute were behind the plaintiff's house, the plaintiff remained in their possession and planted trees on them. On 6th June 1929, the plaintiff obtained the plots in dispute by a deed of exchange executed by Mt. Param Jot Kuari. Thereafter the defendants applied to the Revenue Court for the entry of their names as grove-holders and the Revenue Court allowed their application. The plaintiff brought this suit for declaration of his proprietary title after the order of the Revenue Court. The defendants contended that they were the owners of the land and the trees in dispute. They stated in Cl. (d) of their additional statements:

The plaintiff or his ancestors and the zamindars have nothing to do therewith; nor have they been ever in possession and enjoyment thereof. All the allegations made by the plaintiff to the contrary are evidently wrong and not correct. The contesting defendants are the owners in possession of the land in dispute and the trees standing thereon as baghdars. The plaintiff has no right to take objection or bring a suit.

The trial Court found in favour of the plaintiff and decreed the suit. On appeal, the learned District Judge, Gorakhpur, agreed with the findings of the trial Court and, confirming the decree of the trial Court, dismissed the appeal. Both the Courts have found concurrently in favour of the plaintiff.

The trial Court found that the plaintiff was the owner of the land and the trees and this finding was confirmed by the lower appellate Court.

The learned counsel for the appellants has urged that the order of the Revenue Court about the entry of the defendants' names in the revenue papers bars the present suit. As will appear from the application made by the defendants, it was an application for the correction of jamabandi, under S. 42, Land Revenue Act (3 of 1901), as was stated in the application. The relief sought by the applicants was that their names might be entered as "tenant-grove-holders" against the land in dispute. The case in the Revenue Court was fought on the basis of possession. In para. 2 of their application the defendant, Kalp Nath Chand stated that he had been in possession over the land in dispute for about 16 years. The application was contested by the plaintiff-respondent. He stated in his written statement that he had been in possession over the land in dispute. The Revenue Court framed the following issues:

(1) Whether defendant 2 (Samar Dhuj Chand) holds the grove in suit as proprietor ? (2) Whether the plaintiff is in possession as a grove-holder ?

The first issue was decided against the defendant, Samar Dhuj Chand, and the second issue was decided in favour of the defendants applicants (the appellants). No declaration was made by the Revenue Court as to whether the defendants were the tenants of the plaintiff. The only order passed by the Revenue Court was:

The area shall be recorded as "grove" inside the abadi and the applicant as the grove-holder.

There is nothing in the whole of the order to show who was the land-holder. The case in the Revenue Court cannot be regarded by any stretch of imagination as one for a declaration under S. 121, Tenancy Act. On the other hand, the application itself shows that it was made under S. 42, Land Revenue Act. Though the application was described as one under S. 42, Land Revenue Act. Though the application been made under it, because the applicants did not state that they were the tenants of the opposite parties. Section 42, Land Revenue Act, applies where the tenancy is admitted and the dispute relates to the class or tenure of the tenant. As held in 1930 All 305 (1), a clear distinction exists between the case where the tenancy itself is disputed and the case where the tenancy is admitted, but its class or tenure is in dispute. In the revenue case, the applicants wanted themselves to be entered as grove-holders. The dispute between the parties in the revenue case was regarding the entries in the annual register. Section 40, Land Revenue Act, lays down that all disputes regarding entries in the annual register shall be decided on the basis of possession. Both the parties, as already stated, fought the case and it was actually decided on the basis of possession.

Even if the order of the Revenue Court be regarded as one made under S. 42, Land Revenue Act, it cannot operate as res judicata. In 1930 All 611 (2), it was laid down that the scope of S. 42 was very limited and was limited to the case of a dispute relating to class and tenure. Where the question was, who was the tenant, S. 42 had no relation to such a dispute. It was a mistake to read into S. 42, all the provisions of S. 95, Tenancy Act of 1901, (S. 121, of the present Tenancy Act). It was also held that assuming that the Assistant Collector's judgment was given under section 42, Land Revenue Act, his decision could not operate as res judicata.

As already stated, the defendants do not themselves admit to be the tenants of the plaintiff nor have they so far got it declared. The dispute between the parties, is about the proprietary title of the land and the trees. Both the parties allege themselves to be the proprietors. The matter of proprietary title does not relate to the annual register mentioned in Cl. (e), S. 32, Land Revenue Act. It relates to the register mentioned in Cl. (a). Whether the order of the Revenue Court be regarded as passed under S. 40 or 42, Land Revenue Act, the order of the Revenue Court would not bar a suit in the Civil Court in view of the provisions of Cl. (3), S. 40 or S. 44. I therefore agree with the finding of the lower Court that the suit is not barred by the order of the Revenue Court passed in the case of the correction of jamabandi. In the face of the findings of fact of the lower Courts, there is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

Permission to file a Letters Patent appeal is granted.

K.S. *Appeal dismissed.*

1. Ramjas Singh v. Ram Harakh Panday, 1930 All 305=120 I C 200.

2. Kashi Prasad v. Ambika Prasad, 1930 All 611=125 I C 23=52 All 823.

A. I. R. 1935 Alladabad 753

NIAMATULLAH AND BAJPAI, JJ.

Pyare Lal—Applicant.

v.

Bibi Amna Khatun Begum— Opposite Party.

Misc. Case No. 452 of 1934, Decided on 5th March 1935, reference submitted by Registrar, Board of Revenue, United Provinces, Allahabad, D/- 29th August 1934.

Agra Tenancy Act (1926), S. 242 (d)— Cl. (d) is limited to cases where amount of revenue payable is in dispute — It does not include case where dispute is between two individuals regarding liability to pay revenue.

Clause (d), S. 242, is limited to cases in which the amount of the revenue payable is in dispute. Its language is not wide enough to include cases in which the liability to pay revenue as between two individials is the question at issue.

[P 753 C 2]

Panna Lal—for Applicant.

N. P. Asthana—for Opposite Party.

Niamatullah, J.—This is a reference by the Board of Revenue under S. 267, Agra Tenancy Act. The facts as stated in the order of reference and as admitted by counsel on both sides are as follows: A certain mahal, or a portion thereof, was sold nearly a 100 years ago. One of the convenants in the sale-deed was that the vendor would retain a portion of the land included in the mahal, or part thereof, as the case may be, and that the vendee should pay the land revenue in respect of the land thus reserved to the vendor. The vendee and his representatives have hitherto paid the revenue in terms of the covenant already mentioned. There was a settlement in 1308 fasli. In making the assessment it was noted by the settlement officer that the vendee had been paying the revenue in respect of the lands in possession of the vendor and would continue to do so in future. Recently the representatives of the vendees appear to have reconsidered their position and instituted a suit for recovery of a sum less than Rs. 200 representing the revenue paid by them in respect of the lands in possession of the vendor under the sale-deed above referred to. The representatives of the vendor contested the claim relying on the covenant in the sale-deed and on the practice which prevailed ever since the date of sale. The Assistant Collector in whose Court the suit had been instituted dismissed it. An appeal was preferred by the plaintiff to the District Judge who dismissed it on the ground that no appeal lay to him. A second appeal was preferred in this Court which was likewise dismissed. The judgment of the learned Single Judge who heard the second appeal makes a reference to S. 242 (d). It may be that '(d)' is a clerical error for '(a)' as the body of the judgment may be construed to indicate. The main ground on which the learned Judge held that no appeal lay on the civil side was that the value of the subject-matter did not exceed Rs. 200. The aggrieved party moved the Commissioner in revision and the latter made a report to the Board of Revenue which has resulted in the present reference.

The Board of Revenue seem to be of opinion that the learned Single Judge of this Court overlooked the provisions of S. 242 (d) which, according to the Board, applies to the present case. It is undeniable that an appeal lies to the District Judge from the decree of an Assistant Collector, inter alia, when

the amount of the revenue annually payable has been in issue in the Court of first instance and is in issue in appeal,

in suits under Ss. 221, 222, 223, 224, 226 and 227. It should be noted that Cl. (d) S. 242, quoted above, is limited to cases in which the amount of the revenue payable is in dispute. Its language is not wide enough to include cases in which the liability to pay revenue as between two individials is the question at issue. The learned advocate for the defendant has strongly pressed the contention that where the defendant repudiates his liability to pay revenue he in effect disputes the amount of the revenue payable by him. To quote his own words he argued that

According to the defendant the revenue payable by him is zero and not the amount claimed by the plaintiff.

We are unable to uphold this contention. The language of S. 242 (d) clearly contemplates cases in which the amount of revenue payable in respect of a land is in dispute. Questions regarding the liability of particular lands and individuals owning interest therein have been advisedly left out of the jurisdiction of Civil Courts. Such questions fall within the purview of certain provisions of the Land Revenue Act. If we accept the contention of the learned advocate for the defendant and assume an extended jurisdiction, a conflict of jurisdiction may arise in view of the provisions of S. 233, United Provinces Land Revenue Act. Accord-

ingly we hold that the language of S. 242 (d) should not be strained in the manner suggested and that only when the amount of revenue, as distinguished from liability in respect thereof, is in dispute, an appeal lies to the District Judge. As the amount of revenue annually payable is not in dispute in this case no appeal lay to the District Judge. We answer the reference accordingly.

K.S. *Reference answered.*

A. I. R. 1935 Allahabad 754

HARRIES, J.

Tika Ram Joshi—Defendant—Appellant.

v.

Ram Lal Sah and *others*—Plaintiffs—Respondents.

Second Appeal No. 593 of 1932, Decided on 15th January 1935, from decision of Dist. Judge, Kumaun, D/- 12th February 1932.

(a) Easements Act, S. 18—Right of privacy may be acquired by virtue of local custom.

A right of privacy can exist. It is a customary easement and may be acquired in virtue of a local custom. [P 755 C 1]

(b) Custom — Whether it exists and its nature are questions of fact.

Whether a custom exists and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower appellate Court, if based on admissible and relevant evidence, are conclusive. [P 755 C 1]

(c) Easement Act, S. 18—Right of privacy —Suit to restrain defendant from interfering with it—Plaintiff must prove existence of custom and that he has enjoyed such right

To succeed in an action to restrain any interference with a right of privacy, a plaintiff must show not only that such a right of privacy exists by custom in the district in which the premises are situated, but also that he has in fact enjoyed such a right and that it has been substantially or materially affected by the acts of the defendant: 10 *All* 358, *Rel. on.* [P 755 C 2]

(d) Easements Act, S. 18—Right of privacy — Premises already overlooked by apertures — Opening of further apertures cannot be said to be not actionable.

It cannot be said that where premises are already overlooked by apertures, the opening of further apertures overlooking such premises cannot be actionable: 10 *All* 358 and *Bhagwandas* v. *Abdul Rahman* (1908 *unreported*) *Expl.* [P 756 C 2]

K. N. Katju, B. L. Dave and *R. K. Dave*—for Appellant.

Panna Lal—for Respondents.

Judgment.—In this case the plaintiffs claimed an injunction to compel the defendant to close up certain apertures which he had opened in a side wall of his premises overlooking a house owned and occupied by them and to restrain him from opening any such apertures in the future. The learned Munsif who tried the case decreed the claim, but on appeal the decree was modified. The learned District Judge refused to grant any injunction but ordered that certain windows should be rendered in such a condition as to make it impossible for anyone in the defendant's premises to see through them into the plaintiffs' premises. Against this decision the defendant has appealed to this Court contending that the opening of the apertures in question does not amount to an infringement of the plaintiffs' rights. The plaintiffs being also dissatisfied with this decision have filed a cross-objection claiming that the decree of the learned Munsif should be restored.

The facts of the case are simple and are not in dispute. The respondents, the plaintiffs in the suit, are the owners in possession of a dwelling house bearing the Municipal number 12 in Lala Bazar in the town of Almora. This house has been occupied by the family of the plaintiffs for many years and the ladies of the household have been in the past and are at present pardanishin ladies. Shortly before action was brought, the defendant-appellant purchased a house—Municipal No. 10—which is situate near the respondents' dwelling house and proceeded to demolish part of it and rebuild the same. During this reconstruction the appellant without the respondent's consent opened windows and a doorway which it is alleged, overlooked the respondents' dwelling house and the latter contended that the opening of such apertures amounted to an infringement of or interference with their right of privacy. It has been found that the doorway referred to can in no way be objectionable and the contest in the lower appellate Court was confined solely to the windows. That Court has found that a view of a part of the respondents' premises known as the "pakholia" can be obtained from three of these windows, whilst no objection can be taken to the fourth window. It must be conceded that the findings are binding on this Court in second appeal, but it has been strenuously argued that in spite of such findings the lower appellate Court was wrong in law in granting to the respondents any relief. The respondents, on the other hand, have argued that having regard to these findings the lower appellate Court

should have ordered the three windows in question to be bricked or walled up and granted an injunction restraining the appellant from making any such aperture in the future.

The "pakholia" which is overlooked by these three windows is used by the ladies of the respondents' household for the performance of their household duties and personal ablutions. It is not a yard or courtyard in the centre of the respondents' house but is situated at the back of it. The side walls of this yard are the walls of the adjoining houses and it is separated from the fields at the rear of the premises by a wall which is described as shoulder or neck high. Having regard to the use made of this "pakholia" by the ladies of the household, the presence of these windows is obviously objectionable, but the appellant is entitled to make such windows unless the making of them infringes or interferes with the respondents' legal rights. On the other hand, if the respondents have a right of privacy, such a right must be protected by appropriate and suitable relief.

It is first contended before me that the respondents have no right of privacy. That such a right can exist is beyond dispute. Such right is a customary easement and may be acquired in virtue of a local custom: see S. 18, Indian Easements Act, 1882. It is conceded that by local custom a right of privacy does exist in the cities and plains of these Provinces, but it is argued that no such custom exists in the towns and villages situated in the hills. Whether such a custom exists and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower appellate Court, if based on admissible and relevant evidence, are conclusive. In the judgment of the lower appellate Court the findings as to the existence of such a custom and its nature and limits were vague and far from clear. I therefore framed certain issues with a view to obtaining certain and definite findings on these points and such findings have now been returned to this Court. In my judgment these findings conclude the matter and entitle the respondents to a considerable measure of protection.

The learned District Judge has found that in Almora there does exist a customary right of privacy of a limited nature. He has found as a fact that occupiers of houses in Almora are entitled by custom to claim that their women-folk should not come under full observation from windows of neighbouring houses when engaged in their household duties and personal ablutions. The "pakholia" which is overlooked by the windows in question is a place where the ladies of the respondents' household do perform such tasks and therefore the respondents are prima facie entitled by custom to claim that such part of their premises shall not be observed from windows of adjoining premises. There was abundant evidence before the lower appellate Court of the existence of such a custom and consequently the finding cannot be challenged on second appeal.

It was contended however by the appellant that even if such a custom existed, the respondents had in fact never enjoyed any privacy and that in any event the opening of the windows in question did not amount to a substantial or material interference with such rights as they possessed.

To succeed in an action to restrain any interference with a right of privacy, a plaintiff must shew not only that such a right of privacy exists by custom in the district in which the premises are situated, but also that he had in fact enjoyed such a right and that it has been substantially or materially affected by the acts of the defendant. See 10 All 358 (1), and per Edge, C. J. at p. 386. In the present case the appellant denies that the respondents have ever enjoyed or do enjoy such rights of privacy as are customary in Almora by reason of the fact that the "pakholia" in question has been and is overlooked from the roofs of adjoining or neighbouring houses. It is however found as a fact by the lower appellate Court that the respondents do in fact enjoy the rights of privacy customary in Almora. It is impossible for me to say that there is no evidence to support this finding. A large number of witnesses were called and the premises viewed by the learned District Judge who heard the appeal in the first instance and by his successor to whom the issues previously referred to were forwarded That being so, the finding is conclusive and cannot be challenged in this Court. It is further contended however that even assuming that the respondents have in fact enjoyed and do enjoy the rights of privacy customary in the district, the opening of the win-

1. Gokal Prasad v. Radho, (1888) 10 All 358= 1888 A W N 135.

dows in question cannot give rise to a cause of action.

To give rise to a right of action for infringement of a right of privacy the act complained of must amount to a substantial or material interference with such a right, see 10 All 358 (1), and it is argued that where a house is already overlooked the opening of further apertures overlooking such premises cannot amount to a substantial or material interference with the right of privacy of the occupier of such premises. The lower appellate Court has found as a fact that the opening of the windows in question does amount to such an interference with the respondents' rights, but it is urged that there is no evidence to support such a finding and that authority binding upon the lower appellate Court and this Court makes such a finding impossible and that effect cannot be given to it. The appellant has strenuously contended that I am bound by the decision of a Bench of this Court in the unreported case of Bhagwan Das v. Abdul Rahman, decided on 17th January 1908.

In that case the plaintiffs sought an injunction to restrain the defendants from making certain apertures in a wall overlooking their premises and to compel them to remove a certain door frame which had already been erected. It was established to the satisfaction of the lower appellate Court that the plaintiffs' premises were already overlooked from adjoining houses and it was held that the opening of the apertures complained of did not amount to a substantial or material interference with the plaintiffs' rights. In fact the Court held that what had been done and what was proposed to be done would virtually increase and not diminish the privacy enjoyed by the plaintiffs.

On second appeal Knox, J., however in 29 All 582 (2), held that the opening of the apertures in question did amount to a substantial or material interference with the plaintiffs' rights and granted an injunction. In his judgment he pointed out that windows were far more objectionable than roofs as ladies could see persons on a roof and withdraw, whereas they might be observed unknown to themselves by a person looking through a window. Observers on a roof would themselves be inevitably observed, whereas the existence of an observer at a window might well be unknown to those observed.

On appeal to a Bench of this Court this decision was reversed, the Court holding that the learned Judge was bound by the findings of fact of the lower appellate Court. It is contended that the effect of this decision is that the opening of windows overlooking other premises cannot be restrained if such other premises are already overlooked from any parts of adjoining or neighbouring premises such as roofs. In my judgment this contention is not sound and is in direct conflict with the judgment of Edge, C. J., in 10 All 358 (1). It is pointed out in this latter case that each case must be decided on its particular facts and in my judgment the unreported case of Bhagwan Das v. Abdul Rahman, is a decision which must be confined to the facts of that particular case which were exceptional and peculiar. In my view, that case does not lay down a rule that where premises are already overlooked, the opening of further apertures overlooking such premises cannot be actionable. In that case what was complained of actually increased rather than diminished the plaintiffs' rights and that being so, it was impossible to say that there had been any substantial or material interference with such rights.

For the above reasons it cannot be said that the lower appellate Court could not in the present case find that there had been a substantial interference with the respondents' rights, and that being so, such a finding is binding upon me. The respondents have therefore succeeded in establishing a right of privacy and an actionable infringement of such a right and consequently they are entitled to some degree of protection. The lower appellate Court set aside the injunctions granted by the trial Court but ordered that the two windows on the fourth floor should be screwed up and always have opaque glass and be maintained in that condition and one window on the third floor should be so altered as to prevent the respondents' "pakholia" being visible from it. In my judgment this order amply protects the respondents and gives them all that they can justly claim. Their right of privacy must be protected and safe-guarded, but if this can be done without undue harshness to the appellant, such a course should be adopted. To order the windows in question to be bricked

2. Abdul Rahman v. Bhagwan Das, (1907) 29 All 582=4 A L J 445=1907 A W N 183.

up would not give the respondents any greater privacy and by depriving the appellant of light would involve unnecessary hardship on him. In my view the decree of the lower appellate Court is adequate and I therefore dismiss the appeal and cross-objection and affirm that decree. The appellant must pay the costs of this appeal, but all costs occasioned to either the appellant or respondents by reason of the cross-objection must be borne by the respondents. Leave to appeal under Letters Patent is granted.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 757

NIAMATULLAH, J.

Hafiz Uddin—Decree-holder—Applicant.

v.

(*Firm*) *Parshadi Lal Monohar Lal*—Judgment-debtor—Opposite Parties.

Civil Revn. No. 527 of 1934, Decided on 24th January 1935, against order of Judge, Small Cause Court, Meerut, D/- 12th May 1934.

Limitation Act (1908), Art. 182 (5)—Limitation runs only from date of final order—Order of Court merely directing office to prepare certificate is not final order on application for transmission of certificate—Civil P. C. (1908), O. 21, R. 6.

The order of the Court which merely directs the office to prepare a certificate cannot be considered to have finally disposed of the application which prayed that the certificate be transmitted. Application can be considered to have been finally disposed of only when the required certificate is prepared and handed over to the decree-holder who has undertaken to present it before the transferee Court. [P 758 C 1]

Sri Narain Sahai—for Applicant.

S. N. Gupta—for Opposite Parties.

Order.—The only question involved in this case is one of limitation. The applicant obtained a decree from the Small Cause Court, Delhi, on 2nd October 1929. He made an application to the Court passing the decree on 11th January 1930, asking for a certificate of transfer to a Court in Meerut, where the decree-holder desired to execute his decree. The Court ordered on 17th February 1930, that a certificate be prepared. On 5th March 1930, the decree-holder deposited the requisite court-fee for preparation or transmission (it is not clear which) of the certificate. On 8th March 1930, the certificate was prepared and handed over to the decree-holder and the case was consigned to the record room. No satisfaction of the decree was obtained on that occasion, and the decree-holder did not make any application till 27th February 1933, when the present application for execution was made at Meerut. The judgment-debtor resisted it and pleaded limitation. The lower Court upheld the judgment-debtor's plea and dismissed the decree-holder's application for execution, holding that the application having been made more than three years after the date of the decree must be considered to be barred by limitation, unless the final order on the application for transfer, dated 11th January 1930, be taken to have been passed within three years from the date of the present application. It was contended on behalf of the judgment-debtor that, though the application dated 11th January 1930, amounted to an application to the Court to take a step-in-aid of execution, the final order passed thereon was on 17th February 1930, when the Court ordered that the certificate be prepared. The present application was made more than three years from that date. On behalf of the decree-holder it was contended that the payment of fee on 5th March 1930, implied an application by the decree-holder that further action be taken for the preparation and transmission of the certificate and that, in any case the final order disposing of the application dated 11th January 1930, was passed on 8th March 1930, when the certificate was ordered to be handed over and was in fact handed over to the decree-holder for presentation at Meerut where the decree was to be executed.

It is not necessary to consider whether the act of depositing the requisite fee on 5th March 1930, implied an application to the Court to take a step-in-aid of execution within the meaning of Cl. (5), Art. 182, as the final order on the application dated 11th January 1930, was not passed till 8th March 1930. It should be noted that, according to Art. 182, Cl. 5 as amended in 1927, limitation is to be reckoned not from the date of the application, but from the date of the final order passed on an application to the Court to take some step-in-aid of execution. O. 21, R. 6, Civil P. C., lays down the procedure for transfer of a decree for execution in a Court other than the one which passed it. It provides that a certificate setting forth that satisfaction of decree has not been obtained by execution in the Court which passed it, shall be sent with a copy of the decree to the Court in which execution is desired. The order of the Court,

dated 17th February 1930, merely directed the office to prepare a certificate. That order cannot be considered to have finally disposed of the application which prayed that the certificate be transmitted. The proceedings taken by the Court on 8th March 1930, should be considered to have finally disposed of the application dated 11th January 1930. On that date the required certificate was prepared and handed over to the decree-holder, who had undertaken to present it before the Meerut Court. This being done the fact was noted on the application and the record was ordered to be consigned. It is true that there is no definite order in black and white directing the office to hand over the certificate to the decree-holder; but in my opinion this is clearly the effect of the proceedings of that date, as on no previous occasion after the application of 11th January 1930, the Court passed an order that the certificate be transmitted. Without a specific order of the Court a certificate could not be transmitted as required by O. 21, R. 6.

For the reasons stated above, I hold that the decree-holder's application, dated 27th February 1933, which was within three years from 8th March 1930, was within time. The result is that this application is allowed, the order of the lower Court is set aside and the case is sent back to that Court with a direction that the decree-holder's application for execution be dealt with according to law. Costs shall abide the result.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 758

NIAMAT ULLAH, J.

Muhammad Qulikhan — Plaintiff — Appellant.

v.

Mt. Mubarak Fatima—Defendant — Respondent.

Second Appeal No. 1081 of 1934, Decided on 18th January 1935, from decision of Sub-Judge, Bareilly, D/- 30th May 1934.

Mahomedan Law—Waqf — One of mutawallis in possession of bulk of income of property—Payment by him to beneficiaries—He is not entitled to contribution from co-mutawalli—Contract Act (1872), S. 69.

Where the mutawallis who are in charge of the property have been made liable to pay certain sums out of the income thereof to the beneficiaries, and if only one of the two mutawallis is in possession of the bulk of the income and he pays off the beneficiaries, it cannot be said that he has paid what the other mutawalli was bound to pay. He has paid what he was himself bound to pay, having regard to the fact that the bulk of the profits came into his own hands. Hence he is not entitled to contribution from his co-mutawalli. [P 759 C 1, 2]

Ambika Prasad Dube—for Appellant.

Judgment.—The suit which has given rise to this appeal was brought by the plaintiff-appellant for contribution. The parties to this case are co-mutawallis under a deed of endowment which reserves certain benefits in favour of certain persons hereinafter called the beneficiaries. Both the Courts below have dismissed the plaintiff's suit.

The beneficiaries instituted a suit against the parties to this case for recovery of what was receivable by them under the deed of endowment in respect of the years 1332-1334 Fasli. The present plaintiff was arrayed as defendant 1 and the present defendant was defendant 2. The latter did not enter appearance, and the proceedings were ex parte against her. Defendant 1 (the present plaintiff) contested the suit, inter alia, on the ground that half the property is entered in Mubarak Fatima's (the present defendant's) name, who had received from defendant 1 all her profits up to 1334 Fasli. One of the issues framed by the Court in that case was "What amount, if any, is due to the plaintiff and against which defendant or against both." The Court decreed the plaintiff's claim in these terms:

The plaintiffs are therefore entitled to a decree against both the defendants as both are trustees of the endowed property appearing so in revenue papers. The beneficiaries executed their decrees and obtained satisfaction thereof from the plaintiff alone. The present suit was brought by the plaintiff for recovery of half of what he had to pay to the beneficiaries under the decree obtained by them. His case is that the parties being co-mutawallis, the defendant ought to contribute half of what was payable to the beneficiaries. Both the lower Courts have found that the bulk of the profit came into the hands of the plaintiff and the latter is not therefore entitled to recover anything from the defendant, who has no funds in her hands belonging to the endowment. On that finding the plaintiff's suit was dismissed.

It is contended in second appeal that the decision in the beneficiaries' suit operates as res judicata between the parties to this case so far as the de-

fendant's liability to contribute is concerned. I am unable to accept this contention. The present defendant, who was defendant 2 in the beneficiaries' suit, did not enter appearance. There was nothing in the pleas taken by the plaintiffs or defendant 1 in that suit which amounted to an allegation that even though the bulk of the profits came into his hands the co-mutawalli, who was without funds, was nevertheless liable to contribute half of the money payable to the beneficiaries. The question to be decided now was not directly and substantially in issue in the beneficiaries' suit. All that the Court held in that case was that as between the beneficiaries on the one side and the two mutwallis on the other no specification of the latter's liability need be made. Accordingly a joint decree was passed. It was open to the beneficiaries to execute their decree against one or the other of the "mutawallis" who were the judgment-debtors. It so happened that they obtained satisfaction of their decree from the mutawalli who had the funds of the endowment in his possession. It is not open to the latter to to sue his co-mutawalli for contribution, as if the co-mutawalli was under a personal obligation to pay to the beneficiaries. It was out of the income of the endowed property that the mutawallis were to pay to the beneficiaries. One of the two mutawallis realising the bulk of the profits of the endowed property was bound to pay to the beneficiaries. A suit like this can succeed only if it fulfils the requirements of S. 69, Contract Act. which provides:

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

I have not the deed of endowment, and it is not possible to say that it contains any stipulation which, in all circumstances, directs each mutawalli to pay half of what is directed to be paid to the beneficiaries. I take it that the mutawallis who are in charge of the property have been made liable to pay certain sums out of the income thereof to the beneficiaries. If only one of the two mutawallis is in possession of the bulk of the income, and he pays off the beneficiaries, it cannot be said that he has paid what the other mutawalli was bound to pay. He has paid what he was himself bound to pay, having regard to the fact that the bulk of the profits came into his own hands. In this view I think the lower Court has correctly held that the plaintiff is not entitled to contribution and the plaintiff's suit was rightly dismissed. This appeal fails and is dismissed under O. 41, R. 11, Civil P. C.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 759

ALLSOP, J.

Abdul Shakur Khan—Plaintiff—Appellant.

v.

Rajendra Kishore Saran Singh—Defendant—Respondent.

Second Appeal No. 193 of 1933, Decided on 14th March 1935, from decision of Second Addl. Sub Judge, Allahabad, D/- 27th October 1932.

(a) Limitation Act (1908), Arts. 97 and 115—Promise to execute lease—Consideration paid—Defendant resiling from promise and refusing to execute lease—Suit for return of money—Cause of action arises on breach and suit is governed by Arts. 97 and 115.

Where plaintiff has paid consideration and the defendant has promised to execute a lease but subsequently resiles from the promise and refuses to execute the lease and plaintiff files a suit for return of money, the cause of action does not arise on date of payment of money. The suit is governed by Art. 97 or by Art. 115 and that it is either a claim for money paid upon an existing consideration which afterwards failed in that the payments were made in consideration of the promise to execute the lease and the promise was afterwards repudiated or it is a claim for compensation for the breach of any contract express or implied not in writing registered and not specially provided for. The cause of action arises on breach of the promise to execute the lease. [P 760 C 1, 2]

(b) Practice—Pleadings—Mere inaccuracy in plaint is not sufficient to dismiss claim.

The mere inaccuracy in the plaint is not sufficient to justify the dismissal of the claim. [P 760 C 2]

Basudeva Mukerji—for Appellant.

Banke Behari—for Respondent.

Judgment.—This second appeal gives rise to a question of limitation. The plaintiff instituted a suit to recover two sums of Rs. 75 paid by him to the other party on 26th October 1926 and 1st January 1927. His case was that he made these payments by way of premium or nazrana because the defendant-respondent had promised to execute in his favour a lease of a certain holding. He claimed that the sums should be returned on the ground that the defendant-respondent had resiled from his promise and refused to execute the lease. The defendant-respondent did not allege that he was prepared to execute the lease. His de-

fence was that there had been a subsequent arrangement by which the claims of the parties had been adjusted and that for that reason the amounts were no longer due. This defence was disbelieved by the Courts below. I am left with these facts that the plaintiff advanced these two sums on the faith of a promise made by the other party that he would execute the lease in the plaintiff's favour and that subsequently the defendant refused to execute the lease.

The suit was originally instituted in the Court of Small Causes on 26th October 1929. The Court ultimately decided that it had no jurisdiction and returned the plaint for presentation to the proper Court on 21st May 1930. It was presented on 11th June 1930. The learned Judge of the lower appellate Court came to the conclusion, and rightly, so, that the plaintiff was entitled to the benefit of the provisions of S. 14, Limitation Act, for the period from 26th October 1929 to 21st May 1930, that is for a period of very nearly seven months. He decided that the plaintiff's claim in respect of the payment made on 1st January 1927 was therefore within limitation on 11th June 1930 but he held that the claim for the other payment made on 26th October 1926, was barred by time, because it was outside limitation by the period extending from 21st May 1930 to 11th June 1930.

The plaintiff has only himself to blame for the decision which was reached. In his plaint he asserted that his cause of action arose on 26th October 1926 and 1st January 1927. On the consideration of the facts alleged it is clear enough that his cause of action did not arise on those dates. This was clearly a claim which was governed either by Art. 97, Limitation Act, or by Art. 115, that is, it was either a claim for money paid upon on existing consideration which afterwards failed in that the payments were made in consideration of the promise to execute the lease and the promise was afterwards repudiated or it was a claim for compensation for the breach of any contract express or implied not in writing registered and not specially provided for. It is immaterial which of these articles is applied to the facts of the case. It has been suggested on behalf of the respondent that the plaintiff rightly said that his cause of action arose on 26th October 1926 and 1st January 1927, but it is obvious that this is not a good argument because it is inconceivable that the plaintiff could have instituted a suit for the recovery of the money advanced on 26th October, if he had wished to institute it on the next day, 27th October. He would clearly then have had no claim for the refund of the money. In one sense of course a part of the cause of action did arise on the dates mentioned because there would have been no cause of action if no money had been advanced, but it is also evident that these were not the complete causes of action because the plaintiff could not claim his money until there was a breach of the promise to execute the lease. As the second payment was made on 1st January 1927 it is obvious that the breach of the promise occurred after that date, and the cause of action really arose from the breach. As the plaintiff was entitled to the benefit of the provisions of S. 14, Limitation Act, his claim for both the sums was clearly within time.

The only question is whether the plaintiff should not be allowed to enforce his claim because in his plaint he wrongly stated that the cause of action occurred in respect of the first payment on 26th October 1926 and omitted to mention the other date when the breach took place. I do not think that meticulous accuracy in drafting of plaints can be demanded in this country. It does not appear that the inaccuracy in the plaint could have given rise to any difficulty on the part of the defendant or could have affected the defences which he has taken. I hold that the whole claim was within limitation and that the mere inaccuracy in the plaint is not sufficient to justify the dismissal of the claim. I therefore allow the appeal, set aside the order of the Court below and restore the order of the Munsif. The appellant will get his costs in the lower appellate Court, but the parties will bear their costs in this Court. Leave to file an appeal under the Letters Patent is refused.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 760

SULAIMAN, C. J. AND BENNET, J.

Municipal Board, Benares — Defendant—Appellant.

v.

Krishna and Co. —Plaintiff—Respdt.

Letters Patent Appeal No. 37 of 1934, Decided on 13th February 1935, against decision of Young, J., D/- 3rd January 1934, reported in 1934 All. 550.

(a) Appeal — Letters Patent appeal—Plea of jurisdiction not pressed before single Judge can be raised in Letters Patent appeal—Jurisdiction.

Where a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. But the expediency of adopting such a course may be doubted when the pleas cannot be disposed of without deciding nice questions of fact. A plea of want of jurisdiction can be raised in Letters Patent appeal even though it has not been pressed before the single Judge : 1932 *P C* 118, *Rel. on.*; 20 *All* 258, 1931 *All* 35 and 1931 *All* 490, *Ref.*
[P 761 C 1, P 762 C 1]

(b) U. P. Municipalities Act (2 of 1916), Ss. 128 (1) and 133 (1)—Tax includes octroi or toll also.

The word 'tax' is intended to be comprehensive enough to include an octroi or a toll also.
[P 762 C 1]

(c) U. P. Municipalities Act (2 of 1916), S. 164—Suit for refund of octroi assessed by Board on goods imported does not lie in civil Courts on ground that goods are not assessable.

No suit for a refund of octroi which has been assessed by the Municipal Board on goods imported lies in a civil Court on the ground that the goods were not in fact assessable or that the amount of assessment was excessive : 1935 *All* 68 and 35 *Cal* 859, *Ref.* [P 763 C 1]

(d) U. P. Municipalities Act (2 of 1916), Schedule, Class (14)—Electric ceiling fans are exempt from duty (*Obiter*).

Obiter.—Class (14) expressly exempts from duty machinery, meaning machines or sets of machines to be worked by electric power. Electric ceiling fans are obviously within the scope of this category. [P 763 C 1]

A. M. Khwaja—for Appellant.

K. N. Katju and *B. Malik*—for Respondent.

Judgment.—This is an appeal by the Municipal Board of Benares arising out of a suit brought by the plaintiff company for refund of certain octroi duty charged from them on certain ceiling fans imported into the Municipal limits. The goods were detained at the barrier and were charged at the rate of six pies per rupee on their value. The plaintiffs paid the duty under protest and got their goods released. The plaintiff company has now instituted the suit in the Civil Court for refund of the octroi on the ground that the goods were not chargeable with octroi at all. The defendant inter alia pleaded that the Civil Court had no jurisdiction to entertain the suit. An issue on the question of jurisdiction was framed by the trial Court, but it was not seriously pressed on behalf of the defendant. The point was again raised in the grounds of appeal before the lower appellate Court, but the judgment of that Court does not suggest that the point was argued. Before a learned Judge of this Court in second appeal the point does not appear to have been argued, and the only question considered was whether the electric ceiling fans could come under the category of "hardware" so as to be chargeable under Art. 82 of the Schedule.

A preliminary objection is taken on behalf of the plaintiff that a new point which was not argued before the Judge of this Court should not be allowed to be raised in the Letters Patent appeal. Reliance is placed on the observations in 20 All 258 (1), that in appeals under the Letters Patent an appellant is not entitled to be heard on points which he had not raised before the Judge from whose decree he was appealing. Probably all that the learned Judges meant to lay down was that he was not entitled as of right to raise such a question, and not that the Letters Patent Bench itself is precluded from allowing such a point to be raised. Even in 1931 All 35 (2), it was conceded that a question involving jurisdiction can be raised for the first time in appeal. It was pointed out in a later Full Bench case of 1931 All 490 (3), that the list could not be exhaustive and any suggestion that no other category could be considered would be an obiter dictum. The matter has been set at rest by the pronouncement of their Lordships of the Privy Council in 1932 P C 118 (4). where their Lordships quoting the remarks of Lord Watson in (1892) A C 473 (5), at p. 480 pointed out that where a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent, but expedient in the interests of justice to entertain the plea. But the expediency of adopting such a course may be doubted when the pleas cannot be disposed of without deciding nice questions of fact. We are therefore of opinion that a plea of want of jurisdiction can be

1. Brij Bhukhan v. Durga Dat, (1898) 20 All 258=1898 A W N 41.
2. Ram Kinker Rai v. Tufani Ahir, 1931 All 35=133 I C 428=53 All 65 (F B).
3. Mahabir Singh v. Narain Tewari, 1931 All 490=134 I C 236 (F B).
4. M. E. Moolla & Sons, Limited v. Mrs. Burjorjee, 1932 P C 118=136 I C 737=59 I A 161=10 Rang 242 (P C).
5. Connecticut Fire Insurance Co. v. Kavanagh, (1892) A C 473=61 L J P C 50=57 J P 21=67 L T 508.

raised in this Letters Patent appeal even though it does not appear to have been pressed before the learned Judge of this Court.

The first contention urged on behalf of the appellant is that no suit for a refund of octroi duty lies in the Civil Court. S. 128 (1), Municipalities Act, 1916, empowers a Board to impose several kinds of "taxes", and the list includes an octroi on goods or animals brought within the Municipality for consumption or use therein. The opening portion of the sub-section indicates that an octroi is regarded as one of the taxes which can be imposed by the Board. In S. 133 (1) it is specifically mentioned that if the proposed "tax" falls under any of the Cls. (i) to (xii), sub-S. (1), S. 128, the Commissioner may refuse to sanction it. Cl. (8). sub-S. (1) is the clause referring to octroi on goods. Similarly S. 166 speaks of any sum on account of "tax" other than an octroi or toll, or any similar tax payable upon immediate demand. It therefore seems to be obvious that the word "tax" is intended to be comprehensive enough to include an octroi or a toll also. S. 153 also is general in its scope and provides for the making of rules regulating the assessment, collection or composition of taxes, and in the case of octroi or toll, the determination of octroi or toll limits. That is to say, the assessment and collection of octroi as well as the determination of the limits of octroi can be provided for in the rules made by the Board. S. 160 allows an appeal in the case of all taxes other than those assessed upon the annual value of buildings or lands, and S. 162 provides for a reference to the High Court in case there is a reasonable doubt. It is difficult to hold that these sections are inapplicable to the assessment, imposition or demand of octroi.

We then come to S. 164, on which main reliance is placed on behalf of the appellant. It provides:

(1) No objection shall be taken to a valuation or assessment, nor shall the liability of a person to be assessed or taxed be questioned in any other manner or by any other authority than as provided in this Act.

(2) The order of the appellate authority confirming, setting aside or modifying an order in respect of valuation or assessment or liability to assessment or taxation shall be final, etc.

The marginal note added to the section is "Bar to jurisdiction of Civil and Criminal Courts in matters of taxation." Both the marginal note as well as the language of the two sub-sections indicate that it is the intention of the Legislature that matters of this kind are to be decided finally in accordance with the provisions laid down in the Municipalities Act and not otherwise, and that they should not be re-opened in any Civil or Criminal Court in any manner other than that which is provided in this Act. It is obviously intended that all objections to the valuation or assessment as well as to the liability or assessment of taxes shall be made either to the Board or appellate authority and that the ultimate decision of the appellate authority shall be absolutely conclusive and incapable of being re-opened in any other Court except in accordance with the provisions of the Act itself.

It has been held by a Bench of this Court that when proceedings are started under S. 155, Municipalities Act, the question whether an offence has in fact been committed can be considered afresh by the Criminal Court because there is provision for conviction for such an offence in the Act itself. In 1935 All 28 (6), there was a remark in the nature of an obiter dictum that:

So far as civil Courts are concerned, the contention (that the jurisdiction is barred) is well-founded.

The learned counsel for the respondent has relied on 35 Cal 859 (7). That case turned on the interpretation of S. 116, Bengal Municipalities Act, 1884. In the previous Act the words "nor shall the liability of any person to be assessed or rated be questioned," had also occurred in the same section, but in 1894 those words were deliberately deleted by the Legislature and omitted from the section. Furthermore, there was no marginal note indicating that the section was intended to be a bar to the jurisdiction of Civil or Revenue Courts. It is also quite clear that there the taxation had been made in respect of income earned outside the jurisdiction of the Muncipal limits. In those circumstances the Calcutta High Court held that suit in a Civil Court was maintainable. The position in these Provinces is quite different because the language of S. 164, together with its marginal note is quite emphatic. It may also be noted that in Chap. 10, of the Municipal Account Code, S. 134, onwards, the imposition of octroi duty

6. Kashi Prasad Varma v. Municipal Board, Benares, 1935 All 28=154 I C 750=36 Cr L J 560.
7. Chairman of Giridih Municipality v. Srish Chandra Mazumdar, (1908) 35 Cal 859=7 C L J 631=12 C W N 709.

is called an assessment. We are therefore of opinion that no suit for a refund of octroi which has been assessed by the Municipal Board on goods imported lies in a Civil Court on the ground that the goods were not in fact assessable or that the amount of assessment was excessive.

The next question is whether the goods were really chargeable with octroi duty. It is not absolutely necessary to decide this finally in this case. The learned Single Judge was of the opinion that ceiling electric fans did not come within the category of hardware mentioned at serial No. 82 of the schedule. There is much to be said for the view that "hardware" would not include machinery of the kind of electric ceiling fans. The learned counsel for the Municipal Board suggested that they may come under the heading "other metals and articles made therefrom", while the learned counsel for the respondent pointed out that iron, brass copper, etc., had been previously mentioned and the expression "other metals" would not include iron. It is not necessary to decide this point. But we may point out that class (14) expressly exempts from duty machinery meaning machines or sets of machines to be worked by electric power. Electric ceiling fans are obviously within the scope of this category. Although no suit lies for refund of the octroi duty, we must express our opinion that the goods were actually exempt from duty, when considering the question of costs.

We accordingly allow the appeal and dismiss the plaintiff's suit, but we direct that the parties should bear their own costs throughout.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 763

THOM, J.

Lieut. Basil Douglas Hope Dunbar—Petitioner.

v.

Mrs. Evelyn Diana Hope Dunbar and *another*—Respondents.

Matrimonial Case No. 10 of 1934, Decided on 5th April 1935.

Indian and Colonial Divorce Jurisdiction Act (1926), S. 1 (1) (d)— Consistorial causes should be entertained only in Court of parties' domicile—Only in exceptional case will High Court entertain petition for dissolution of marriage by persons who are not domiciled and resident in India.

Consistorial causes should be entertained only in the Court of the parties' domicile. The High Court will always be slow to entertain petitions for the dissolution of marriages by persons who are not domiciled and resident in India. Only in exceptional circumstances will the Court exercise its jurisdiction in such cases. The Court, before it does so, must be clearly of the opinion upon the facts before it that because of the reasons referred to in S. 1 sub-S. (1)(d), the petitioner cannot effectively prosecute his suit for divorce in the Court of his domicile. Further, the Court, before it will entertain such a petition, must be satisfied that the interests of justice imperatively demand that the suit should be decided in India. [P 764 C 2; P 765 C 1]

O. M. Chiene—for Petitioner.

K. N. Malaviya and *R. N. Banerji*—for Respondent.

R. N. Gurti—for Co-respondent.

Order.—This is a petition by Lt. Basil Douglas Hope-Dunbar of the Cameron Highlanders against Mrs. Evelyn Diana Hope-Dunbar, his wife, and Captain J. W. T. Woolridge of the Indian Army Service Corps. The petition is presented under the Indian and Colonial Divorce Jurisdiction Act of 1926. In the petition the petitioner prays for dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent. In para. 17 of his petition the petitioner avers that the respondent committed adultery with the co-respondent in July, August and September 1933, at Bombay in October 1933 and in Bareilly between the last week of December 1933 and the first week of January 1934. The respondent has taken a preliminary objection to this petition. She has contended that this Court should refuse to entertain the petition upon the ground that it is not in the interests of justice that the petition be adjudicated upon by a Court in India and that no sufficient cause has been shown for the presentation of the petition in a Court in India. The relevant section of the Indian Divorce and Colonial Jurisdiction Act is S. 1, Sub-S. (1) (c) and (d). These sub-sections are in the following terms:

(c) No such Court shall grant any relief under this Act except in cases where the petitioner resides in India at the time of presenting the petition, and the place where the parties to the marriage last resided together was in India, or make any decree of dissolution of marriage except where either the marriage was solemnized in India or the adultery or crime complained of was committed in India; (d) any such Court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause he or she is prevented from taking proceedings in the Court of the country in which he or she is domiciled, and the Court shall so refuse if it is not satisfied that in the interests

of justice it is desirable that the suit should be determined in India.

The petition was filed in November 1934. On 19th December the petitioner left with his regiment for Khartum where he at present resides. The adultery alleged is averred by the petitioner to have taken place at various places in India. It follows therefore that the conditions set forth in S. 1, Sub-S. (1) (c) are present in this case. Learned counsel for the respondent has contended that the Court ought, in the exercise of its discretion, to refuse to entertain the petition upon the ground that the petitioner had failed to show that by reason of official duty, poverty or other sufficient cause he was prevented from taking proceedings in the Court of the country in which he was domiciled. Further, learned counsel invited the Court to dismiss the petition upon the ground that, upon a consideration of the entire facts and circumstances, it was not in the interests of justice that the petition should be entertained by this Court. As already observed, the petitioner resides at Khartum. Learned counsel for the petitioner has stated that he has been informed by his client that there is a possibility of his return to India upon his transfer from the Cameron Highlanders to the Indian Army. It appears that the application for transfer to the Indian Army was made by the petitioner shortly before he left India in December 1934. The petitioner however is unable to say definitely whether his transfer will be effected or whether in fact he will return to India on service within any reasonable time.

The petitioner has failed to show that the exigencies of the service would prevent him securing the necessary leave to enable him to go to Scotland if he so desired to be present at the prosecution of his suit in the Court of Session there. It is common knowledge that regimental officers are granted special leave for purposes of prosecuting suits for the dissolution of their marriages and in any event as was pointed out by learned counsel for the respondent the evidence of the petitioner could very easily be taken upon commission. This is common practice and one to which in cases, such as the present, there is no real objection. Learned counsel for the petitioner has contended that it is in the interests of justice that his client should be present in Court to give evidence. Undoubtedly that would be more satisfactory from his point of view. On the other hand, the evidence which he will be able to give will be evidence which can easily and appropriately be recorded on commission. Learned counsel for the petitioner has further pointed out that all the material witnesses apart from the parties are resident in India. It is true that they do not reside within the jurisdiction of this Court, but learned counsel has stated that there would be no difficulty in securing the attendance of these witnesses in this Court should this Court entertain the petition. This fact undoubtedly is a weighty consideration, but, on the other hand, the evidence of such witnesses in divorce case is recorded on commission frequently and no difficulty presents itself to the recording of the evidence of the petitioner's witnesses in the present instance.

The respondent resides in England. She would not have come to India at all had she not been married to the petitioner. She has no intention of returning to India. Now it is quite certain that in the interests of justice her evidence should be recorded in the Court which decides the petitioner's suit for the dissolution of his marriage. She undoubtedly will be the most important witness in the case. It is not only desirable but essential in the interests of justice that the Court should have the opportunity of hearing the witness give her evidence and observing her demeanour in the witness box. If this Court entertains the petition then the respondent would have to journey to India to give evidence. On the other hand, if the Court refused to entertain the petition, the petitioner will either have to give his evidence on commission or journey to Scotland to give his evidence. The evidence of the other witnesses in India would be recorded upon commission. Upon a consideration of the entire circumstances it is in the interests of justice that the petitioner's action for the dissolution of his marriage with the respondent should be taken in the Court of their domicile. The general principle is that consistorial causes should be entertained only in the Court of the parties' domicile. There are many reasons for this principle. These are patent and need not be enumerated here. This Court will always be slow to entertain petitions for the dissolution of marriages by persons who are not domiciled and resident in India. Only in exceptional circumstances will the Court exercise its jurisdiction in such

cases. The Court before it does so must be clearly of the opinion upon the facts before it that because of the reasons referred to in S. 1, Sub-S. (1) (d), Indian and Colonial Divorce Jurisdiction Act, the petitioner cannot effectively prosecute his suit for divorce in the Court of his domicile. Further the Court, before it will entertain such a petition, must be satisfied that the interests of justice imperatively demand that the suit should be decided in India.

The petitioner and the respondent are domiciled in Scotland. The petitioner has completely failed to show that poverty or official duty or any other sufficient cause prevents him from proceeding to Scotland to prosecute his suit there. Further the petitioner has failed to satisfy me that it is in the interests of justice that the suit should be decided in India. In these circumstances the petition is dismissed. The respondent is entitled to costs. I assess these costs at Rupees 500. The co-respondent who is represented is also entitled to costs. I allow to him Rs. 200 as costs subject to his filing a fee certificate within one week.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 765

NIAMATULLAH, J.

Mt. Muniran—Plaintiff — Applicant.

v.

Ali Husain — Defendant — Opposite Party.

Civil Revn. No. 619 of 1934, Decided on 20th February 1935.

Civil P. C. (1908), S. 24 — Suit filed in Munsif's Court on Small Cause side transferred to Honorary Munsif's Court—On application of defendant suit transferred by District Judge to Additional Munsif's Court having no Small Cause powers—Appeal lies from his decision — U. P. Honorary Munsifs Act (2 of 1896), S. 8, Proviso.

A suit for recovery of Rs. 152-8-0 was instituted in the Court of the Munsif, who had jurisdiction of a Court of Small Causes upto Rs. 200. The suit was cognizable by the Munsif on the Small Cause Court side of his jurisdiction. Before any proceedings could be taken, the suit was transferred to a Bench of Honorary Munsifs, where it remained pending until, on the application of the defendant, the District Judge transferred it to the Court of the Additional Munsif, who had no jurisdiction to try cases under the Provincial Small Cause Courts Act. The Munsif tried the suit on the merits and dismissed it. The plaintiff appealed from the Munsif's decree to the Court of the District Judge, who held that no appeal lay, as the Munsif should be deemed to have decided the case as a Judge, Small Cause Court:

Held **: that when the suit was transferred to the Bench of Honorary Munsifs, it became subject to the provisions of the Honorary Munsifs Act (Local), No. 2 of 1896. The proviso to S. 8 of that Act expressly excludes the application of S. 24 (4), Civil P. C. When the sult was transferred from the Court of the Bench of Honorary Munsifs to that of the Additional Munsif, the latter cannot acquire the jurisdiction of the Court of Small Causes in respect of this suit by virtue of S 24 (4), which does not in terms apply, the transfer not being from a Court of Small Causes. The Additional Munsif could therefore try the suit only within the limits of his own jurisdiction, and as such an appeal lay to the District Judge from his decision.**

[P 766 C 1,2]

M. N. Raina—for Applicant.

Lakshmi Narain Gupta—for Opposite Party.

Order.—This is an application for revision under S. 115, Civil P. C., and is directed against an order passed by the learned Subordinate Judge of Shahjahanpur. The applicant in this Court was the plaintiff in a suit for recovery of Rs. 152-8-0, instituted in the Court of the Munsif, who had jurisdiction of a Court of small causes upto Rupees 200. It is not disputed that the suit was cognizable by the Munsif on the Small Cause Court side of his jurisdiction. Before any proceedings could be taken, the suit was transferred to a Bench of Honorary Munsifs, where it remained pending untill on the application of the defendant, the District Judge transferred it to the Court of the Additional Munsif, Shahjehanpur, who had no jurisdiction to try cases under the Provincial Small Cause Courts Act. The Munsif tried the suit on the merits and dismissed it. The plaintiff appealed from the Munsif's decree to the Court of the District Judge, Shahjehanpur, who held that no appeal lay, as the Munsif should be deemed to have decided the case as a Judge, Small Cause Court. This view purports to be based on S. 24 (4), Civil P. C. The Subordinate Judge dismissed the appeal, holding that none had lain to him. The present application for revision is directed against the decree of the Subordinate Judge dismissing the plaintiff's appeal to his Court. The reasons on which the judgment of the Subordinate Judge proceeds are somewhat involved; but his view seems to be that the suit, throughout its progress, retained its character as a suit of Small Cause Court nature, that even when it was pending in the Court of the Bench of Honorary Munsifs it was

a suit of a Small Cause Court nature with the only difference that the losing party had a right of appeal under the Honorary Munsifs Act (Local) No. 2 of 1896, and that the Additional Munsif, who was not subject to the Honorary Munsifs Act, had power to try it as a Judge, Small Cause Court though he had otherwise no jurisdiction under the Provincial Small Cause Courts Act. The Judge has referred to S. 24 (4), C. P. C., as being applicable to the circumstances of this case. In my opinion the ground on which the Judge has based his judgment is erroneous. It is true that the Court in which the suit was originally instituted had jurisdiction to try it as a Small Cause Court.

It is equally true that, if the suit had been transferred on the application of one of the parties to it to another Court other than that of Honorary Munsifs, such Court would have had jurisdiction to try it as a Small Cause Court, even though it otherwise had no jurisdiction under the Provincial Small Cause Courts Act. But when the suit was transferred to the Bench of Honorary Munsifs, it became subject to the provisions of the Honorary Munsifs Act (Local), No. 2 of 1896. The proviso to S. 8 of that Act expressly excludes the application of S. 24 (4), Civil P. C. It should be noted that the reference in the proviso is to S. 25 of Act 14 of 1882, which corresponds to S. 24 of Act 5 of 1908. The proviso clearly provides that S. 24, Civil P. C., shall not be deemed applicable to cases transferred from Courts of Small Causes to those of the Honorary Munsifs, who are to exercise jurisdiction under Act 2 of 1896 (Local). The learned Subordinate Judge has over-looked the proviso to S. 8, otherwise he could not have maintained that the suit, when transferred to the Court of the Bench of Honorary Munsifs, retained its character as a suit of the Small Cause Court nature with the difference that the decree of the Honorary Munsifs was appealable. As already stated, the application of S. 24 (4) is completely excluded by the proviso to S. 8. But for S. 24 (4), Civil P. C., a Court to which a suit of the Small Cause Court nature is transferred can try it within the limits of its own jurisdiction, and not as a Court of Small Causes, if it has no power under the Provincial Small Cause Courts Act. Outside S. 24 (4) there is no rule of law which justifies the view that the Court to which a suit is transferred has all the powers of the Court in which it was originally instituted. It follows that it is not correct to say that "The suit retained its character as a Small Cause Court suit" while it was pending in the Court of the Honorary Munsifs.

When the suit was transferred from the Court of the Bench of Honorary Munsifs to that of the Additional Munsif, the latter cannot acquire the jurisdiction of the Court of Small Causes in respect of this suit by virtue of S. 24 (4), which does not in terms apply, the transfer not being from a Court of Small Causes. The Additional Munsif of Shahjahanpur, could therefore try the suit only within the limits of his own jurisdiction, and not within the jurisdiction supposed to have been delegated to him. In my opinion, the decree passed by the Additional Munsif in this suit was as much open to appeal as any other decree passed by him in any suit of a like description instituted in his Court. Accordingly I hold that the plaintiff's appeal to the Court of the Subordinate Judge was competent and that he should have disposed it of on the merits. The application for revision is allowed with costs, the decree of the Subordinate Judge is set aside and the case is remanded to his Court with the direction that the plaintiff's appeal be disposed of on the merits.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 766

GANGA NATH, J.

Kan Kuar—Defendant—Appellant.

v.

Atal Behari Lal and *others*—Plaintiffs—Respondents.

Second Appeal No. 649 of 1933, Decided on 29th March 1935, from decision of Dist. Judge, Farrukhabad, D/- 19th January 1933.

Agra Tenancy Act (1926), S. 243— Essentials under, mentioned — Claim to proprietary right not in issue — No second appeal lies.

Under S. 243, Tenancy Act, three things are necessary : (1) A question of proprietary right should be in issue, (2) between the parties claiming such right and (3) it should be in the first appellate Court as well as in the appeal.

[P 767 C 1]

Where the appellant does not claim any proprietary right for himself, it cannot be said that there is a question of proprietary right in issue between the parties, claiming such right, and hence no second appeal lies and no third appeal lies from such order dismissing the appeal.

[P 767 C 1]

Baleshwari Prasad—for Appellant.

Judgment.—This is a defendant's appeal and arises out of a suit brought against him by the plaintiffs-respondents for recovery of rent from Rabi 1335 F to Kharif 1338 F. The suit was originally brought against the defendant by Atal Behari and Sita Ram. On an objection by defendant 1, Lalta Prasad, Daya Shanker and Gobind Prasad, who had been impleaded as defendants were made plaintiffs. Defendant 1 contended that plaintiffs 1 and 2, that is Atal Behari and Sita Ram, were not the landholders and had no right of suit and that the suit was barred by O. 2, R. (2). Civil P. C. The trial Court found against the appellants and decreed the suit. An appeal was filed and the decree of the trial Court was confirmed by the learned Assistant Collector, who heard the appeal. Against his decision an appeal was filed to the learned District Judge, who dismissed the appeal holding that no second appeal lay. Against this decision this appeal has been filed. A preliminary objection has been taken by the learned counsel for the respondents that no third appeal lies. Under S. 246, Agra Tenancy Act, an appeal lies to the High Court from the appellate decree of a District Judge on any of the grounds specified in S. 100, Civil P. C. 1908. An appeal shall lie under S. 243, Tenancy Act, to the District Judge from the appellate decree of a Collector in any suit in which (a) a question of proprietary right has been in issue between the parties claiming such right in the first appellate Court, and is in issue in the appeal; or (b) a question of jurisdiction has been decided and is in issue in the appeal. It has been urged by the learned counsel for the appellant that inasmuch as the defendant-appellant denies the proprietary right of the plaintiff-respondents, a question of proprietary right is in issue between the parties.

Under S. 243, Tenancy Act, three things are necessary: (1) A question of proprietary right should be in issue; (2) between the parties claiming such right, and (3) it should be in issue in the first appellate Court as well as in the appeal.

In this case the appellant does not claim any proprietary right for himself. So it cannot be said that there is a question of proprietary right in issue between the parties claiming such right. The finding of the learned District Judge that no second appeal lay is correct. The appeal fails on the preliminary point. It is therefore ordered that it be dismissed with costs.

Premission to file a Letters Patent appeal is granted.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 767

NIAMATULLAH AND BAJPAI, JJ.

(*Firm*) *Naraindas Lachhmandas* — Plaintiff.

v.

Dina Nath and *others*—Defendants.

Misc. Ref. No. 262 of 1934, Decided on 27th March 1935.

Partnership—One firm cannot be partner in another firm— Dissolution of such joint concern is not dissolution of partnership within the meaning of Stamp Act (1899), Art. 46-B.

One firm cannot be a partner in another firm, so that if three firms agree to combine their property, labour or skill in some business, they cannot be considered to be partners. Hence a dissolution of a concern formed by these firms is not a dissolution of a partnership within the meaning of Art. 46-B, Stamp Act: 1931 *All* 225 and 1933 *All* 77, *Rel on.* [P 768 C 1]

But if the firms constituting as concern belong to a sole owner in each case, there can be dissolution of partnership. [P 768 C 2]

Muhammad Ismail—for the Crown.

Niamatullah, J.—This is a reference under S. 61 (2), Stamp Act. The question is whether the document dated 15th July 1924 is only an agreement, as held by the Subordinate Judge, or a deed of dissolution of partnership within the meaning of Art. 46-B, as maintained by the Chief Inspector of Stamps. Messrs. Dina Nath Hemraj, Messrs Naraindas Luchmandas and Messrs Dewanchand and Sons, all of Calcutta, entered into an agreement with the East Indian Railway for the supply of castor seeds during the year 1923-24. In pursuance of that agreement they supplied from time to time castor seeds and received certain sums of money. Payments appear to have been made to all the three sets of suppliers. On 15th July 1924, they executed a deed reciting their agreement with the E. I. Railway, the fact that they had supplied castor seeds, the sums received by each and the amount found due to each on settlement of accounts being made between them. A certain sum was due from the E. I. Railway, and it was, by agreement of the parties to the deed assigned to Dina Nath Hemraj alone, who were authorised to recover it from the Railway. Messrs. Narain Das Luchmandas and Messrs. Dewnachand and Sons, declared at the end of the document to "have no further concern with or share

or interest in the said sum." The document makes it abundantly clear that after the execution thereof none of the parties had any claim against any other party and that a final settlement of accounts in respect of their joint enterprise had been made.

It seems that, if the agreement in question had been executed by three individuals, who had previously entered into a partnership for the supply of castor seeds to the E. I. Railway, the view of the Chief Inspector of Stamps would have been correct. The agreement; on the face of it, puts an end to their relationship qua the partnership previously entered into for the purpose of supplying castor seeds to the E. I. Railway. The entire assets of the partnership business were brought into the hotchpot, and the rights and liabilities of each of the contracting parties were finally determined and the assets completely divided among them.

There is however a peculiar difficulty in accepting the point of view put forward by the Chief Inspector of Stamps. Art. 46-B, S. 1, Stamp Act, provides that a stamp duty of Rs. 5 shall be paid on a deed of dissolution of partnership. The Stamp Act contains no definition of either "dissolution" or of "partnership." There can be no doubt that both these terms have been used in the sense in which they are used in the Contract Act, which regulates partnership and the dissolution thereof. Partnership is defined in S. 239, Contract Act, as

> the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them.

It has been held by this Court in 1931 All 225 (1) and 1933 All 77 (2), that one firm cannot be a partner in another firm, so that if three firms agree to combine their property, labour or skill in some business, they cannot be considered to be partners, the essential requirement of S. 239 being that the contracting parties should be "persons", i. e. individuals. We are bound by the view taken in the cases above referred to, and must hold that if Messrs. Dina Nath Hemraj, Messrs. Naraindas Luchmandas and Messrs. Dewanchand and Sons, the executants of the document under consideration, are firms each consisting of several partners, their agreement to combine property, labour or skill for the purposes of supplying castor seeds to the E. I. Railway did not amount to an agreement of partnership. The result is the same if any of them is a firm. They may have been partners in the popular sense of the term, but could not be considered to form a partnership as defined in S. 239, Contract Act. If they did not form a partnership, there could be no dissolution of partnership within the meaning of Article 46-B, Sch. 1, Stamp Act. It is however not clear whether anyone of Messrs. Dina Nath Hemraj, Messrs. Naraindas Luchmandas and Messrs. Dewanchand and Sons, is a concern belonging to several persons as partners, or everyone of them belongs to a sole owner. In the former case, the agreement in question is not a deed of dissolution of partnership. In the latter case it is. We declare accordingly.

K S. *Order accordingly.*

1. Basanti Bibi v. Babu Lal, 1931 All 225=124 I C 19.
2. In re Jai Dayal Madan Gopal of Benares, 1933 All 77=143 I C 390=54 All 846.

A. I. R. 1935 Allahabad 768

BENNET, J.

Nanhoon—Applicant.

v.

Mt. Gendiya and *another* — Decree-holders—Opposite Parties.

Civil Revn. No. 456 of 1934, Decided on 10th April 1935, against decision of Small Cause Court Judge, Cawnpore, D/- 30th July 1934.

Civil P. C. (1908), S. 145 — Amin entrusting property attached in execution to supurddar is not surety within the meaning of S. 145 and liability cannot be enforced in execution proceedings.

The amin attached certain crops belonging to a judgment-debtor and the supurddar to whom the crop was entrusted was found to have disobeyed an order of the Court :

Held : that supurddar was not a surety within the meaning of S. 145 and that the liability could not be enforced in execution : 1933 *All* 385 and 1926 *All* 406, *Rel on.* [P 769 C 2]

Kedar Nath Gupta—for Applicant.

S. N. Verma—for Opposite Parties.

Order.—This is an application in civil revision by one Nanhoon who was a supurddar appointed by an Amin. The amin attached certain crops belonging to a judgment-debtor and the supurddar to whom the crop was entrusted is found to have disobeyed an order of the Court. The Court therefore ordered that the supurddar should pay Rs. 229-10-0 with costs. The objection was taken that the liability if any could be enforced against the supurddar only by a separate suit and not in the execution department. The only rule of law under which a liability can be

enforced in the execution department against persons other than the judgment-debtor which might possibly apply is S. 145, Civil P. C. That deals with enforcement of liability against a surety, and the section lays down the kind of surety in question:

(a) for the performance of any decree or any part thereof, or (b) for the restitution of any property taken in execution of a decree or, (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon.

It is clear that the supurddar in question was not at all a surety within the meaning of S. 145. He did not undertake any liability for the performance of the decree, nor was he liable as a surety for the restitution of property taken in execution of a decree, nor was he liable for the payment of money, etc. This view has been taken in various rulings such as 1933 All 385 (1) and 1926 All 406 (2). I consider therefore that the lower Court had no jurisdiction to deal with this matter of the liability of the supurddar in execution proceedings. Accordingly I allow this application with costs and set the order of the lower Court aside and direct that the money if paid shall be refunded.

K.S. *Application allowed.*

1. Jagat Narain v. Nizamuddin, 1933 All 385=144 I C 364.
2. Badri Prasad v. Chokhe Lal, 1926 All 406=95 I C 828=48 All 510.

A. I. R. 1935 Allahabad 769

KENDALL, J.

Parsotam Das and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. Nos. 71 and 72 of 1935, Decided on 4th April 1935, from order of Sess. Judge, Muttra, D/- 23rd January 1934.

Criminal P. C. (1898), S. 239 (d)—Complaint that all accused had joined to defame complainant—Printer charged under S. 501 and publishers and distributors of notice containing defamatory matter charged under S. 500—Joint trial—Held provision of Cl. (d), S. 239 was not violated—Penal Code (1860), Ss. 500 and 501.

The complaint as made was against all five accused on the basis that they had all joined in a plot to defame the complainant. There was no definite accusation of conspiracy, nor was the case tried as a conspiracy. But the complaint was that the accused had all been acting together with the object of publishing and distributing the notice which was printed by some of them and it was found that the accused were acting together for this purpose. The accused who had printed it were charged under S. 501 and those who published and distributed it were charged under S. 500 but all of them were tried jointly:

Held: that the provisions of S. 239 (d) were not violated. [P 770 C 2]

Lakshmi Narain Gupta—for Applicants.

Asst. Govt. Advocate—for the Crown.

S. C. Das—for Opposite Party.

Order.—These two applications for revision have been made by Parsotam Das and Murli Dhar and Gulzari from two separate appellate orders passed by the Sessions Judge, Muttra, on two appeals against one judgment of a First Class Magistrate by which the applicants were sentenced: Gulzari to one year's simple imprisonment, and the other two applicants to a fine of Rs. 100 each, under Ss. 500 and 501, Penal Code. The circumstances briefly are that a notice was printed on 19th July 1934, which was said to contain matter defamatory of the complainant. This notice was published on 20th July and distributed on 21st. The printers of the notice were the applicants, Parsotam Das and Murlidhar, and they were therefore charged under S. 501, while the other applicant Gulzar was charged with publishing and distributing the notice, which was said to be an offence under S. 500, Penal Code. The applications were made on various grounds, but the principal ground was that the applicants were prejudiced by being tried jointly. It is said that this was not a case to which Cl. (d), S. 239 Criminal P. C., applied, that is to say, the offence, if any, committed by the printers began and ended with the printing of the notice and was not part of the same transaction as the offence with which Gulzar Behari was charged. It is claimed, in the first place, that it was a misjoinder of charges that went to the very root of the matter, that is to say, it affected the mode of trial and was not merely an irregularity which could be cured by S. 537, Crimianl P. C., but was an illegality which could not be cured at all. This argument was advanced in the Court of the Sessions Judge, who held that the joint trial of Gulzar with the other accused was not "really very regular," but that it had not in any way prejudiced Gulzar's case. In dealing with the appeal of the printers, the other two applicants, he also remarked that there was nothing to show that these two were in any way prejudiced by the joint trial.

The case for the applicants is largely based on a decision of their Lordships of the Privy Council in the case of 25 Mad 61 (1). It was held there that a misjoinder of charges was not a mere irregularity which could be cured by S. 537, Criminal P. C.:

The disregard of an express "provision of law as to the mode of trial," their Lordships remarked, "was not a mere irregularity, and they held that in the case before them the procedure had amounted to such a disregard of the provisions of the law."

This decision is dated 1901, and it has been pointed out that the provisions of the Criminal Procedure Code, relating to the framing of a charge have been made wider by S. 63, Criminal P. C.. Amendment Act of 1923 and that in the case of 1933 All 264 (2), a Full Bench of this Court has discussed the decision of the Privy Council referred to above and interpreted it to mean that the sole criterion in deciding whether proceedings in a criminal case have been vitiated by an error in procedure is the question of whether the irregularity had worked injustice to the accused or not. The Full Bench refused to draw a distinction between an "illegality" and an "irregularity." It is to be noticed that the Full Bench was discussing the interpretation of S. 537, Criminal P. C., under which an irregularity in procedure is not to occasion an alteration of an order passed by a Court, and the Full Bench did not really discuss those passages in the Privy Council decision of 1901 or in the later one to which they refer, namely, the case of 1927 P C 44 (3), in which it has been held that a serious defect in the mode of conducting a criminal trial cannot be cured.

I am not however called upon to decide whether a violation of the provisions of the Criminal Procedure Code relating to the joinder of charges ought still to be held to be a defect in the mode of trial, or whether it is a mere irregularity in procedure; nor need I discuss whether the decision of the Full Bench will cover such a violation of the provisions of the Criminal Procedure Code, because after hearing the case, which has been fully discussed. I am of opinion that there has in reality been no violation of the provisions of Cl. (d), S. 239, Criminal P. C. The complaint was made against all five accused on the basis that they had all joined in a plot to defame the complainant. There was, it is true, no definite accusation of conspiracy, nor was the case tried as a comspiracy. But the complaint was that the accused had all been acting together with the object of publishing and distributing the notice which was printed by some of them, and the trial Court definitely found that the accused were acting together for this purpose. In the appeal before the Sessions Judge this finding was not directly challenged, though it is a fact that the legality of the joint trial was called in question in the Magistrate's Court, and it may be argued that as this too was one of the grounds of appeal in the Sessions Court, an objection to the finding of fact, namely, that all the accused had combined together to commit the offence, was challenged in that Court too. There can be no doubt that all the five accused believed themselves to be partners in a common defence, and nothing has been said to me to show that the finding of the Magistrate which is equivalent to a finding that the offences committed by the three applicants, though they may be distinguished, were really part of the same transaction, was not a proper finding. I am not therefore of the opinion that the provisions of the Criminal Procedure Code have been violated.

This being so, it is unnecessary to consider the other arguments that have been developed in this Court, namely, whether as a matter of fact the applicants were prejudiced by the form in which the trial was conducted, or whether the notice itself was defamatory. This last question indeed is probably not one which can legitimately be raised in revision. The result is therefore that the applications are dismissed.

K.S. *Application dismissed.*

1. Subramania Ayyar v. King-Emperor, (1902) 25 Mad 61=28 I A 257=8 Sar 160 (P C).
2. Kapoor Chand v. Suraj Prasad, (1933) All 264 =1933 Cr C 434=142 I C 537=34 Cr L J 414 =55 All 301 (F B).
3. Abdul Rahman v. Emperor, 1927 P C 44=100 I C 227=28 Cr L J 259=54 I A 96=5 Rang 53 (P C).

A. I. R. 1935 Allahabad 770

GANGA NATH, J.

L. Sunder Lal and *another*—Plaintiffs—Appellants.

v.

Rahat Ali Khan and *another*— Defendants—Respondents.

Second Appeal No. 709 of 1933, Decided on 29th March 1935, from decision of Addl. Sub-Judge, Shahjahanpur, D/- 14th March 1933.

Hindu Law— Joint family — Mortgage in favour of one of brothers — Money advanced from joint fund—Mortgagor selling property to mortgagee's brother— Held mortgage was discharged—Mortgage.

Defendant 2, the vendee of the mortgaged property, and the plaintiffs in whose names the mortgage-deed was, were members of the joint family and their business was also joint. There were circumstances to infer safely that the money advanced to the mortgagor in this case came from joint fund and to infer that the property transferred by the mortgagor to one of the brothers only meant transfer of such property to the joint family of all the brothers who were admittedly living jointly :

Held : that the mortgage was fully discharged by the sale-deed and a suit on the mortgage by the brother in whose favour it was executed was not maintainable : 1922 *All* 76, *Rel on.*

[P 771 C 1, 2]

N. P. Asthana, Lakshmi Narain Gupta—for Appellants.

S. B. Johari—for Respondent.

Judgment.—This is a plaintiff's appeal and arises out of a suit brought by them against the defendants-respondents to recover money on the basis of a mortgage executed by defendant 1. The defendants contended that the mortgage had been satisfied by the sale of the mortgaged property in favour of defendant 2 who was a member of the joint family of the plaintiffs. Both the Courts below have concurrently found that defendant 2, the vendee of the mortgaged property, and the plaintiffs in whose names the mortgage-deed is, are members of the joint family and that their business is also joint. The plaintiffs and defendant 2 are own brothers and they have joint business. The Courts below have found that there are circumstances to infer safely that the money advanced to the mortgagor in this case came from joint funds and that it was equally right to infer that the property transferred by the mortgagor to one of the brothers only meant transfer of such property to the joint family of all the brothers who are admittedly living jointly. There is not the slightest evidence to show that any of the members or defendant 2 has any self-acquired property in his own name. If the mortgagees and the vendee had not been members of the joint family and if the mortgagees had been persons totally unconnected with the vendee other considerations would have arisen. They being members of the joint family are virtually one and the same person. In 1922 All 76 (1), a mortgage was executed on 18th June 1908. The mortgagor sold, on 25th August 1914, the mortgaged property together with other property to the mortgagee's father. The father and the son were members of a joint family living together, and were to be deemed, as regards these transactions, as virtually the same person. The amount due on the mortgage was left with the vendee for discharge thereof. The mortgagee brought a suit on the mortgage. It was held that the suit was not maintainable, as the mortgage was fully discharged by the acceptance of the sale-deed.

In view of the findings of the lower Court which are quite correct and with which I agree, there is no force in the appeal. It is ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

K.S. *Appeal dismissed.*

1. Lachman Prasad v. Lachmeshwar Prasad, 1922 All 76=66 I C 206.

A. I. R. 1935 Allahabad 771

NIAMATULLAH, J.

Qutubuddin—Defendant—Appellant.

v.

Mangala Dubey and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 20 of 1933, Decided on 26th February 1935, from decision of Sub-Judge, Azamgarh, D/- 7th December 1932.

(a) Transfer of Property Act (1882), S. 53 —A deed not meant by executant to be fictitious is only voidable at option of creditors —If not avoided it is valid.

Under S. 53 of the Act a deed, unless it was meant by the executant thereof to be fictitious, is only voidable at the option of the creditors; and if it is not avoided by the latter, it is a perfectly valid instrument as between the parties to it. [P 773 C 1]

(b) Compromise—Compromise given effect to in decree—It is not collusive unless it is fraud on rights of third parties.

If the plaintiff and the defendant in an action compromise, and the compromise is given effect to in the decree, it cannot be considered to be collusive, unless it is a fraud on the rights of third persons. The word "collusive" is not a term of art and generally implies an understanding between two persons. As between the parties to a transaction no question of collusion can arise only because they acted in concert—a characteristic which is common to all agreements. [P 773 C 1]

(c) Cosharer—Undivided mahal — One cosharer transferring land—Others are entitled to set aside alienation and eject transferee.

One of several cosharers in an undivided mahal cannot transfer to stranger lands held by him in severalty and if he does so, the other cosharers are entitled to have the alienation set aside, to eject the transferees and to take joint

possession with the transferors: 1920 *All* 111 and 1928 *All* 59, *Rel on.* [P 773 C 2]

Mukhtar Ahmad—for Appellant.

Kanhaiya Lal Misra—for Respondents.

Judgment.—This is a plaintiff's appeal and arises from a suit for possession of two plots: Nos. 394-1 and 494, by ejectment of defendant 1, who claims it under a mortgage deed executed by defendant 2. The plaintiff and defendant 2 are recorded co-sharers of a "khata" in which the plots in suit lie. The trial Court decreed the plaintiff's suit so far that joint possession was allowed to the extent of 11-12. The lower appellate Court dismissed the plaintiff's suit.

The "khata" in which the plots in suit are situated originally belonged to one Makhdum Bakhsh. In 1906 he executed a deed of gift in respect of the entire khata in favour of his daughter's sons, Abdur Rauf and Muhammad Hanif. Makhdum Bakhsh subsequently died, leaving a daughter, Wasiha Bibi, and her two sons, the donees. Qutubuddin is the son of Zaibunnisa, daughter of Wasiha Bibi. Mutation of names was effected in favour of the donees, Abdur Rauf and Muhammad Hanif. The latter died, apparently unmarried, and his share devolved partly on his mother and partly on his brother and sister. The sister also died, leaving the plaintiff and her mother Wasiha Bibi as her heirs. Wasiha Bibi thus obtained a fractional share in the "khata" from her deceased son and daughter, though she got nothing on the death of her own father, Makhdum Bakhsh, who had gifted away the entire share to her sons. Abdur Rauf made a gift of his share to the plaintiff. Wasiha Bibi executed a deed of mortgage with possession to defendant 1 Mangala Dubey, in respect of plots Nos. 394-1, and 494. Thereupon the plaintiff instituted the suit which has given rise to this appeal for exclusive possession of the plots in dispute impugning the deed of mortgage and the right of the mortgage to remain in possession of the plots which formed part of the undivided property of the plaintiff and Wasiha Bibi, from whom defendant 1 admittedly derives title. The suit was contested by defendant 1, who pleaded that the deed of gift under which the plaintiff claims title and which was executed by Abdur Rauf was fictitious and fraudulent and conferred no title on the plaintiff. The plaintiff had also impugned the mortgage relied on by defendant 1 on the ground that Wasiha Bibi did not intelligently execute it in favour of defendant 1 nor did she receive any consideration in respect thereof.

Both the lower Courts have concurrently found that the mortgage deed in favour of defendant 1 is perfectly valid. This finding must be accepted, and defendant 1 should be treated as a mortgagee with possession from Mt. Wasiha Bibi. The lower appellate Court upheld the defence as regards the validity of the deed of gift in favour of the plaintiff. It is somewhat difficult to ascertain the exact finding of that Court on this part of the case. It is alleged on behalf of the respondent that the finding amounts to a declaration that the deed of gift was void. I shall advert to this question presently.

It is no longer in dispute that Abdur Rauf executed a deed of gift in favour of the plaintiff in 1918, and had it registered. Mutation of names was effected in his favour in respect of the share of Abdur Rauf in the "khata" we are concerned with. Abdur Rauf subsequently instituted a suit for cancellation of the deed of gift, alleging that the deed was fictitious and was not given effect to. The suit was compromised and a decree dismissing the suit in terms of the compromise was passed on 26th April. 1920. The decree clearly states that the deed of gift be declared to be valid and the plaintiff's suit be dismissed. This was the effect of the compromise, which however provided that certain house and sir and khudkasht lands would remain in possession of Abdur Rauf. After sometime Abdur Rauf appears to have instituted another suit again impugning the deed of gift as before. He also impugned the compromise and the decree passed in the earlier suit. As regards the compromise, he said that it was collusive. Excepting the plaint, no other document relating to that suit has been filed by any of the parties. It is conceded on both sides that the suit was eventually dismissed. It is not suggested that Abdur Rauf was not in possession of the share to which the deed of gift related. In the face of this history it is surprising that the lower appellate Court upheld the defence that the deed of gift is not valid and confers no title on the plaintiff. The learned Subordinate Judge, who heard the appeal, refers to some evidence showing that Abdur Rauf was indebted to certain persons and that he dealt with one or two plots as if

he were the owner after the deed of gift. The suggestion that Abdur Rauf was indebted was based on some oral evidence and the admission of the plaintiff that Abdur Rauf was indebted to one Kaihaiya Lal, who was paid off by the donee (the plaintiff) after the deed of gift. The learned Subordinate Judge also referred to the allegation of Abdur Rauf himself in his plaint in the suit brought for cancellation of the deed of gift.

On these facts the learned Subordinate Judge held that the deed of gift had been executed to defraud the creditors and was therefore void. He failed to take note of the fact that no creditor ever challenged the deed of gift. He is apparently of opinion that a deed of gift executed to defeat the creditors is necessarily void. This is not a correct proposition. Under S. 53, T. P. Act, a deed, unless it was meant by the executant thereof to the fictitious, is only voidable at the option of the creditors; and if it is not avoided by the latter, it is a perfectly valid instrument as between the parties to it. That the deed of gift in question was not fictitious is abundantly proved by the fact that mutation of names was effected and that the donee (the plaintiff) has been in possession of the gifted share and his right is questioned only as regards the two plots which are now in dispute. The decree, though based on the compromise, is conclusive as regards the validity of the deed of gift. Abdur Rauf or any one claiming under him, is bound by the decree which affirmed the validity of the deed of gift. The learned Subordinate Judge has brushed it aside with the remark that it was "collusive." He did not pause to consider what a collusive transaction means. If the plaintiff and the defendant in an action compromise, and the compromise is given effect to in the decree, it cannot be considered to be collusive, unless it is a fraud on the rights of third persons. The word "collusive" is not a term of art and generally implies an understanding between two persons in fraud of the rights of third persons. As between the parties to a transaction no question of collusion can arise only because they acted in concert—a characteristic which is common to all agreements. It is not suggested that the object of the compromise between the parties to this suit was to prejudice the right of any one else. As already stated, Abdur Rauf or any one claiming under him, is estopped by the compromise and the decree from questioning the validity of the deed of gift. Much less is a third person like defendant 1 entitled to raise any question in respect of the binding character of the deed of gift. For these reasons, I set aside the finding of the lower appellate Court so far as it relates to the validity of the gift relied on by the plaintiff-appellant.

The learned advocate for the appellant has referred to 1920 All 111 (1) and 1928 All 59 (2) and contended that one of several cosharers in an undivided mahal cannot transfer to a stranger lands held by him in severalty and that if he does so, the other cosharers are entitled to have the alienation set aside, to eject the transferees and to take joint possession with the transferors. One of these cases is the decision of a Division Bench, and I am bound by it. The lower Courts have found as regards one of the plots in dispute that it was in exclusive possession of Wasiha Bibi. If she had not executed the mortgage deed relied on by defendant 1, the plaintiff would not have been entitled to joint possession with her; but as ruled in the cases already referred, to, he becomes entitled to joint possession after ejecting the transferee. Acting on this view, the Court of first instance decreed joint possession to the plaintiff, declaring his share to be 11-12. It did not however pass any decree for ejectment of defendant 1, the transferee. The latter appealed to the lower appellate Court; but the plaintiff did not file any cross-objection, nor did he prefer a separate appeal of his own. The lower appellate Court dismissed the suit holding that the plaintiff had no right under the gift set up by him, but went on to observe that if the deed of gift had been found by it to be valid, it would have decreed joint possession to the plaintiff. According to the calculation of shares made by that Court, the plaintiff's share comes to 121-144 and not 11-12, as assumed by the trial Court. It is clear that the plaintiff acquiesced in the form of the decree passed by the trial Court and did not insist on the ejectment of defendant 1. None of the grounds taken in the memorandum of appeal in this Court is directed against the ejectment of defendant 1. In this state of things, I do not think that

1. Jamna v. Jhalli, 1920 All 111=55 I C 94.
2. Mohamad Sher Khan v. Bharat Indu, 1928 All 59=106 I C 656.

a decree for ejectment of defendant 1 need be passed. In the view of the case I have taken, the decree of the trial Court should be restored, declaring the plaintiff's right to be 121-144, as found by the lower appellate Court. The order of the trial Court decreeing mesne profits is also restored.

The result is that the appeal is allowed with costs. The decree of the lower appellate Court is set aside and that of the Court of first instance is restored with this modification that the plaintiff's share shall be considered to be 121-144 and not 11-12. Leave to appeal under the Letters Patent is refused.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 774

NIAMATULLAH, J.

Baboo Singh—Plaintiff—Appellant.

v.

Ram Manohar and *others*—Defendants—Respondents.

Second Appeal No. 121 of 1933, Decided on 28th February 1935, from decision of Second Addl. Sub-Judge, Allahabad, D/- 18th October 1932.

(a) Adverse Possession—Cosharer—Possession of one is constructive possession of all.

Amongst cosharers, possession of any one of them must be considered to be constructive possession of all unless the person in actual possession ousted his cosharers in denial of their rights. [P 775 C 1]

(b) Limitation Act (1908), Art. 142—Plaintiff suing for possession of land actually cultivated or of house capable of actual occupation—Allegation of dispossession by defendant— Art. 142 applies and plaintiff must prove dispossession within 12 years of suit.

Where property in dispute consists of lands actually cultivated or of house capable of actual occupation and the plaintiff sues for possession of such property on the allegation that he was dispossessed by the defendant, Art. 142 is undoubtedly applicable and the plaintiff must show that his dispossession occurred within 12 years before the institution of the suit. In such a case it may be necessary for him to adduce evidence showing when his own possession ceased and that of the defendant or of any other trespasser began. But where the property is of such a nature that it is not capable of actual physical possession or where the property, though capable of physical possession, is in the occupation of one through whom the plaintiff can be in constructive possession, different considerations obviously apply. A man may be in possession of his property without actually occupying it. In considering therefore the question whether the plaintiff was dispossessed within 12 years or whether his possession discontinued within 12 years, the nature of the property and the possession of those actually occupying it, if it is capable of actual occupation, must be taken into consideration. [P 775 C 2]

(c) Co-sharer—Co-sharer is not presumed to know contents of registered document executed by person denying his title—But if transferee takes possession of property as to give notice that his right is denied, transferee's possession is adverse—Notice.

A subsequent transferee or any other person having occasion to deal with any property may be fixed with notice of a prior registered instrument because he is put to inquiry and is expected to inspect the Registration Office, but a cosharer cannot be presumed to know the contents of a registered document, executed by persons who impliedly denied his title by executing the document. It is obviously impossible to expect that every owner of property must periodically inspect the Registration Office to find if any other person has dealt with his property adversely. At the same time if the vendee takes possession of the vended property in a manner which is calculated to give clear notice to the person whose title is affected by the sale, that his right is denied, and is precluded, the vendee's possession will be adverse. [P 776 C 1]

Damodar Das, *Hyder Mehdi* and *Zafar Mehdi*—for Appellant.

Shiva Prasad Sinha—for Respondents.

Judgment.—This appeal has arisen from a suit brought by the appellant for declaration of his right to half of the tank in dispute and in the alternative for possession. Both the Courts below dismissed the suit as barred by limitation. The plaintiff is one Baboo Singh. The defendants are vendees from Amarjeet Singh and Bijai Bahadur Singh under a sale-deed, dated 27th April 1917. The relationship between the plaintiff Baboo Singh and the defendants vendors will appear from the following pedigree:



It has been found by both the Courts below that the tank in dispute (No. 708 old and 851 new) was purchased at an auction by Daulat, who acted in that transaction on behalf of himself and his two brothers. Daulat died issueless and his interest devolved upon his two brothers either by survivorship or by inheritance, a point which is not material, as in either case after the death of Daulat Singh the plaintiff's father and the father of the defendants' vendors were co-sharers. Plaintiff suc-

ceeded to the interest of his father, while the defendants' vendors succeeded to the interest of their father. On these facts there can be no doubt that the plaintiff and the defendant's vendors were co-sharers. There was controversy in the lower Court as to whether Baboo Singh, was in actual enjoyment of the tank or whether Amarjeet Singh and Bijai Bahadur Singh alone were in possession. All of them being co-sharers, possession of any one of them must be considered to be constructive possession of all unless the person in actual possession ousted his co-sharers in denial of their rights. There is no suggestion either in the pleadings or evidence that before the sale-deed, dated 27th April 1917, Baboo Singh's right was denied by the defendants' vendors or that Baboo Singh was in any manner ousted from the constructive possession which he must be deemed to have had. On the question of limitation there is another important point which both the lower Courts have overlooked and which has a very important bearing on that point. The property in dispute is a tank with a belt of parti land round about it. It is not suggested in evidence, nor is there any finding in the judgments of the lower Courts, that the tank and the belt of land surrounding it were capable of actual enjoyment. The tank does not appear to be one of those hollow lands which can be cultivated in particular seasons of the years or that it yields any crop of any kind, such as singhara. There is also no suggestion that it yielded any fish which could be the source of income to the owners of the tank. The sale-deed obtained by the defendants describes the property conveyed thereby as a tank measuring 4 bighas 17 biswas with three babool trees standing on its bhita. I have mentioned these facts in detail to show that the rightful owner cannot be considered to be out of possession only because he is not able to establish by evidence definite acts of possession. In such cases possession must follow title.

First of all the lower Courts addressed themselves to the question whether Arts. 142 or 144 applies. They held that having regard to the allegations contained in the plaint Art. 142 is the proper article to apply. Having arrived at that conclusion, they addressed themselves to the further question as to whether the plaintiff established his possession within limitation, that is to say, whether the plaintiff had proved such acts of possession as could be considered to save limitation. As already stated, in this connection they completely ignored the fact that the property is not one in respect of which the plaintiff, or for the matter of that the defendants' vendors, could have exercised any definite acts of possession. They also overlooked the fact that Baboo Singh and the vendors of the defendants being co-sharers, possession of one co-sharer is constructive possession of all. This is not the first case which has recently come to my notice in which subordinate Courts have viewed Art. 142, Limitation Act. in such a manner as to make it almost impossible for a plaintiff to establish his possession within limitation in cases in which the plaintiff may well be considered to be in constructive possession through others or his possession must follow his title having regard to the nature of the property. Where property in dispute consists of lands actually cultivated or of house capable of actual occupation and the plaintiff sues for possession of such property on the allegation that he was dispossessed by the defendant, Art. 142 is undoubtedly applicable and the plaintiff must show that his dispossession occurred within twelve years before the institution of the suit. In such a case it may be necessary for him to adduce evidence showing when his own possession ceased and that of the defendant or of any other trespasser began. But where the property is of such a nature that it is not capable of actual physical possession or where the property, though capable of physical possession, is in the occupation of one through whom the plaintiff can be in constructive possession, different considerations obviously apply. A man may be in possession of his property without actually occupying it. In considering therefore the question whether the plaintiff was dispossessed within twelve years or whether his possession discontinued within twelve years the nature of the property and the position of those actually occupying it, if it is capable of actual occupation, must be taken into consideration.

As already stated, in the present case the plaintiff must be deemed to have been in constructive possession of the tank in dispute, even assuming the vendors of the defendants, who were his co-sharers, were alone in possession and the tank was capable of actual possession. The plaintiff's title was never denied expressly or by necessary

implication till 27th April 1917, when the defendants obtained a sale-deed from the plaintiff's co-sharers. The sale-deed is a registered document, but the plaintiff cannot be considered to have obtained knowledge of its contents only because it was registered. A subsequent transferee or any other person having occasion to deal with any property may be fixed with notice of a prior registered instrument because he is put to inquiry and is expected to inspect the Registration Office; but a co-sharer cannot be presumed to know the contents of a registered document, executed by persons who impliedly denied his title by executing the document. It is obviously impossible to expect that every owner of property must periodically inspect the Registration Office to find if any other person has dealt with his property adversely. At the same time if the vendee takes possession of the vended property in a manner which is calculated to give clear notice, to the person whose title is affected by the sale, that his right is denied and he is excluded, the vendee's possession will be adverse. Applying this rule to the present case, if the defendants took possession of the tank and the belt of land around it in a manner amounting to a denial of the plaintiff's right and exclusion of his possession as it was before the sale, the plaintiff's constructive possession terminated, and if the suit was brought more than twelve years after the date of such dispossession or discontinuance of possession, the suit would be undoubtedly barred. There is no suggestion in the judgments of the lower Courts that the defendants so conducted themselves in relation to the tank purchased by them as to amount to the plaintiff's dispossession. As already mentioned, the tank and its appurtenance were not capable of enjoyments. The plaintiff's possession must be taken to have continued till the defendants' possession became adverse as regards continuity and extent.

The plaintiff's case is that in 1928, there was a dispute between the parties about the cutting of babool trees, and the defendants then set up their exclusive right and possession which necessitated the present declaratory suit. To be on the safe side the plaintiff claimed possession in the alternative. I do not consider that these allegations attract the application of Art. 142, Indian Limitation Act. If the question were of importance, I would apply Art. 144 to a case of this kind. But as in my opinion it makes no difference having regard to the circumstances of the case, whether Art. 142 or Art. 144 be applied. I have approached the case as if Art. 142 is applicable. If the plaintiff's allegation is true, his dispossession occurred in 1928. If it is not true, and it is not suggested by the defendants that there was any occasion before 1928 when the parties could come in conflict plaintiff's possession must be inferred from his title which was unaffected by anything taking place before or after the sale-deed of 1917. The property being what is, his possession followed title. In all these circumstances, I am clearly of opinion that the lower Courts have arrived at an incorrect finding in holding that the plaintiff failed to establish his possession within limitation.

The learned advocate for the appellant strongly pressed upon me the view that the finding of the lower appellate Court is one of fact and is conclusive in second appeal. It is true that the conclusion is so worded as to amount to a finding of fact, but it has been arrived at in complete disregard of the legal propositions which are involved in the consideration of the question and which I have indicated above. In my opinion the finding is vitiated by errors of law and it is open to me to interfere with it in second appeal. This is of course, on the assumption that Art. 142 is applicable. If Art. 144 be applied the finding which does not affirm defendants' adverse possession is beside the mark.

One of the pleas put forward by the defendants-respondents was that the plaintiff is not entitled to possession except on payment of compensation for improvements made by them. This plea was embodied in the third issue framed by the trial Court which found that the defendants spent Rs. 288, in re-digging the tank. That Court did not however express any opinion as to whether the defendants are entitled to half of that amount from the plaintiff. The lower appellate Court disposed of the case on the question of limitation without entering into any other question arising in the case. It is unnecessary to make any further enquiry on this point as Mr. Panna Lal, the learned advocate for the appellant expresses his client's readiness to contribute half of the sum spent by the defendants. The result is that I declare the plaintiff's suit to be in time and pass a decree for joint

possession in respect of half of the tank. As the defendants' claim to compensation has been conceded, I direct that parties should pay their own costs in all the Courts. The defendants shall be entitled to recover Rs. 144 by execution of decree.

N. B.—Leave to appeal under the Letters Patent is granted.

K.S. *Decree passed.*

A. I. R. 1935 Allahabad 777

IQBAL AHMAD AND COLLISTER, JJ.

Mitthu Lal—Defendant—Appellant.

v.

Mt. Chameli and *another* — Plaintiffs —Respondents.

Second Appeal No. 621 of 1932, Decided on 17th April 1934, from decree of Dist. Judge, Aligarh, D/- 9th March 1932.

(a) U. P. Land Revenue Act (1901), S. 4—Person acting a slambardar and collecting rent—He cannot say that he is not legally appointed.

Where the defendant was de facto lambardar and it was not pleaded that he was appointed without his consent, and it was admitted that he acted as lambardar in the years in suit, and that as lambardar he collected rents:

Held: that it did not lie in his mouth to say that he had not been legally appointed. Having accepted the post of lambardar, it must be presumed that he consented to perform the obligations which go with the post. [P 777 C 2]

(b) Hindu Law—Co widow — Transfer by widow having life interest voidable at option of co-widow—Such co-widow not challenging it in her life time—Her consent for transfer may be presumed.

Where a widow had only a life-interest in the property which she had transferred, and her deed of gift was voidable at the option of co-widow and no one else had the right to challenge the transfer during her lifetime and she does not do so, it must be presumed that the transfer was made with her consent.

[P 777 C 2; P 778 C 1]

Baleshwari Prasad and *Binod Behari Lal*—for Appellant.

S. B. L. Gaur—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for profits which was filed by the plaintiffs under S. 226, Agra Tenancy Act, in respect of the years 1332 and 1334 Fasli. The plaintiffs were Hub Lal and his son, Ram Rachpal. The former has since died. One Daryao Singh died leaving two widows, Mt. Surja and Mt. Jumna, and on his death his 10 biswas share in the village devolved upon the said widows. On 9th September 1921, the widows jointly executed a usufructuary mortgage of 5 biswas in favour of Hub Lal. Mt. Jumna had a daughter by name Mt. Brindaban, who was married to Hub Lal, and plaintiff No. 2 namely, Ram Rachnal, as their son. On 9th January 1922, Mt. Jumna executed a deed of gift in respect of 5 biswas ($2\frac{1}{2}$ biswas being proprietary rights and $2\frac{1}{2}$ being mortgagee rights) to Mt. Brindaban and Ram Rachpal. It is not disputed that the rights of Mt. Brindaban have now devolved upon Ram Rachpal. Mt. Jumna died about four years before the institution of this suit.

The plaintiffs' case was that Hub Lal was a cosharer of 5 biswas as mortgagee in possession in the years in suit and that Ram Rachpal was a cosharer of 2 biswas, 10 biswansis in 1332 and 1333 Fasli and of 2 biswas and $7\frac{1}{2}$ biswansis in 1334 Fasli.

The Court of first instance decreed the suit of the plaintiffs for Rs. 1,070-0-9. The lower appellate Court has allowed the appeal in respect of Rs. 40, but in other respects has confirmed the decree of the trial Court. The first plea which is taken before us is that the defendant-appellant is a thekadar and not a cosharer, and that a thekadar cannot legally be appointed lambardar. Under S. 4, Land Revenue Act, a lambardar is defined as:

"a co-sharer of a mahal appointed under this Act to represent all or any of the co-sharers in the mahal."

Whatever the position of a thekadar may be under the Act of 1926, it cannot be denied that he was not a cosharer under the Act of 1901. On the other hand, it is perfectly clear that the defendant in this case was the de facto lambardar. It is not pleaded that he was appointed without his consent, and it is admitted that he acted as lambardar in the years in suit, and that as lambardar he collected rents. This being so, it does not lie in his mouth to say that he had been legally appointed. Having accepted the post of lambardar, it must be presumed that he consented to perform the obligations which go with the post. In our opinion therefore this plea cannot prevail. The next point taken is that Mt. Jumna was only competent to transfer her life interest to Ram Rachpal and Mt. Brindaban and it is argued that her deed of gift ceased to be operative after her death. It is a fact that Mt. Jumna had only a life-interest in the property which she has thus transferred, and her deed of gift was voidable at the option of her co-widow, Mt. Surja. No one else had the right to challenge the transfer during the life-time of Mt. Surja, and since Mt. Surja herself has not done

so, it must be presumed that the transfer was made with her consent. The third plea taken is that the defendant-appellant is not liable to pay profits on the basis of gross rental.

The lower appellate Court has found that the tenants were solvent, so much so that their rents were enhanced, and the Court points out that the defendant-appellant has failed to show that he filed any suits against the tenants or distrained their crops in order to realise the rent. No receipt books were produced before the Court to show how much was realised in the way of rent and from whom it was realised, and the defendant made no effort to have the rents entered up in the siyaha. In the circumstances the Courts below were justified in giving the plaintiffs a decree on the basis of gross rental. The only point which remains is as regards village expenses. The Court of first instance allowed village expenses at the rate of 5 per cent. on the net profits, but the lower appellate Court has allowed village expenses at the rate of 10 per cent. We consider however that these should be on the basis of gross rental, and on this calculation it is conceded by counsel that the defendant-appellant is entitled to a further set off of Rs. 90.

The result of our findings is that we allow this appeal to the extent that we reduce the amount which has been decreed by the lower appellate Court in the amount of Rs. 90 only. This suit is therefore decreed for Rupees 940 with past interest at 12 per cent. and pendente lite and future interest at 6 per cent. The parties will pay and receive costs in proportion to success and failure.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 778

THOM AND IQBAL AHMAD, JJ.

Govind Prasad and *another* — Defendants—Appellants.

v.

Shanti Swarup and *others*—Plaintiff and Pro forma Defendants — Respondents.

Second Appeal No. 1165 of 1933, Decided on 22nd March 1935 from decision of Third Addl. Dist. Judge, Cawnpore, D/- 20th September 1933.

(a) Hindu Law—Joint family — Burden of proving that member threw his self-acquired property into common stock lies on him who asserts—Such burden is discharged by proof of expression of intention to abandon his separate and exclusive rights.

The burden of proving that a member of a joint Hindu family threw his self-acquired property into the common stock lies on the person making the assertion, and this burden can only be discharged by proof of the fact that the owner of the property clearly expressed an intention to abandon his separate and exclusive rights in the property in favour of the members of the joint family. The intention may be expressed by words, or may be inferred by the manner in which the profits of the property were dealt with. [P 780 C 1]

(b) Civil P. C. (1908), O. 32, Rr. 3 and 4—Decree against minor without appointment of guardian-ad-litem is nullity — But mere irregularity in appointment of guardian does not render decree nugatory if guardian has been appointed.

The provisions of O. 32, R. 3, that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, are mandatory. A decree passed against a minor without the appointment of a guardien ad litem is a nullity. But if a guardian has been appointed for a minor defendant, mere irregularities in the appointment of the guardian or the mere fact that a proper person was not appointed the guardian, does not render the decree nugatory against the minor unless and until it is proved that the minor was not effectively represented in the suit and was prejudiced by the omission of the guardian to take the pleas that could validly be raised on his behalf. Hence in the cases where a guardian ad litem for a minor defendant has been appointed and a decree passed against the minor, the minor is not entitled to avoid the decree without proof of the fact that he was not effectively represented in the suit, and that he was prejudiced by the omission of the guardian to raise proper pleas on his behalf: 1924 *All* 892; 30 *Cal* 1021; 1916 *All* 22; 1922 *All* 91 and 1925 *All* 214, *Ref.* [P 780 C 2; P 781 C 1]

(c) Civil P. C. (1908), O. 34, R. 4 (3)—Suit on mortgage by conditional sale — Court is bound to pass decree for foreclosure.

A Court is bound to pass a decree for foreclosure when the suit is based on the basis of a mortgage by conditional sale. It is only when the suit is on the basis of an anomalous mortgage that discretion is given to the Court to pass a decree for sale in lieu of decree for foreclosure. [P 781 C 2]

P. L. Banerjee and *S. N. Seth* — for Appellants.

M. L. Chaturvedi—for Respondents.

Judgment.—The suit giving rise to the present appeal was brought by Shanti Swarup, respondent, for a declaration that the preliminary and the final decrees for foreclosure passed in suit No. 92 of 1930, of the Court of the Subordinate Judge of Cawnpore in favour of the contesting defendants are a nullity and not binding on him. The said decrees were for the foreclosure of a mortgage-deed dated 22nd June

1928, executed by Chhadammi Lal, the grandfather and Jagannath Prasad the father of Shanti Swarup plaintiff-respondent. The mortgage was for a sum of Rs. 7,000 and was in favour of the contesting defendants.

Chhadammi Lal, Jagannath and Shanti Swarup were impleaded as defendants in the foreclosure suit. Shanti Swarup was a minor, and his father Jagannath Prasad was appointed as his guardian for the suit. The plaintiff-respondent assailed the validity of the decrees mentioned above on the ground that Jagannath being himself one of the executants of the mortgage-deed was not in a position to raise appropriate pleas on his behalf in bar of the claim for foreclosure of the mortgage and, as such was not a proper person to be appointed as his guardian ad litem. The plaint gave no indication of the pleas that according to it the plaintiff could be successfully raised on his behalf in the foreclosure suit. At the trial however it was suggested on behalf of the plaintiff-respondent that Jagannath omitted to plead that the mortgage was not for legal necessity, and that the rate of interest stipulated in the mortgage-deed was excessive, and lastly, that the Court should in any case instead of passing a decree for foreclosure pass a decree for sale in favour of the mortgagees, and the omission of Jagannath to raise these pleas was due to the fact that he himself was one of the mortgagors and resulted in serious prejudice to the plaintiff.

The defendants contested the suit. They denied the allegation of the plaintiff that Jagannath was not a proper person to be appointed as the guardian ad litem of the plaintiff in the foreclosure suit, or that he omitted to take such pleas as could validily be raised in bar of the claim for foreclosure. They alleged that the property mortgaged by the deed of 1928 was the self-acquired property of Chhadammi Lal and the plaintiff had no interest in the same, and accordingly contended that even if Jagannath was not a proper person to be appointed as the plaintiff's guardian, the plaintiff was in no way prejudiced, as he had no interest in the mortgaged property. The defendants therefore challenged the right of the plaintiff to the relief claimed by him.

There was abundant evidence in the case to justify the assertion of the defendants that the mortgaged property was the self-acquired property of Chhadammi Lal, and, both the Courts below have recorded a finding to that effect. But the case put forward by the plaintiff in the Courts below was that Chhadammi Lal had thrown the property into the common stock and, as such. the property became the property of the joint family cosisting of Chhadammi Lal, Jagannath and the plaintiff. The trial Court overruled the contention of the plaintiff that the property was thrown into the common stock and held that the omission of Jagannath to take the pleas mentioned above could in no case be prejudicial to the interests of the plaintiff for the simple reason that the plaintiff had no interest in the mortgaged property. The trial Court also considered the question whether or not the debt secured by the mortgage was raised for legal necessity, and answered the question in the affirmative. It therefore held that Jagannath could not successfully raise the plea of want of legal necessity on behalf of the plaintiff-respondent in the foreclosure suit. It further observed that Jagannath had actually pleaded in the foreclosure suit that the rate of interest was excessive, and, the Court had given effect to that plea by reducing the rate of interest. In view of these findings the trial Court dismissed the plaintiff's suit.

On appeal by the plaintiff the lower appellate Court reversed the decree of the trial Court and decreed the suit. It held that Chhadammi Lal had thrown the property into the common stock, and the plaintiff had an interest in the same. It did not record any finding on the question whether or not the debt secured by the mortgage was for family necessity, as it was of the opinion, that Jagannath being one of the executants of the mortgage-deed was not in a position to resist the foreclosure suit on behalf of the plaintiff either on the ground that the debt was not for legal necessity or was tainted with immorality, or to raise the plea that the Court should in any case, in lieu of a decree for foreclosure. pass a decree for sale of the mortgaged property. It accordingly held that Jagannath was not a proper person to be appointed as the guardian ad litem of the plaintiff, and that this fact by itself rendered the foreclosure decree nugatory so far as the plaintiff was concerned.

The contesting defendants have come up in second appeal and they assail the decree of the lower appellate Court

on two grounds. Firstly, it is contended that the finding of the lower appellate Court that Chhadammi Lal had thrown the mortgaged property into the common stock is erroneous. It is accordingly urged that the plaintiff had no interest in the property with respect to which the foreclosure decree was passed, and, is therefore not entitled to challenge the validity of that decree. Secondly, it is contended that in the absence of a finding to the effect that the plaintiff was not effectively and adequately represented in the foreclosure suit and that he was prejudiced because of the non-appointment of a proper person as his guardian ad litem, the suit should not have been decreed.

As we consider that the second contention advanced on behalf of the defendants is well-founded, we are relieved from the necessity of expressing an opinion as regards the first contention advanced on behalf of the defendant-appellants. We may however observe that we are by no means satisfied that the finding of the lower appellate Court as regards the property being thrown into the common stock by Chhadammi Lal is based on legal evidence. The burden of proving that a member of a joint Hindu family threw his self-acquired property into the common stock lies on the person making the assertion, and this burden can only be discharged by proof of the fact that the owner of the property clearly expressed an intention to abandon his separate and exclusive rights in the property in favour of the members of the joint family. The intention may be expressed by words, or may be inferred by the manner in which the profits of the property were dealt with. The finding of the lower appellate Court on the point is based on the fact that Chhadammi Lal associated Jagannath and the present plaintiff with himself while executing two mortgage-deeds with respect to the property. The first mortgage was executed in the year 1925 by Chhadammi Lal and Jagannath Prasad for himself, and on behalf of the plaintiff who was a minor. The second mortgage-deed was the mortgage-deed on the basis of which the foreclosure decree was passed and, this mortgage was executed both by Chhadammi Lal and Jagannath. The lower appellate Court observed that as Chhadammi Lal joined Jagannath and the plaintiff in the execution of the mortgage-deeds, it must be presumed that he threw his self-acquired property into the common stock. It may very well be that Chhadammi Lal associated Jagannath and the plaintiff with himself while mortgaging the property simply on the insistence and for the satisfaction of the mortgagee. Be that as it may, we are far from holding that the fact that the son and grandson of Chhadammi Lal joined in the execution of the mortgage-deeds was by itself sufficient to justify the inference that Chhadammi Lal abandoned his exclusive rights to the property in favour of the joint family consisting of himself, his son and grandson.

We are however clearly of the opinion, that the plaintiff was adequately and effectively represented in the foreclosure suit and that all the pleas that could validity be taken on his behalf were raised by Jagannath, and, accordingly the decrees for foreclosure are binding on him. The provisions of O. 32, R. 3, Civil P. C., that where the defendant is a minor, the Court, on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit for such minor, are mandatory, and it is well settled that a decree passed against a minor without the appointment of a guardian ad litem is a nullity: vide, 1924 All 892 (1). But it is equally well-settled that if a guardian has been appointed for a minor defendant, mere irregularities in the appointment of the guardian or the mere fact that a proper person was not appointed the guardian does not render the decree nugatory against the minor unless and until it is proved that the minor was not effectively represented in the suit and was prejudiced by the omission of the guardian to take the pleas that could validly be raised on his behalf: vide, 30 All 1021 (2), 1916 All 22 (3), 1922 All 91 (4) and 1925 All 214 (5). The reason for this rule of law is not far to seek. The law insists that the minor should be represented by a proper person whose interests are not adverse to the interests of the minor, so that the minor's interest may not in any way be neglected or prejudiced. But if it is apparent that the minor's in-

1. Champi v. Tara Chand, 1924 All 892=82 I C 516=46 All 744.
2. Walian v. Banke Behari Pershad Singh, (1908) 30 Cal 1021 = 30 I A 182 = 8 Sar 512 (PC).
3. Baijnath Rai v. Dharam Das Tiwari, 1916 All 22=35 I C 707=38 All 315.
4. Murlidhar v. Pitambar Lal, 1922 All 91 = 66 I C 372=44 All 525.
5. Raja Babu v. Balmukand, 1925 All 214 = 88 I C 323.

terests in the suit in which he was a defendant were not in any way prejudiced, it becomes wholly unnecessary to inquire into the question as to whether or not the guardian appointed was a "proper person" within the meaning of O. 32, R. 4 Civil P. C., for the simple reason that the purposes for which a guardian is appointed are achieved.

It follows therefore that in cases where a guardian ad litem for a minor defendant has been appointed and a decree is passed against the minor, the minor is not entitled to avoid the decree without proof of the fact that he was not effectively represented in the suit, and that he was prejudiced by the omission of the guardian to raise proper pleas on his behalf. In the case before us, we find that all the pleas that could be raised with any hope of success on behalf of the present plaintiff in the foreclosure suit were raised by Jagannath. No exception can be taken to the finding of the trial Court that the debt secured by the mortgage was for legal necessity. Out of the sum of Rs. 7,000 secured by the mortgage-deed, a sum of Rs. 6,530 was for the payment of antecedent debts. To that extent the mortgage was clearly for legal necessity. The balance of the sum, Rs. 470, was paid by the mortgagee at the time of the execution of the mortgage-deed. One of the contesting defendants stated on oath that the sum of Rs. 470 was paid for the expenses of the execution and registration of the mortgage-deed, and this statement was not challenged in the course of cross-examination, and was therefore rightly accepted by the trial Court. It follows that the entire debt secured by the mortgage-deed was for legal necessity and it would have been idle for Jagannath to plead that the mortgage was not for legal necessity.

There was no suggestion on behalf of the plaintiff in the trial Court that the mortgage-deed was tainted with immorality. The lower Appellate Court was therefore wrong in proceeding on the assumption that if some person other than Jagannath had been appointed guardian ad litem of the plaintiff, he could have pleaded that the debt was raised for an immoral purpose. Jagannath did plead that the rate of interest was excessive, and this plea was given effect to in the foreclosure suit. We further find that the plea that the Court should, instead of a decree for foreclosure, pass a decree for the sale of the mortgaged property, was embodied in the written statement in the foreclosure suit. There is however nothing in the judgment of that case to show that this plea was pressed at the time of hearing. The plea was without substance, as a Court is bound to pass a decree for foreclosure when the suit is based on the basis of a mortgage by conditional sale. It is only when the suit is on the basis of an anomalous mortgage that discretion is given to the Court to pass a decree for sale in lieu of decree for foreclosure.

It was not suggested in the Courts below, and it is not suggested in this Court. that any other pleas could be successfully raised on behalf of the present plaintiff in the foreclosure suit, nor is it suggested that Jagannath was not in a position to raise such pleas because of the fact that he was one of the executants of the mortgage-deed. There is no escape from the conclusion that the plaintiff failed to prove that he was not effectively represented in the foreclosure suit, or that he was prejudiced in any way by the omission of Jagannath to raise appropriate pleas on his behalf. It follows that the plaintiff was not entitled to the decree granted to him by the lower appellate Court. We accordingly allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs in all Courts.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 781

ALLSOP, J.

Jhillar Rai and *others*—Defendants—Appellants.

v.

Rajnarain Rai and *others*—Plaintiffs—Respondents.

Second Appeal No. 542 of 1933, Decided on 18th March 1935, from decision of Sub-Judge, Azamgarh, D/- 8th March 1933.

(a) Cosharer—Several cosharers in Mahal—Some having sir rights—All of them are proprietors of area comprised in sir—Person whose sir it is, is not entitled to transfer whole of proprietary title—If he does so, it is valid only to the extent of his share.

Where there are several cosharers in a mahal and some one or other of those cosharers have sir rights, all the cosbarers are the proprietors of the area comprised in the sir and consequently the person whose sir it is, is not entitled to transfer the whole of the proprietary title in the land. But if he does so, the transfer will be valid to the extent of such part as has vested in him.

[P 782 C 2, P 783 C 1]

(b) Cosharer—Sir rights—Nature of and what it is, mentioned.

The land over which the sir rights exist is the property of all the cosharers in the sense that they are all owners of it in accordance with their shares. The sir rights are something separate from the proprietary rights. They are an addition to them. The sir holder has certain rights against person to whom he may lease the land and he has certain rights against the other proprietors, i. e. he is entitled to occupy the land personally and to cultivate to the exclusion of the other cosharers who can do no more than claim their share of the profits from him. If the person who has the sir rights transfers his share as a proprietor, he becomes the ex-proprietary tenant of the land. He is of course the tenant of the whole body of cosharers because he is a tenant and they are in accordance with their shares, the landholders. If he relinquishes his ex-proprietary rights in the land, that land becomes ordinary land which may be held by a tenant or which may be cultivated by any of the proprietors as his khudkasht: 1924 *P C* 144, *Rel on.* [P 783 C 2]

(c) Cosharer—Mahal—Several cosharers—One of them in occupation cannot be forcibly ejected by others.

Where there are several cosharers in the mahal and one of them happens to be in the actual occupation of the land, the other cosharers are not entitled forcibly to eject him. Similarly, if there is a piece of land which is unoccupied by any cosharer or tenant, any one of the cosharers may go into possession and cultivate it. If he does so the others cannot forcibly eject him. Hence when the mortgagees i. e. the plaintiffs, were cosharers and they were in peaceful possession and they sowed a crop and the defendants-appellants forcibly entered the fields and appropriated part of the produce:

Held: this they were not entitled to do and that they must pay damages, although they in their turn can doubtless get their share of profits, if they institute a suit in the proper Court;

Held further: that plaintiffs were entitled to retain possession over the plots in dispute as they had entered peacefully. [P 784 C 1, 2]

(d) Evidence Act (1872), S. 68—Execution of mortgage not specifically denied—Marginal witness need not be produced.

Under S. 68 it is not necessary to prove or to produce a marginal witness unless the mortgage is specifically denied. There would be no necessity to prove the deed at all if it is admitted; and consequently the section contemplates a distinction between the position where execution is not admitted and a position where execution is specifically denied: 1933 *All* 521, *Dist.* [P 784 C 2]

Kanhaiya Lal Misra—for Appellant.

Krishna Murari Lal—for Respondents.

Judgment.—This second appeal arises out of a suit in which the plaintiffs-respondents originally claimed damages against certain persons for appropriating a crop in certain fields and also an injunction restraining these people from interfering with their possession. At a later stage there was a further prayer for possession over the property. The plaintiffs-respondents claimed as mortgagees in possession on the basis of a mortgage deed executed in their favour on 23rd September 1929, by Madan Gopal and Radha Raman. This deed purported to create a mortgage over 5 plots, viz., 160-1, 160-2, 160-3, 160-4, and 160-5 comprising a total area of a little over 5 acres in khewat Pahalwan Singh. It appears that the mortgagors had a share of 1 anna 6 pies in this khewat and had sir rights in the 5 plots which they purported to transfer by the deed which they executed in favour of the plaintiffs. The whole area of land in the mohal was 65.8 acres, so that the area which corresponded with the share of the mortgagors was about 7 acres. In addition to the plots transferred under the mortgage the mortgagors were also in possession of certain other sir plots, the total area of their sir being 13.77 acres.

The plaintiffs alleged that they had obtained actual possession over the 5 plots mortgaged to them because their mortgagors had given up their ex-proprietary rights and that they had been in possession and had sown crops and that these crops were appropriated by some of the defendants by force in the absence of the plaintiffs. The persons impleaded as defendants were originally Mukta Rai, Partaju Rai and Jangi Rai, but as these persons stated that they had nothing to do with the matter, three others, namely Udit Rai, Deonarain Rai and Sahdeo Rai were impleaded later. The trial Court decided that the mortgage was invalid and dismissed the suit. The lower appellate Court came to the conclusion that the plaintiffs were entitled to a decree against Udit Rai, Deonarain Rai and Sahdeo Rai for damages and to a decree for possession against all the defendants.

The first argument which has been addressed is in support of the proposition accepted by the trial Court that the mortgage was invalid and created no rights in favour of the plaintiffs. The suggestion is that the mortgagors were not the sole owners of the plots which they purported to transfer and that, therefore they could not transfer them. It is no doubt true where there are several cosharers in a mohal and some one or other of those co-sharers have sir rights, that all the co-sharers are the proprietors of the area comprised in the sir and consequently that the person whose

sir it is, is not entitled to transfer the whole of the proprietary title in the land. It does not seem to me however that it necessarily follows from this proposition that the mortgage was an invalid document. It failed no doubt to transfer such part of the title as did not vest in the mortgagors, but I cannot see why it should be invalid in respect of such part of the title as did vest in them. Madan Gopal and Radha Raman had a share of 1 anna 6 pies in the mohal in which the disputed plots were situated. A co-sharer has a share in every part of the land of which the mohal consists. As these plots were in the mohal it must be held that Madan Gopal and Radha Raman had a 1 anna 6 pies share in each of them and indeed in every part of each of them. There was no reason why Madan Gopal and Radha Raman should not transfer their shares in these specific plots.

It has been argued that a co-sharer may transfer his share in the mohal or a part of his share in the mohal but that he cannot transfer a specific plot and I gather that it is further suggested that he cannot transfer his share in a specific plot. Part of the argument is based on the inconvenience which would arise at a partition if a cosharer was allowed to transfer his share in any specific plot in the mohal. It may be that such inconvenience may arise but the other co-sharers cannot set up a possible inconvenience to them to prevent a person from transferring something which vests in him and which he is otherwise entitled to transfer. One may conceive of a case where two sons may inherit two identical houses from their father. No doubt if they immediately entered into a partition it would be very convenient for them each to receive one of the houses, but that would not prevent one of the sons prior to a partition from transferring his half share with the result that the other son at any subsequent partition might not obtain a whole house. By analogy it seems to me that there was nothing to prevent Madan Gopal and Radha Raman from transferring their 1 anna 6 pies share in the specific plots which they purported to transfer. They could not transfer the whole and in respect of a 14 annas 6 pies share, doubtless, their transfer was invalid, but in respect of a 1 annas 6 pies share the transfer was perfectly valid. It is not necessary to go any further in this case. What I mean is that it seems quite certain to me that a 1 anna 6 pies share in these plots did pass from Madan Gopal and Radha Raman to the plaintiffs-respondents, their mortgagees, and it is unnecessary for me to decide definitely one way or the other whether the remaining share in the plots vested in the plaintiffs or did not vest in them.

If a 1 anna 6 pies share vested in the plaintiffs. they were co-sharers in the plots in suit with the defendants-appellants. It has been argued that the mortgagors could not transfer their sir rights. That is a self-evident proposition. It was not necessary for them to do so and nobody could hold that the plaintiffs-respondents had any sir rights in the plot in suit. Another argument is that the mortgagors could not relinquish their ex-proprietary rights in favour of the plaintiffs-respondents alone. About this there can also be no doubt. It is however not a question of these rights being relinquished in favour of any particular co-sharer. It has been found on the evidence that the rights were relinquished in the sense that the mortgagors never attempted to enforce them. If those rights were relinquished, they simply disappeared. There was no question of relinquishing them in favour of any particular person. The land simply became like any other land in the mohal to which no particular rights of tenancy occupation attached.

It is necessary to have a clear conception of what sir rights really are. The land over which the sir rights exist is the property of all the co-shares in the sense that they are all owners of it in accordance with their shares. The sir rights are something separate from the proprietary rights. They are an addition to them. The sir holder has certain rights against persons to whom he may lease the land and he has certain rights against the other proprietors, i. e., he is entitled to occupy the land personally and to cultivate to the exclusion of the other co-sharers who can do no more than claim their share of the profits from him. If the person who has the sir rights transfers his share as a proprietor, he becomes the ex-proprietary tenant of the land. He is of course the tenant of the whole body of co-sharers because he is a tenant and they are in accordance with their shares the land-holders. If he relinquishes his ex-proprietary rights in the land, that land becomes ordinary land which may

be held by a tenant or which may be cultivated by any of the proprietors as his khudkasht. That is the position in the present case. The plaintiffs-respondents are at least co-sharers in the area in dispute with the other proprietors in the mohal. No proprietor has any particular right to occupy the land. The position is explained in the case of 1924 P C 144 (1).

Where there are several co-sharers in the mohal and one of them happens to be in the actual occupation of the land, the other co-sharers are not entitled forcibly to eject him. Similarly, if there is a piece of land which is unoccupied by any co-sharer or tenant, any one of the co-sharers may go into possession and cultivate it. If he does so, the others cannot forcibly eject him. It has been argued in the present case that the mortgagees, i. e., the plaintiffs, were not entitled to exclude the other co-sharers. I do not think that this is strictly a case of exclusion. It is a case of actual enjoyment for the time being. If a room is in the possession of tenants-in-common, all the tenants are entitled to every portion of it. But if at any particular time, one of the tenants happens, for example, to be sitting in a chair in the room, it is not open to any of the other tenants to eject him and occupy the chair. The same principle applies to fields in a mohal. All the co-sharers have a right to use the fields, but if at any time any of them has sown a crop, he is entitled to reap it and the others cannot eject him. They can of course claim profits from him. This is the principle set forth in the case to which I have referred above.

The finding of fact in this case is that the mortgagees were peaceably let into possession of the plots in suit upon their exproprietary rights. The mortgagees, i. e., the plaintiffs, were co-sharers and they were in peaceful possession. They sowed a crop and the defendants-appellants forcibly entered the fields and appropriated part of the produce. This they were not entitled to do and it is obvious that they must pay damages, although they in their turn can doubtless get their share of profits, if they institute a suit in the proper Court. It has been suggested that no decree for possession should be passed in favour of the plaintiffs on the principle which I have enunciated. The essence of the matter however is that a co-sharer is entitled to continue in possession if he has entered peaceably. This does not mean that any other co-sharer who forcibly ejects him is in his turn entitled to retain possession over the plots in dispute. I have no doubt in these circumstances that the decree for possession and damages was rightly granted.

There has been a subsidiary argument that the plaintiffs cannot claim to be co-sharers, because the mortgage deed has not been proved. The argument is based on the provisions of S. 68. Evidence Act. It appears that the execution of the mortgage was proved, but not by the production of a marginal witness. Under S. 68 as it now runs, it is not necessary to prove or to produce a marginal witness unless the mortgage is specifically denied. It is obvious that there would be no necessity to prove the deed at all if it was admitted and consequently the section contemplates a distinction between the position where execution is not admitted and a position where execution is specifically denied. In the present case the plaintiffs in the first paragraph of the plaint stated that they were mortgagees under the deed dated 23rd September 1929, and that they had been in possession of the plots in question. The defendants said in their written statement that they did not admit this paragraph. But it is clear from the additional pleas that what they were questioning really was not the execution of the deed but the fact of possession. No issue was framed clearly on the question of execution. In these circumstances it cannot be held that the execution of the mortgage was specifically denied. The mortgage was therefore sufficiently proved. I have been referred to the case of 1933 All 521 (2), but this is a case which turned upon a construction of O. 8, R. 5, Civil P. C., and is no authority for the proposition that a marginal witness must be produced to prove the execution of a mortgage if the execution is not admitted but is not specifically denied.

On the question of damages, it has been argued that the plaintiffs are not entitled to any decree. The reason is that they originally alleged that the crop had been appropriated by Mukta Rai, Partaj Rai and Jangi Rai and it was only afterwards that they alleged that it had been appropriated by Udit Rai, Deonarain Rai and Sahadeo Rai.

1. Midnapore Zamindary Co. Ltd. v. Kumar Naresh Narayan Roy, 1924 P C 144=80 I C 827=51 I A 293=51 Cal 631 (PC).

2. Mansa Ram v. Ancho, 1933 All 521=145 I C 802=55 All 700.

It has been alleged that the three later persons never admitted that they had taken the crop. There is no force in this argument because it is clear enough from the written statement where these persons pleaded that they were in possession of the field that they must have meant that they had taken any crop which was growing upon it because they were the owners thereof. One of them even entered the witness-box in order to give evidence about the value of the crop. It was never contended that there was no crop in the field or that any crop that there may have been was appropriated by other persons. There is no force in the appeal and I dismiss it with costs. Permission to appeal is granted.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 785

NIAMATULLAH, J.

Bakhtawar—Defendant—Appellant.

v.

Lila Pat — Proforma Defendant and another—Respondents.

Second Appeal No. 1274 of 1934, Decided on 30th January 1935, from decision of Addl. Dist. Judge, Meerut, D/- 3rd July 1934.

Lease — Usufructuary mortgage — Mortgagor executing kabuliyat and continuing in possession as thekadar—Kabuliyat not registered—Suit for rent by mortgagee — Though lease is not valid, suit can be treated as one for compensation for use and occupation and amount agreed to as rent in kabuliyat can be awarded as compensation.

The mortgagor executed a kabuliyat and agreed to continue in possession as "thekadar" and to pay a certain rent to his own usufructuary mortgagee. The kabuliyat was not registered. In a suit for rent by the mortgagee:

Held : that though in the absence of a registered lease executed by the lessor, no relationship of lessor and lessee could come into existence, the plaintiff was entitled to compensation for use and occupation of the land and the amount of compensation being agreed upon between the parties, the rent agreed to in kabuliyat can be awarded as compensation. [P 785 C 2]

P. M. L. Verma—for Appellant.

Judgment.—This appeal is without substance. The suit which has given rise to it was brought by the respondent for recovery of three years' rent on the basis of a "Qabuliat" executed by the appellant, who had on the date of the "Qabuliat" also executed a deed of usufructuary mortgage in favour of the plaintiff in respect of the land covered by the "Qabuliat." The transaction was not at all of an uncommon character.

The mortgagor agreed to continue in possession as a "thekadar" and to pay a certain rent to his own usufructuary mortgagee. The "Qabuliat" was not registered. The argument put forward on behalf of the "thekadar" is that, in the absence of a registered lease executed by the lessor, no relationship of lessor and lessee could come into existence. This contention may be right; but it is not enough to defeat the plaintiff's claim. It cannot be disputed that the parties fully intended to enter into a transaction of usufructuary mortgage. Symbolical possession was delivered by the mortgagor to the mortgagee. The mortgagor there and then changed the character of his own possession. He parted with his possession as proprietor and entered into possession as a "thekadar" and agreed to pay rent amounting to Rs. 121 a year besides land revenue Rs. 16-4-6. Technically the relationship of lessor and lessee might not have come into existence; but it is conceded that the plaintiff is entitled to compensation for use and occupation of the land. If the plaintiff's suit be treated as one for compensation for use and occupation, there is no difficulty in decreeing it. The amount of compensation being agreed upon between the parties, no further proceeding is necessary, as the plaintiff's suit can be decreed straight away. The only difference which is not one of substance, is that the amount awarded to the plaintiff should not be termed "rent" but as "compensation" for use and occupation. The learned advocate for the appellant contended that if the suit be treated as one for compensation for use and occupation of land, the Revenue Court, in which it was instituted, had no jurisdiction, as a suit of this nature is cognizable by a civil Court. He also pointed out that this objection was taken from the very beginning. Even so, S. 269, Agra Tenancy Act, clearly covers the case. The District Judge had all the materials before him for the final disposal of the suit, and so have I. The contention put forward on behalf of the appellant so far as it is based on the absence of a registered lease has therefore no substance.

The advocate for the appellant also contended that the "theka" was not given effect to, as no rent was ever paid by the defendant to the plaintiff. It is also stated that the defendant is entitled to possession of the land which is the sir of the mortgagor, he being entitled to exproprie-

tary rights which accrued on the execution of the deed of usufructuary mortgage. No rent has been assessed under S. 36, Land Revenue Act; and if any is assessed, it will be payable to the defendant himself, who is the "thekadar." In any case, the defendant cannot escape his liability to pay rent in terms of his own agreement in the "Qabuliat." The appeal is dismissed under O. 41, R. 11.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 786

NIAMATULLAH AND ALLSOP, JJ.

Jawahar Ram and *others*—Plaintiffs—Appellants.

v.

Jhinguri Lal and *others*— Defendants and Plaintiffs--Respondents.

First Appeal No. 12 of 1932, Decided on 28th March 1935, from decision of Sub-Judge, Gorakhpur, D/- 31st August 1931.

Limitation Act (1908), Art. 116 — Vendee deprived of property purchased in consequence of vendor's defect in the title—Suit for compensation is governed by Art. 116—Held limitation ran when first Court found that vendors had no power to sell and vendees were dispossessed — Subsequent affirmance of decree of trial Court does not give fresh starting point.

Article 116, Sch. 1, to the Lim. Act, is applicable to a suit for compensation by a vendee who has been deprived of the property purchased by him in consequence of a defect in the title of the vendor.

The sons impugned the sale-deed executed by their father on the ground that the property which it purported to convey belonged to the joint family of which the plaintiffs of that suit and the vendors were members and that there was no legal necessity for the alienation. The suit was decreed by the first Court on 31st January 1924. Delivery of possession was taken by the successful plaintiffs on 27th February 1924. Part of the land included in the shares was under cultivation of the vendees who did not vacate it. Disputes arose between the sons of defendant 1 and the vendees, which led to proceedings under S. 145, Criminal P. C. These proceedings resulted in favour of the vendees, and the sons of defendant 1 had to institute another suit for possession in respect of the plots which had remained in possession of the vendees in spite of the symbolical delivery of possession. The vendees remained in possession of such plots till a time within six years before the institution of the present suit, which was brought on 30th June 1930. From the decree obtained by the sons in the Court of first instance the vendees had appealed to the District Judge who dismissed it on 19th January 1926. A second appeal to the High Court was dismissed on 31st October 1928. A Letters Patent appeal was likewise dismissed on 2nd June 1930. Plaintiffs sued for return of consideration money relying on clause in sale-deed:

Held : that the plaintiff's cause of action was complete when the first Court found that the vendors had no power to sell and the vendeess were dispossessed. Subsequent affirmance of the decree of the trial Court cannot give a fresh starting point. The fact that the vendees managed to retain actual possession of part of the land included in the vended property in spite of delivery of possession could not save limitation. [P 787 C 2; P 789 C 1]

Haribans Sahai—for Appellants.

S. B. Johari—for Respondents.

Judgment.—This appeal has arisen from a suit brought by the appellants for refund of the price paid by them for a zamindari share in two villages to defendant 1 and his deceased brother Mahadeo Prasad, who executed a sale deed on 15th April 1907, in favour of some of the plaintiffs and the predecessors of the others. The principal question which arises in appeal is whether the suit has been rightly held by the lower Court to be barred by limitation.

The plaintiffs were deprived of the property conveyed by the aforesaid sale-deed in consequence of a decree for possession obtained by the sons of defendant 1 in suit No. 69 of 1923. The sons impugned the sale-deed executed by their father and Mahadeo Prasad on the ground that the property which it purported to convey belonged to the joint family of which the plaintiffs of that suit and the vendors were members and that there was no legal necessity for the alienation. The suit was decreed by the first Court on 31st January 1924. Delivery of possession was taken by the successful plaintiffs on 27th February 1924. Part of the land included in the shares was under the cultivation of the vendees who did not vacate it. Disputes arose between the sons of defendant 1 and the vendees, which led to proceedings under S. 145, Criminal P. C. These proceedings resulted in favour of the vendees, and the sons of defendant 1 had to institute another suit for possession in respect of the plots which had remained in possession of the vendees in spite of the symbolical delivery of possession. It is not disputed that the vendees retained possession of such plots till a time within six years before the institution of the present suit which was brought on 30th June 1930. From the decree obtained by the sons in the Court of first instance the vendees had appealed to the District Judge who dismissed it on 19th January 1926. A second appeal to the High Court was dismissed on 31st October

1928. A Letters Patent appeal was likewise dismissed on 2nd June 1930. It would be seen that the present suit is within six years from the judgment of the District Judge and the judgments of the High Court in second and the Letters Patent appeals, and from the time when they finally lost possession of the plots actually cultivated by them. It was however brought more than six years after the decree of the first Court and after the 'dakhal dehani' in respect of the shares in dispute. The controversy between the parties relates to the starting point of limitation. The present suit must be held to be barred, whichever Article of limitation mentioned in the course of the arguments (Arts. 62, 97, 116 and 120) be considered to be appropriate, if time is taken to have run from the date of the decree of the trial Court or the date of delivery of possession. If on the other hand, time be reckoned from the decree of any of the Courts of appeal, the suit is in time if Art. 116 is applicable. If the period of limitation be reckoned from the final judgment of the High Court. the suit is in time whichever article referred to be applied.

To determine the proper article of the Limitation Act applicable to the circumstances of the case and the starting point thereunder, the nature of the plaintiffs' claim has to be examined. The plaintiffs claimed refund of the price and damages basing their claim on a covenant contained in the sale-deed, dated 15th April 1907, which runs as follows:

Now we, the executants, or our heirs, neither have nor shall have any concern or connexion with the shares sold. If in future we, the executants, or our heirs, bring any sort of claim in respect of the thing sold, it shall be false and illegal. If by reason of the act of us, the executants, or the omission of us, the executants or our heirs, any sort of defect is found in respect of the shares sold and it is interfered with, the vendees shall have the power to recover by proper means the whole of their sale consideration from our house and moveable and immovable property.....

The plaintiffs are also entitled to rely on the implied covenant imported into every sale-deed by S. 55 (2), T. P. Act, whereby the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. The implied covenant is however less comprehensive than the express covenant quoted above as it also includes the undertaking which by force of Statute, is part of every contract of sale in respect of immovable property. If there had been anything in the express covenant overriding the implied covenant, the latter would have been superseded to that extent. The present case is free from any such complication. It has been held in numerous cases that Art. 116 of the first Schedule to the Indian Limitation Act, is applicable to a suit for compensation by a vendee who has been deprived of the property purchased by him in consequence of a defect in the title of the vendor. See, for instance, 1930 All 771 (1), in which a large number of cases are referred to and discussed. In certain cases a distinction has been drawn between cases in which a vendee is dispossessed and those in which he was unsuccessful in obtaining possession. To the latter class of cases Art. 97 has been held to be more appropriate. We are of opinion that, having regard to the frame of the present suit, it cannot be regarded otherwise than as a suit for compensation for breach of a contract in writing and registered and that Art. 116 is applicable. The plaintiffs charge the defendants with a breach of warranty of title and of covenant for quiet enjoyment. The measure of compensation is claimed to be the price paid by them together with out-of-pocket expenses incurred in defending their title. The covenant contained in the sale-deed of which the breach is complained is expressly referred to in the plaint.

The material question to determine is the starting point of limitation. According to the language of Art. 116 read with Art. 115, it is clearly the time when the contract, of which the breach is complained of, was broken. According to the covenant, on which the plaintiffs' claim rests, they are entitled to compensation if any sort of defect is found in respect of the share sold and it is interfered with. It was found by the trial Court in the suit by the sons of defendant 1 that there was no legal necessity for the sale, which the vendors were not empowered to make according to Hindu Law. The vendees' possession was interfered with when delivery of possession was given to the successful plaintiffs of suit No. 69 of 1923. It is argued that the plaintiffs' cause of action did not arise until both contingencies happened, that is defect was found in the title of the vendors and possession of the ven-

1. Muhammad Siddiq v. Muhammad Nuh, 1930 All 771=124 I C 185=52 All 604.

dees was interfered with, and that it cannot be said that the defect was found until the High Court finally decided that the sale was invalid. Reliance in placed on 1919 Mad 887 (2), which was a suit by the vendee for compensation after his suit for possession was dismissed by the first appellate Court and the High Court, though it had been decreed by the trial Court. The learned Judges apparently applied Art. 97 of the Limitation Act and took the judgment of the High Court as the terminus a quo. The suit would have been barred if limitation had been reckoned from the date of the judgment of the first appellate Court. The case is certainly an authority for the view that the limitation runs from the date of the final decision of the High Court. The learned Judges observed that:

It was only when it was finally determined that the sale by the plaintiff's vendor could not take effect against the sale by the manager that the former sale became infructuous, consequently it was only then that the consideration failed.

The same view had been taken by the Madras High Court in an earlier case, 30 Mad 316 (3), wherein it was held in similar circumstances that:

Where, as in the present case, a man has been dispossessed by suit, it would, in our opinion, be equally unreasonable to require him to sue for relief founded on such dispossession before the date of the final decree under which he was dispossessed. The dispossession in execution of the decree of the Court of first instance was not final but subject to the result of an appeal, and the effect of filing of the appeal, was to re-open the question of his right to possession and make it once more sub judice pending the decision of the appeal. If the appellant had succeeded, his dispossession under the decree of the Court of first instance would have been disregarded for purposes of limitation, and he would have been held to have been in possession throughout.

In a somewhat hard case like the one before us, the reasoning on which the decision of the Madras High Court proceeds is attractive. The existence or absence of legal necessity is highly controversial in many cases of alienations by the manager of a joint Hindu family, and the vendee may honostly believe that an adverse decision given by the trial Court is erroneous and is likely to be reversed in appeal. It is but reasonable that he should have an opportunity of challenging it by an appeal to a higher Court. At the same time, it should be borne in mind that the period of six years is sufficiently long to enable a vendee to fight out his case in the Courts of appeal and at any rate, in the first Court of appeal, which is the last Court so far as facts are concerned. The ground on which the Madras view proceeds is negatived by a dictum of their Lordships of the Privy Council in 1918 P C 151 (4). The facts of that case are not similar but the argument repelled by their Lordships is the same as put forward before us and as was given effect to in the two Madras cases cited above. The question before their Lordships was whether failure of consideration occurred when an adverse decision was given by the trial Court or when it was affirmed by the High Court. Their Lordships said:

But by the decision in the first suit, No. 248 of 1904, the sale was reversed in its entirety and for all purposes irrespective of the decrees in the three later suits, so that if the reversal of the sale is the cause of action, the only question is whether time began to run, as the plaint alleges, from 3rd August 1906, the date of the appellate decree, or as the defendant-respondent contends, from 24th August 1905, the date of the original decree in Suit No. 248 of 1904.

(The decree of the first Court had been affirmed in appeal).

Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal.

It is clear that this dictum runs counter to the reasons on which the decision of the Madras High Court is founded. Their Lordships do not recognize that in India the controversy set at rest by the decree of the first Court, is again sub judice, if an appeal is presented, so as to interrupt the operation of the decree appealed from where it is affirmed in appeal. It may be otherwise where it is reversed or interfered with on appeal. In the case before us it was found by the Court of first instance that the sale was invalid and effect was given to its decree by delivery of possession. The vendees either did not apply to the Courts of appeal for stay of execution, or they applied but were unsuccessful. In either case, the decree of the trial Court remained operative throughout the litigation which was carried up to the High Court. We think that the plaintiff's cause of action was

2. Sarvothama Row v. Chinnasami Pillai, 1919 Mad 887=49 I C 729=42 Mad 507.
3. Rajagopalan v. Somasundara Thambiran, (1907) 30 Mad 316=17 M L J 149.
4. Juscurn Boid v. Pirthichand Lal, 1918 P C 151=50 I C 444=46 I A 52=46 Cal 670 (P C).

complete when the first Court found that the vendors had no power to sell and the vendees were dispossessed. Subsequent affirmance of the decree of the trial Court cannot give a fresh starting point. The fact that the vendees managed to retain actual possession of part of the land included in the vended property in spite of delivery of possession cannot save limitation. They were deprived of the shares sold by delivery of possession. If, in disregard to the process of law, they retained possession of the 'sir' and 'khudkasht' cultivated by them and had to part with it later on, it cannot be relied on as showing that their cause of action accrued long after the delivery of possession. The covenant on which the plaintiffs' suit is based, gives them a right to sue when "interference" with their possession occurs. It cannot be said that no interference occurred when delivery of possession was taken by the successful plaintiffs of suit No. 69 of 1923. The breach of the covenant under the law takes place when interference falling short of complete dispossession occurs, for it follows another contingency contemplated by the covenant namely, "defect is found". We think that the finding of the Court of first instance in the suit brought by defendant 1, followed by delivery of possession, which at least amounts to interference within the meaning of the covenant, made time running against the plaintiffs under Art. 116, Limitation Act.

Article 62 and 97 were referred to in the course of the arguments and relied on by the respondents. These articles provide shorter periods of limitation and if they be applied the plaintiffs' suit is barred, but for the reasons already stated we do not think they can apply having regard to the circumstances and the frame of the present suit. It was faintly suggested on behalf of the appellants that Art. 120 is applicable, as no other article is appropriate. As we hold that Art. 116 is applicable, the residuary Art. 120 cannot apply. The result is that this appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 789

BENNET, J.

Balwant and *another* — Defendants — Appellants.

v.

Parshadi Lal and *others*—Plaintiffs—Respondents.

First Appeal No. 124 of 1934, Decided on 15th November 1934, from order of Sub-Judge, Meerut, D/- 7th April 1934.

Civil P. C. (1908), S. 91 — Case of encroachment of private easement — Sanction of Advocate-General is not necessary.

Section 91 deals with the case of a public nuisance for which it is necessary that the sanction of the Advocate-General should be obtained. Where the case is not one of a public nuisance but one of an encroachment of a private easement, sanction is not necessary. [P 790 C 1]

N. P. Asthana and *B. N. Sahai*—for Appellants.

Judgment.—This is a first appeal from order by defendants. The plaintiffs brought a suit alleging in their plaint that they are owners of abadi plots Nos. 32, 25-2 and 48 to 52 in a certain village and that they had a right of way by prescriptive easement over plots Nos. 15 and 63 of the said village, that the defendants had constructed a wall on plot No. 15 and had begun to tie their cattle on plot No. 63 and that owing to these wrongful acts the plaintiffs were inconvenienced in going by the right of way over those plots. The defence was that there was a public thoroughfare through the plots Nos. 63 and 15 and that the defendants had built a wall in plot No. 1, but that this did not block the public thoroughfare and that the defendants were owners of plot No. 15. They denied that they had tied their cattle in plot No. 63. The Munsif dismissed the suit on the ground that the suit was barred by S. 91, Civil P. C., deciding only this preliminary point. The lower Court finds that the statement of defendant 2 shows that the wall does not block the way of the public and their cattle and that none of the village people except the plaintiffs have any complaint. Further that the plaintiff's evidence shows that the obstruction has affected the rights of way of the plaintiffs. The lower appellate Court considers that under the circumstances the plaintiffs' suit cannot be barred by S. 91, Civil P. C. The finding of the lower appellate Court is that there was no evidence to show that the people of other villages had been using this

way in question. Learned counsel did not show that this finding is one which should be set aside by this Court in first appeal from order. The map indicates that the numbers in question said to belong to the plaintiffs are in the village site and the map supported the contention of the plaintiffs that the exit from their premises is over the plot No. 15 in question. The finding of fact of the lower appellate Court that this is not a case of a public right by way but of a private right of easement over certain plots is a finding which has not been shown to be incorrect. Under these circumstances S. 91, Civil P. C., cannot bar -the case. That section deals with the case of a public nuisance for which it is necessary that the sanction of the Advocate-General should be obtained. The present case is clearly not one of a public nuisance but one of an encroachment of a private easement. Under these circumstances, I dismiss this first appeal from order under Order 41 R. 11.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 790

ALLSOP, J.

Bandan Kurmi—Plaintiff—Appellant.

v.

Bindra Kurmi and *others*—Defendants—Respondents.

Second Appeal No. 114 of 1933, Decided on 5th April 1935, from decision of 1st Addl. Sub-Judge, Jaunpur D/- 8th December 1932.

Civil P. C. (1908), O. 2, R. 2—Two separate and unconnected buildings erected on land—Suit for removal of one and possession of land underneath dismissed—Subsequent suit for removal of other is not barred—Res judicata.

Where two separate and unconnected buildings are erected on a land and the plaintiff's suit for demolition of one of the buildings and possession of land underneath is dismissed, a subsequent suit for demolition of the other construction is not barred either by O. 2, R. 2 or by res judicata. Each construction gives rise to a separate cause of action and there is nothing to prevent the plaintiff from suing on a cause of action in respect of one or more of the constructions and leaving to a later suit any relief in respect of a cause of action arising out of another construction. [P 790 C 2; P 791 C 1]

N. P. Asthana and *Kedar Nath Sinha*—for Appellant.

M. Wali-ullah—for Respondents.

Judgment.—This appeal arises out of a suit for the removal of a kolhu or sugar mill from plot No. 354 and for possession of the land lying underneath it. There was a also a prayer for a perpetual injunction. Both the Courts below have held that the plaintiff is the zamindar of the plot in suit. The trial Court gave him a decree. One of the defences was that the kolhu had been in existence for more than 12 years. Both Courts below have found that it has not been in existence for more than five or six years. The learned Judge of the lower appellate Court dismissed the suit on the application of the principles of order 2, R. 2, Sch. 1, Civil P. C.

In the year 1931 the plaintiff instituted a suit No. 3 of that year, in which he asked for the removal of certain other constructions on plot No. 354. The learned Judge of the lower appellate Court has found that this kolhu was in existence at the time when the suit of 1931 was instituted and he has held that the plaintiff should have included the removal of the kolhu as one of the claims in that suit and as he did not do so he is barred now from claiming any relief in respect of it. I may say at once that the reliefs which were sought in the suit No. 3 of 1931 as they appear in the decree which is on the record are not very artistically expressed. The plaintiff in that suit prayed that he might be given possession of plot No. 354 in which the constructions complained of were standing and that he might get possession of the land lying underneath those constructions. He prayed that the constructions should be removed and that the land lying underneath them should be restored to its original condition. If the relief can be construed as implying a claim to the possession of the whole of plot No. 354 there is no doubt that the principles of res judicata would apply. The suit at that time was dismissed and it would not be possible now for the plaintiff to claim possession of any part of plot No. 354 against the defendants. It seems to me however that the real intention in the previous suit was to recover possession only of those parts of plot No. 354 which were covered by the constructions and to obtain also a demolition of those constructions. A claim to other parts of plot No. 354 would therefore not be barred by the principle of res judicata. I do not see how the rule in O. 2, R. 2, Civil P. C., can apply to this case. Each construction gave rise to a separate cause of action and there was nothing to prevent the plaintiff from suing on

a cause of action in respect of one or more of the constructions and leaving to a later suit any relief in respect of a cause of action arising out of another construction.

It has been suggested that a case may arise where a trespasser builds a house and where the plaintiff comes in succession to obtain removal of a staircase and a room and so forth until by degrees he has the whole house removed. It is pointed out that a procedure of this nature could not be tolerated. The reply to that is that a house is one entity and that the cause of action arising from the construction of it would be one cause of action. There is however no reason for supposing that the kolhu which is in suit in the present case had any connection whatsoever with the other constructions which were the cause of the suit of 1931. The mere fact that these constructions were standing in one plot would not lead to the conclusion that they all gave rise to one cause of action. A plot might be of any size and it would be as reasonable to suggest that a zamindar in a village should be compelled, if he sued for the removal of one construction in one part of the abadi, to sue at the same time for the removal of all other constructions which might amount to trespasses in other parts of the abadi. As there were separate causes of action it was not incumbent upon the plaintiff to sue in respect of the mill when he instituted the suit in respect of the other constructions in the year 1931, I hold therefore that his suit was not barred either by the rule of res judicata or by any application of the principles set forth in O: 2, R. 2, Civil P. C. That being so, on the findings of the Court below the suit should have been decreed. I allow the appeal and setting aside the decree of the lower appellate Court restore the decree of the trial Court. The plaintiff-appellant will get his costs. I am asked to make it clear that the decree is in respect only of that part of plot No. 354 which lies underneath the kolhu which is to be removed. Leave to appeal is refused.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 791

BENNET, J.

Ada Elizabeth Smurthwaite — Petitioner.

v.

John William Smurthwaite — Respondent.

Matrimonial Case No. 3 of 1935, Decided on 1st May 1935.

Indian and Colonial Divorce Jurisdiction Act (1926), S. 1, Proviso (a)—Court-fee applicable to Divorce Act cannot be applied to petition under Act of 1926—Court-fees Act (1870), Sch. 2, Art. 20.

The court-fee applicable to the Divorce Act, cannot be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act of 1926. Hence Art. 20, Sch. 2, Court-fees Act, does not apply. [P 791 C 2]

T. A. Bradley —for Petitioner.

Order.—This is a reference by the taxing officer on the question of what is the proper court-fee for a petition for divorce under the Indian and Colonial Divorce Jurisdiction Act of 1926. The stamp reporter reported that in such petitions a court-fee of Rs. 20 had always been paid under Art. 20, Sch. 2 Court-fees Act. Learned counsel for the petitioner contended that the petition for divorce was not under the Indian Divorce Act and that Art. 20 only refers to a petition for divorce under the Indian Divorce Act. Learned counsel contended that the proper court-fee was Rs. 2. The Indian and Colonial Divorce Jurisdiction Act is not merely an act conferring jurisdiction on this Court but the Act further sets out in S. 1, Proviso (a) that the decree shall be granted only on grounds according to the law for the time being in force in England. The Court therefore in hearing this petition does not apply the Indian Divorce Act and therefore the court-fee applicable to the Indian Divorce Act cannot be applied to a petition under the Indian and Colonial Divorce Jurisdiction Act of 1926. For these reasons I consider that the report of the stamp reporter is incorrect. I hold that the proper court-fee of Rs. 2 has been paid in this case and therefore the petition should proceed. I do not think that a notice should issue to the Government Advocate.

K.S. *Reference answered.*

A. I. R. 1935 Allahabad 792

BENNET AND BAJPAI, JJ.

S. Afzal Husain— Plaintiff — Appellant.

v.

Chhedi Lal and *others*— Defendants— Respondents.

First Appeal No. 495 of 1929, Decided on 20th November 1934, from decision of Sub-Judge, Allahabad, D/- 17th May 1929.

(a) Mahomedan Law — Wakf — Mere statement that property is free from debts and liens proving to be incorrect does not show fraudulent intent.

The mere statement in the deed of wakf that the property is free from all sorts of debts and liens, although it may be incorrect, does not indicate that there is any fraudulent intent, nor does the execution of the deed of wakf affect the rights of the previous mortgagees or show that it was intended to affect their rights.

[P 794 C 2]

(b) Mahomedan Law— Shiah Law—Power of mutawalli — Usufructrary mortgage — Validity depends on whether it will be sanctioned by District Judge had an application been made before execution of it.

The validity of a mortgage executed by a mutawalli depends on whether the Court will consider that the usufructuary mortgage was one which should have been sanctioned by the District Judge if an application had been made to him previous to the execution of this deed. Where it was executed in order to pay already existing encumbrances on the wakf property and to preserve it:

Held : that a District Judge would have acted correctly in giving sanction for the deed and that it was valid : *Case law referred.*

[P 797 C 2; P 798 C 1]

(c) Evidence Act (1872), S. 115 — Representation of mutawalli in document that he can transfer property—Document acted upon and possession transferred and money received— Held he was estopped from denying validity subsequently.

Where the father and son, present mutawalli, and the subsequent mutawalli executed a supurdnama and the document was acted upon and possession was transferred and sums of money were received:

Held : that the document amounted to a representation; that the plaintiff as mutawalli was competent to make the transfer and that he was estopped from denying the validity of the supurdnama.

[P 798 C 2]

Hyder Mehdi and *Zafar Mehdi* — for Appellant.

K. N. Katju and *M. N. Kaul* — for Respondents.

Judgment. — This is a first appeal brought by one Chaudhari Saiyid Afzal Husain. the sole plaintiff. and continued after his death by his son, Chaudhari Saiyid Iqbal Husain. who was defendant 2. The contesting respondent, defendant 1 is Chhedi Lal. The plaint sets out that the plaintiff, Afzal Husain, was the owner in possession of the property in the list attached to the plaint and that on 18th January 1919, he executed a "wakf" "alal aulad" that is. wakf for his descendants of the property dividing the property into two portions. One village Mauza Samorai, Mahal Rustam Ali, and certain houses and groves were dedicated for religious and charitable purposes. The plaint does not mention further in regard to the other wakf property, but the deed of wakf printed on p. 57 shows that the 26 remaining villages were created a wakf for the benefit of the family of the plaintiff and he was made the first mutawalli with defendant 2 to succeed him. When the family should become extinct, there was a gift over for religious and charitable purposes. The wakf property is referred to in the plaint as list A. Para. 2 of the plaint sets out that at the time of execution of the "wakfnama" one of the villages dedicated Mauza Ajora Buzurg Mahal Afzal Husain, was hypothecated in lieu of Rs. 5,000 to one Sheo Pal Brahman under a mortgage-deed. dated 15th April 1916. Para. 3 states that in order to pay off the aforesaid amount and other amounts which were due by the plaintiff, the plaintiff desired to mortgage with possession villages given below to Chhedi Lal and that a mortgage-deed was executed in the shape of a deed called a "superdnama" on 20th March 1924. It is to be noted that although the language of the plaint is rather loose, only the 26 villages dedicated to the family use, formed the subject of the "superdnama" which is printed on p. 97. Paragraph 4 of the plaint sets out the following items and we understand the paragraph to indicate that defendant 1 was to pay off these items:

	Rs.	a.	p.
Amount due to Sheo Pal under a mortgage-deed	5,000	0	0
"Zaripeshgi" on account of lease of Bisheshar Prasad ...	3,780	0	0
"Zaripeshgi" on account of lease of Saiyid Tanzim Husain ...	2,500	0	0
"Zaripeshgi" on account of lease of Patwari Din	1,800	0	0
Decree for profits held by Muhamad Hamid Ullah and Mohi Uddin ...	500	0	0
Decree for profits held by Munshi Abdul Subhan	1,132	3	6
Decree in respect of pay of Ali Sher Khan	500	0	0

Paragraph 5 states that defendant 1 did not pay any of these items, that

the plaintiff continued in possession and his servants made collections and deposited the amount at the place of the defendant and the defendant sent the amount to meet expenses. Para. 6 sets out that in September 1925, an account was made between the parties, according to which a sum of Rs. 8,844-1-6 was found due to defendant 1 and that the plaintiff to pay off this sum and other amounts executed a document in favour of defendant 1 for Rs. 20,000 under which the consideration was the Rs. 8,844-1-6 already mentioned as due to defendant 1, another sum of Rs. 827 also due to defendant 1, Rs. 1,132-3-6 due to other persons which was not paid, and a sum of Rs. 8,196-11-0 which the document stated was received in cash. In regard to this cash payment, it was pleaded that only Rs. 4,524-13-0 was received and received by instalments at later dates. It was therefore claimed that Rs. 5,804-11-0 were not received out of Rs. 20,000 consideration. The document in question which is a simple money bond is dated 14th December 1925, and is printed at p. 121. Para. 7 states:

> The plaintiff had assigned the amount in order to save the property from being sold by auction and when that amount was not paid off the plaintiff took objection to the application for removal of 'lambardar' which was made on behalf of defendant 1 on 4th February 1926 or thereabout. Ultimately on 25th June 1926 defendant 1 was declared to be entitled to make collections with certain conditions, but as he did not comply with those conditions, the plaintiff began to make collections.

This is a somewhat cryptic paragraph, but apparently it states that the "supurdnama" was executed in order to save the property from being sold by auction and that a dispute took place in regard to possession. Para. 8 sets out that defendant 4, a daughter of the plaintiff brought a suit for cancellation of the "supurdnama" which was decreed by the learned Subordinate Judge on 14th September 1927. We may note that that decree was upheld by this Court and that an appeal is pending before their Lordships of the Privy Council. Para 10 sets out that the "supurdnama" is invalid and null and void and as defendant 1 did not pay any amount thereunder, he is not entitled to remain in possession. Para. 11 sets out that defendant 1 alleged himself to be entitled to possession also of the property in list B. Para. 12 states defendant 1 has obtained a separate bond in lieu of the money which was due to him. Under these circumstances, he has no right to remain in possession in lieu of any amount due to him when he has already obtained a separate bond in lieu thereof. The relief asked for was: (a) It may be declared that the document dated 20th March 1924, is utterly invalid and null and void, and that the plaintiff is in lawful possession of the property given in list (B) as a "mutawalli; (b) the plaintiff may be put into possession of the property entered in list (C) by dispossession of defendant 1.

Now, it will be noted that no allegations are made in the plaint as to why the "supurdnama" is invalid and null and void. These defects in the plaint are remedied by arguments of counsel for the appellant so far as it is possible. It is to be further noted that the plaint is defective in not explaining anything in regard to list (C) for which the plaintiff asks for possession. It is however the case of the appellant that in the 14 villages of list (C) mutation was effected for defendant 1 on the "supurdnama" and for that reason the suit for those 14 villages is for possession. In the 12 villages in list (B) mutation was not effected and the name of the plaintiff remains. List (B) of 12 villages and list (C) of 14 villages make up the 26 villages mentioned in the "supurdnama."

The written statement of defendant 1 was to the effect that the deed of wakf was fictitious and invalid and executed merely to avoid payment of dues to creditors and to practise fraud upon present and future creditors and was not intended as a valid wakf, that the plaintiff had borrowed the amounts set out in para. 4 of the plaint and had represented to defendant 1 that the plaintiff wanted to go on a pilgrimage to Karbala Maula and that the son of the plaintiff was inexperienced:

> therefore he requested the contesting defendant to manage his property, and so far as possible, to try to pay off his debts

and accodingly the "supurdnama" of 20th March 1924, was executed. Paragraph 24 sets out that mutation was effected for defendant 1 in 14 villages and that the plaintiff made collections through his servants and appropriated the entire profits for himself, that when an account was made up in 1932, the sum of Rupees 8,844-1-6 was found due to the contesting defendant by the plaintiff and the plaintiff and his son admitted this as correct and affixed their signatures on the simple money bond for Rs. 20,000 on 14th December 1925, and that disputes continued between the parties and on 18th

December 1928, the plaintiff out of dishonest motive executed a lease for five years of a part of the property in favour of one Tanzim Husain. In paragraph 28 it is alleged that more than Rs. 20,000 are still due to contesting defendant. In para. 30 it is alleged that the suit by the daughter of the plaintiff was in collusion with the plaintiff. It was further urged in para. 31 that the plaintiff was bound by the documents executed by him and in para. 32 an estoppel is pleaded.

Several issues were framed of which the following are important for the decision of the appeal: (1) Is the plaintiff estopped from impeaching the validity of the deed of 20th March 1924, executed by himself in favour of Chhedi Lal, defendant 1 ? (3) If an estoppel does not bar a plea of the invalidity of the deed of 20th March 1924, was the plaintiff competent validly to execute the said deed in spite of the previous deed of 18th January 1919 ? (5) What money, if any, is due to Chhedi Lal, defendant 1, under the deeds of 20th March 1924, and 14th December 1925 ? Is the plaintiff entitled to obtain possession of the disputed property without first paying the dues of Chhedi Lal, defendant 1 ? (6) Is Chhedi Lal, defendant 1 estopped from disputing the validity of the deed of 18th January 1919 ? If not, is the said deed fictitious ? (7) Does S. 53, T. P. Act, vitiate the deed of 18th January 1919 ?

The learned Subordinate Judge has held on issue 1 that the plaintiff is estopped from impeaching the validity of the "supurdnama." On issue 3 he found that the plaintiff was competent to execute the "supurdnama." On issue 5 he found that the plaintiff was not entitled to obtain possession of the property covered by the "supurdnama" without first paying defendant 1. On issue 6 he found that Chhedi Lal was not estopped from disputing the validity of the wakf and that the deed of wakf was fictitious. On issue 7 he found that the wakfnama was void under S. 53, T. P. Act, as being made to defeat the mortgagees and subsequent creditors. The suit was therefore dismissed by the lower Court. The plaintiff has appealed against these findings. After the decision of the lower Court there was a decision of a Bench of this Court in the appeal against the decree in favour of the daughter of the plaintiff. That decree was upheld by a Bench of this Court and defendant 1 has taken the matter in appeal to their Lordships of the Privy Council. Accordingly defendant 1 made a preliminary objection to this appeal being heard and contended that the hearing should be stayed under S. 10, Civil P. C. until the decision of their Lordships of the Privy Council.

That application was opposed by the appellant and a Bench of this Court has held that the appeal should be decided without being stayed under S. 10. Accordingly the appeal has been heard by us. We first of all consider the question of the validity of the deed of wakf as it comes first in point of time. The lower Court considered the validity of the deed of wakf on pp. 35 to 37, and found that:

To all intents and purposes, the alleged 'wakf' was a sham and that Afzal Husain was the real owner of the property covered by the alleged 'wakf' at the time when the 'supurdnama' was executed and that the plaintiff did not divest himself of the proprietary interest.

One of the criticisms levelled against the wakfnama is that it is stated that the endowed property was free from all sorts of liens, debts and liabilities. This was not correct as at the time there were three mortgages on the wakf property. One of these due to Sheo Pal is set out in the plaint. There were also mortgages due to Ahmad Husain and Partap Singh. The plaintiff made various arrangements for the payment of these mortgage debts. On 8th January 1919, there was a sale-deed printed on p. 53, by Afzal Husain to Mahabir Singh. In it he provided for the payment of the mortgage of Ahmad Husain and also of a promissory note due to Ahmad Husain and also for a mortgage of 22nd February 1918, in favour of Chaudhri Surju Singh in which is a reference to the document in favour of Partap Singh. We do not think that the mere statement in the deed of wakf that the property was free from all sorts of debts and liens, although it may be incorrect, indicates that there was any fraudulent intent. We do not think that the execution of the deed of wakf could affect the rights of the previous mortgagees or that it was intended to affect their rights. We do not think that the mere fact that the mutawalli subsequently made a number of leases for five years which he was authorized to do under the wakfnama would indicate any fraudulent intent. Defendant 1 in taking his supurdnama took it from the plaintiff under the description of mutawalli and defendant 1 was well aware of the deed of wakfnama. Defendant 1 accepted that document and did not challenge it in any way and in a suit

which was brought in 1926 by defendant 1 along with the plaintiff, the plaintiff was described as mutawalli (see p. 157). It was only when disputes arose in regard to property and when a daughter of the plaintiff filed her suit in 1927 that defendant 1 changed his mind in regard to the wakfnama and put forward a case that it was a fictitious document. We do not agree with the lower Court and we consider that it has not been shown that the wakfnama was a fictitious or fraudulent document and we consider that it complied with the provisions of the Mussalman Wakf Validating Act (6 of 1913) and that it is valid. A further objection was taken in regard to accumulation of income. It was provided in para. 4 of the wakfnama that after paying off Government dues and maintenance allowance and village expenses, the rest of the income should be employed in purchasing other property. In a table attached at the end of the wakfnama, it was stated that 20 per cent would be available for this purpose. This estimate was extremely optimistic as no amount has actually been available in any year for such purpose. We do not think that the provision would invalidate the wakfnama, nor do we think that the wakfnama is invalid under the provisions of S. 53, T. P. Act. It is true that there were three mortgages in existence at the time of the execution of the wakfnama, there is however nothing to show that the wakfnama was intended to be a fraudulent transfer which would affect the interest of the mortgagees. In our opinion the interest of the mortgagees could not have been affected by this subsequent transaction, nor is it shown that any of the creditors at that time or the subsequent creditors would have been defrauded by the wakfnama. Learned counsel for the appellant pointed out that it was necessary for the respondent to show that fraudulent intention existed on 18th January 1919 at the time of the execution of the wakfnama. We are of opinion that no such fraudulent intention has been shown. We therefore hold that the wakfnama was a valid document.

We now come to the question of the validity or otherwise of the supurdnama of 20th March 1924. As already observed the plaint does not give any ground on which the plaintiff asks that this document should be declared invalid and null and void. The plaint sets out subsequent transactions and alleges that defendant 1 did not make the payments which he undertook to make under this document. The mere failure of defendant 1 to carry out the document would not be a reason for the document to be declared null and void. In para. 12 of the plaint it was set out that defendant 1 obtained a separate bond that is the simple money bond of 14th December 1925, and had no right to remain in possession. It is suggested that this obtaining of a separate bond in some way made the supurdnama null and void. We consider that the plaint was defective in not expressing the grounds on which the relief was based. When we come to the grounds of appeal we find the allegation in the eighth ground:

Because the deed of supurdnama being not within the competence of the mutawalli, the Court below would have in any case passed a decree for possession subject to the payment of any sum if found due to the respondent.

and in ground No. 5:

Because the Court below has erred in holding that the deed of 14th December 1925. was an auxiliary deed; on the other hand it wiped off the debt due to the respondent under the deed of 20th March 1924.

These two grounds give the basis on which the appeal has been argued in regard to the validity of the supurdnama. The questions therefore are: (1) Whether the mutawalli was competent to execute the supurdnama, and (2) Whether the supurdnama was terminated by the simple money bond of 20th March 1924 ? We will deal with the second question first as it is a very small matter. The supurdnama of 20th March 1924, provides for defendant 1 taking possession of 26 villages and making certain payments to previous debtors of the mutawalli and managing the property and making payments of Rs. 1,600 every six months to the mutawalli and his son and making advances for the marriage of the daughters of the mutawalli (para. 10). These payments were to come partly from the income of the property and in para. 3 there is a provision for the rate of interest of Re. 0-8-6 per month for advances made by defendant 1 from his own pocket the rate being changed to Re. 0-9-0 after five years. This interest was not to be compound. In para. 12 it was provided:

If without the payment of the amounts due to the aforesaid persons, we, the executant desire to take back the wakf villages from the supurdgi of the said amin, we shall pay to the supurddar whatever amounts he might have paid up to that time to the persons mentioned above, or any amount which he might have paid on our account and in respect whereof he might possess a receipt together with interest at the

rate mentioned above. In such a case the supurdar shall reconvey the wakf property and shall render an account of the income and expenses.

In para. 13 it was provided:

When the entire amounts or the amounts due under the mortgage zerpeshgi lease money, the amounts of the rukkas, payable on demand, the amounts of the decrees, and also the amounts which the supurddar might have paid from his own pocket together with interest, etc., thereon, have been fully paid off from the profits and income of the wakf property, the supurddar will relinquish all the wakf villages.

It was therefore within the competence of the parties to terminate the possession of defendant 1 in accordance with either of those paragraphs. It cannot be argued with any hope of success that the bond of 14th December 1925, purported to terminate the possession in any such manner. There is no reference in that bond to the termination of possession at all. The bond merely sets out that accounts had been taken for the years 1331 and 1332 Fasli and a sum of money was found due and further advances were due and that the entire amount of Rs. 20,000 would be repaid in eight years with interest at Re. 0-8-6 per month till five years and Re. 0-9-0 after five years and with compound interest at yearly rests. Learned counsel for appellant contends that this document provides defendant 1 with a personal remedy and that he could sue on this document for the amount in question. That may be so, but the document does not purport to terminate the interest created by the supurdnama. It is merely a collateral security in favour of defendant 1 and does not interfere with the rights under the supurdnama which had existed at the time by which defendant 1 was entitled to retain possession of the property until his debts and advances were paid. We therefore find that the bond of 14th December 1925, in no way affected the rights of defendant 1 under the supurdnama. Learned counsel argued that if we held that the supurdnama was invalid and that defendant 1 was entitled to retain possession until he was paid then this document would amount to a payment. We do not consider that the execution of a collateral security does amount to a payment and in the hypothetical case assumed by counsel his argument does not apply. We now turn to the main issue of this appeal that is, whether the mutawalli was competent to execute the supurdnama.

Learned counsel for the respondent based his case on the competence of the mutawalli on certain text books of Mahomedan law, and certain rulings. In Tyabji's Principles of Mahomedan Law, Edn. 2, p. 555, it is laid down in regard to Shias para. 464 (2):

> According to Shia Law the beneficiaries under a wakf may validly make a lease of the wakf property or otherwise transfer or alienate it for the period during which they are entitled to the benefit of the wakf, but so that such lease or transfer or alienation does not prejudice the rights of any succeeding beneficiaries.

The plaintiff was admittedly a Shia. For the respondent the contention is that under the Shia Law a mutawalli is entitled to transfer the usufruct of the property although he is not entitled to transfer the ownership of the property by sale or by mortgage which might end in a decree for sale. Considerable argument was made in regard to the supurdnama in question and in part of the case for respondent it is argued that the supurdnama is something different from a usufructuary mortgage, that it was a kind of agreement by which defendant 1 was to manage the property during the absence of the plaintiff. We consider that the document cannot be regarded as a contract of management. The provisions in the document are that possession is to be taken from Rabi, 1331 Fasli by defendant 1 and that he is to pay certain sums of money and to retain possession until those sums of money are paid back to him. We consider that these conditions make the document a usufructuary mortgage within the definition of the Transfer of Property Act. The question therefore is whether a mutawalli who is a Shia may execute a usufructuary mortgage, and whether in such a case the transaction will be valid during the lifetime of the executants. It is to be noted that although the plaintiff is now dead his son defendant 2, who is appellant was his successor as mutawalli according to the deed of wakf, and this son was also an executant of the supurdnama in question. The supurdnama begins:

> We, Chaudhri Saiyid Afzal Husain, mutawalli of the wakf, and Chaudhri Saiyid Iqbal Hussain, subsequent mutawalli,

execute the document. The distinction which was drawn by Tyabji between a transfer for the period during which the mutawalli was entitled to the benefit of the wakf and a transfer or alienation which would prejudice the rights of succeeding beneficiaries has not been so carefully drawn in other text books. We find in Ammer Ali's Mahomedan Law, Vol. 1, Edn. 3 of 1904, p. 370, a statement:

The mutawalli is not entitled under any circumstances to create any encumbrance by way of mortgage upon the wakf property without the sanction of Kazi, nor can the beneficiaries hypothecate wakf property.

The distinction is not drawn between a transfer of the income and a transfer of the property. In Mulla's Principles of Mahomedan Law, Edn. 10 of 1933, on p. 151 it is stated that a mutawalli has no power without the permission of the Court to mortgage, sell or exchange wakf property or any part thereof unless he is expressly empowered by the deed of wakf to do so. Mulla goes on to state that it has been held in Calcutta in 37 Cal 179 (1), that a mortgage of wakf property though made without the previous sanction of the Court may be retrospectively confirmed by the Court and that the mortgage without the previous leave of the Court is not void ab initio. In this ruling there was a full consideration of the texts of Mahomedan law in original. The case arose where there was a wakf and certain costs of partition were incurred and the Collector fixed a date for sale of the estate for these costs. The mutawalli made a mortgage of a portion of the wakf estate and of his own property to raise money to avert the impending sale. The mortgage therefore was created under grave necessity of an urgent nature. Sanction was not given for the mortgage. On pp. 191 and 192 the Court drew a distinction between those cases where the income alone is pledged and those cases where there was a sale of the property by the mutawalli. The Court held on p. 189:

It is but rational to hold that the approval of the Cadi was deemed requisite, primarily with a view to make sure that the loan was necessary, and in this view approval, antecedent or subsequent, ought to be equally effectual. Tested in the light of these principles, it is clear that in the case before us the mortgage ought to be treated as a valid charge upon the wakf properties.

On p. 191 it was stated:

It is sufficient for us to observe that judicial pronouncements of the highest authority are to be found in the reports in support of the view that not the corpus but the income alone can be pledged under such circumstances.

In 1932 Cal 356 (2), which was also a case which referred to Shias, there was a further consideration of this question, and it was held that a mutawalli differs from shebait or a mahant and has no power without the permission of the Court to mortgage, sell or exchange wakf property unless he is expressly authorized by the deed of wakf to do so. Reference was made with approval to 37 Cal 179 (1), where it was held that a mortgage made by a mutawalli without the previous sanction of the Court is not void if made for a justifying necessity and may be retrospectively confirmed by the Court. In 11 Bom 492 (3), it was held in regard to a mortgage of wakf property that the plaintiff acquired no right under his mortgage which would extend beyond the lifetime of his mortgagors. This also supports the case for the respondent. For the appellant reference was made to 1929 All 849 (4). where it was held that the District Judge takes the place of the qazi to sanction transfers of wakf property. Reference was also made to 1923 P C 44 (5). In the ruling we find on p. 47:

Their Lordships are of opinion that for an advance of money, otherwise than to satisfy the legitimate needs and purposes of the wakf, no part of the property held in wakf is chargeable either by the settlor or by the Court.

Under this dictum the question would arise whether the purpose was one which was for the legitimate needs of the wakf. Learned counsel also relied on 16 O C 109 (6), a ruling of the Court of the Judicial Commissioner in Oudh. That ruling dealt with the case of a simple mortgage and not of a usufructuary mortgage, and it was held that such a mortgage would be invalid without previous sanction. On a review of all these rulings we are of the opinion that the distinction drawn in 37 Cal 179 (1), is a distinction which we should follow and that in the present case the validity of the mortgage depends on whether we consider that the usufructuary mortgage was one which should have been sanctioned by the District Judge if an application had been made to him previous to the execution of this supurdnama. Now, the plaint sets forth the circumstances under which the supurdnama was executed. The plaint admits that it was executed in order to pay off the amount due to Sheopal under the mortgage-deed which he held over the property which was wakf. That mortgage-deed was a simple mortgage and

1. Nimai Chand Addya v. Golam Hossein, (1910) 37 Cal 179=3 I C 353.
2. Sailendranath v. Hade Kaza, 1932 Cal 356=137 I C 500=59 Cal 586.
3. Amrit Lal Kalidas v. Sheikh Hussein. (1887) 11 Bom 492.
4. Askari Hussain v. Chunni Lal, 1929 All 849=122 I C 674.
5. Abdur Rahim v. Narayan Das, 1923 P C 44=71 I C 646=50 I A 84=50 Cal 329 (P C).
6. Hamiduddin Ali Shah v. Court of Wards, Nanpara, (1913) 16 O C 109=18 I C 319.

it was open to Sheopal to bring a suit for sale of the property if he was not paid. In para. 4 of the plaint three zarpeshgi leases are set out, all of parts of the mortgaged property, which the mutawalli desired should be paid off. That paragraph also mentions three decrees for profits which were held by cosharers against the mutawalli. It is clear that the encumbrances were on the mortgaged property and were encumbrances which it was in the interest of that property to liquidate. The transaction therefore was clearly one intended to preserve the wakf property. Under these circumstances we have no doubt that a District Judge would have acted correctly in giving sanction for the supurdnama. Another point to be noted is that compound interest on the mortgage-deed of Sheopal was accumulating. By the usufructuary mortgage in question the accumulation of interest under the simple mortgage and the decrees was prevented and the transaction would therefore have been beneficial to the dedicated property. We consider therefore that the transaction was one which should have received sanction.

For the appellant the argument is advanced that respondent 1 did not actually pay off any of these previous charges. We consider however that, the question we have to examine is what was the state of affairs at the time when sanction would have been the subject of an application. The subsequent conduct of the parties would not have been known then to the District Judge and therefore could not have influenced him. Further we are of opinion from the evidence on the record that the failure of defendant 1 to pay the previous debts in this document is a failure which arises from the action of the plaintiff himself. In the plaint the plaintiff himself admits that he continued in possession of the property and prevented defendant 1 from obtaining possession or making collections. This state of affairs is shown by the accounts for 1331 and 1332 Fasli which formed the subject of the bond of 14th December 1925. There was a rendering of accounts by defendant 1 to the plaintiff as he was bound to do under the supurdnama, and it was admitted by the plaintiff and his son that no less than Rs. 8,444-1-6 were due to defendant 1 for the first two years of his tenure under the supurdnama. Under these circumstances it could not be expected that the supurdnama bound the defendant to supply further large sums from his own pocket for the purpose of paying off the previous debts. For the next two years we have accounts printed on pp. 495 and 496 for 1333 Fasli which show that an amount was due to defendant 1 for that year of Rs. 4,877-2-0 and on p. 497 for the year 1334 Fasli which show that an amount was due to defendant 1 for that year of Rupees 4,317-2-3. These accounts were proved by defendant's witness Bhagwandas, the general agent, on p. 26 where he states:

> **The papers exhibited OO are the extract I prepared from my master's siahas of 1333, 1334 and 1335 Fasli. The extract is correct. I have on me the original siahas from which I prepared the extract.**

We are satisfied therefore that the supurdnama has not been shown to be invalid. We now proceed to deal with the question of estoppel of the plaintiff. The lower Court has held that the plaintiff was estopped from denying the validity of the supurdnama. That estoppel is claimed under the general law of estoppel in S. 115, Evidence Act, which provides that when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. In the supurdnama the recital states that the plaintiff is mutawalli of the wakf and that his son is the subsequent mutawalli and that they execute the supurdnama transferring possession to defendant 1 of the village in question. That document amounts to a representation that the plaintiff as mutawalli was competent to make that transfer. The document was acted upon and possession was transferred and sums of money were received by the plaintiff under this document. The receipt of the sums of money was admitted. It was not for a number of years afterwards that the plaintiff brought the present suit on 11th May 1928. For that period the plaintiff acquiesced in the supurdnama. He has now come forward and the argument advanced on his behalf is that he was not competent as mutawalli to execute the supurdnama. Clearly the case comes within the language of S. 115, Evidence Act. The argument of learned counsel for appellant was that because the plaintiff was under the Mahomedan law not competent to execute this supurdnama, therefore

the provisions of S. 115, Evidence Act, would not apply to him. In our view this proposition of law is incorrect as it is enunciated and also because we consider that the plaintiff can validly execute the supurdnama under the provisions of the Mahomedan law provided sanction is given, and we consider that the sanction can be retrospectively applied by this Court.

In the seventh ground of appeal it was urged that the Court below was bound to find what money was due to Chhedi Lal. defendant 1, at the date of the decree. This was a reference to issue 5. We have referred to the bond of 14th December 1925, under which there was an admission that for the first two years Rs. 8,444-1-6 was due on the accounts and a further sum was taken making Rs. 20,000 in all. The plaintiff in para. 6 of his plaint alleged that his admission in that bond as regards the payment of Rupees 8,196-11-0 in cash should not be accepted against him and that actually only Rs. 4,524-13-0 was received by him out of that amount and also that the sum of Rs. 1,132-6-6 was not paid to other persons. We have already referred to the accounts for 1333 and 1334 Fasli which shows that other large sums were due to defendant 1. The claim in the written statement is that not less than Rs. 20,000 was due to defendant 1. We do not think that there is any necessity to ascertain the exact sum which is due to defendant 1 as the plaintiff has failed to show that he has any right to possession in the manner in which he asks, that is by a declaration that the supurdnama is null and void. The plaintiff has not sued for possession of the property on payment of whatever sum is due to defendant 1. If and when the plaintiff brings a suit for that purpose it will then be proper for the Court to go into that question and ascertain the exact sum which is due, but the present suit is merely one for a declaration of nullity and in our opinion that question does not arise.

For these reasons we dismiss this first appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 799

BAJPAI, J.

Nawab Singh—Appellant.

v.

Daljit Singh—Respondent.

Second Appeal No. 141 of 1933, Decided on 7th March 1935.

(a) Fraud — Plaintiff relying on document —Document coming into existence by joint fraud of both plaintiffs and defendants — Defendant can give evidence as to circumstances giving rise to document—Court should examine into matter and if both parties are equally guilty, it should not assist either party.

Where a plaintiff is relying upon a deed, the defendant is entitled to give evidence of the circumstances under which the document came into existence and when these circumstances include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate the fraud, and that there is no difference in the degree of the guilt of the plaintiff and that of the defendant, the duty of the Court is not to assist either party : 1923 *Cal* 90, *Foll.* [P 800 C 2]

(b) Maxims—"Nemo allegans turpitudinem suam audi endus" and "in pari delicto potior est conditio possidentis"—No conflict—One is general rule; other an exception.

There is no real conflict between the two legal maxims *nemo allegans turpitudinem suam audi endus* and in *pari delicto potior est conditio possidentis.* Whereas the one embodies the general rule, the other provides an exception : 1932 *Lah* 503, *Rel. on.*; 31 *Bom* 405, *Diss. from.* [P 801 C 1]

(c) Fraud—Transaction coming into existence by joint fraud of both parties—Successor of one of them cannot enforce transaction.

Where a transaction has come into existence by virtue of joint fraud of both parties, a successor of one of them cannot seek to enforce the transaction : 1916 *Lah* 130, *Rel. on.* [P 802 C 1]

R. C. Ghatak—for Appellant.

S. B. Johari—for Respondent.

Judgment.—This is a plaintiff's appeal whose suit was decreed by the trial Court, but dismissed by the lower appellate Court. The facts may be stated. On 28th June 1920, one Phul Kunwar sold the plaint property to Daljit Singh, defendant, to the present suit for Rs. 400. On 21st April 1921, Daljit Singh sold the same property along with certain mortgagee rights to Gajraj Singh for Rs. 800. It has been alleged in the present controversy that the sale in favour of Gajraj was a bogus sale and it was not the intention of the parties that ownership should be transferred to Gajraj, but it was apprehended that the sale by Phul Kunwar might be pre-empted by a cosharer and therefore Daljit and Gajraj adopted the trick of getting a document of transfer executed, Gajraj being an equal cosharer with the potential pre-emptor. A pre-emption suit was actually filed by one Narain Singh on

21st June 1921, and he impleaded Phul Kunwar, Daljit and Gajraj as defendants. His allegation naturally was that the sale by Daljit to Gajraj was a bogus sale. In this pre-emption suit Daljit and Gajraj both pleaded that the sale of 21st April 1921, was a real and genuine sale by which ownership was transferred from Daljit to Gajraj; Daljit further appeared as a witness and said that he had received the consideration of Rs. 800 mentioned in the sale-deed of 21st April 1921. In the result the pre-emption suit was dismissed.

It appears that Gajraj applied for mutation on 6th September 1923. on the basis of the sale-deed in his favour. This application however was dismissed on the ground that the name that stood in the revenue papers as against the property was the name of Phul Kunwar and the name of Daljit even, the vendee from Phul Kunwar, had not been mutated and it was not possible therefore to enter the name of Gajraj. Gajraj and his heirs do not seem to have taken any steps after this. On 16th March 1927, Daljit asked for the mutation of his name on the basis of the sale-deed dated 28th June 1920. executed by Phul Kunwar and his name was mutated. Daljit has remained in possession of the property all along. In January 1931 the present suit was instituted by Nawab Singh alleging himself to be the reversioner of Gajraj Singh for recovery of possession of the property sold to Gajraj Singh by Daljit Singh on 21st April 1921. Daljit Singh disclosed the true nature of the transaction in his written statement and pleaded that the object of the transaction was to defeat a possible pre-emption suit and as a matter of fact no consideration passed upon the document of 21st April 1921. The lower appellate Court has distinctly held that sale-deed of 21st April 1921 was "fictitious without consideration and was executed on account of the fear of a pre-emption suit." He took into consideration the fact that Gajraj Singh and Daljit Singh were related, that both of them lived in one and the same house and that the mortgage-deed which was sold along with the property by the sale-deed of 21st April 1921 also remained all along with the defendant. Daljit Singh. The two sale-deeds, namely, one in favour of Daljit and the other in favour of Gajraj were also produced by Daljit Singh. On these considerations the lower appellate Court came to the conclusion that the sale-deed in question was "fictitious and without consideration" and dismissed the plaintiff's suit.

In second appeal it is argued that it was not open to the defendant to plead fraud and to disclose the true nature of the transaction. It is said that a deed cannot be avoided on the ground of fraud by a party to the fraud and reliance is placed upon the case of 31 Bom 405 (1). Reference is also made to the cases of 1918 Mad 365 (2) and 1919 Pat 539 (3). These cases, no doubt support the contention of the plaintiff-appellant, but the Bombay case was considered by this Court in the case of 1923 All 504 (4), and the Letters Patent Bench came to the conclusion that that case was of doubtful authority. After a review of certain English decisions and following a well considered judgment of the Calcutta High Court in the case of 1923 Cal 90 (5), it is held that:

> **Where a plaintiff is relying upon a deed, the defendant is entitled to give evidence of the circumstances under which the document came into existence and when these circumstances include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud and did in fact perpetrate the fraud, and that there is no difference in the degree of the guilt of the plaintiff and that of the defendant, the duty of the Court is not to assist either party.**

Applying this principle I am of the opinion that it was open to the defendant to plead the circumstances under which the document which is the basis of the present suit came into existence and when those circumstances are scrutinised there cannot be the slightest doubt that Gajraj Singh and Daljit Singh both sat down in order to defraud a possible pre-emptor who was actually defrauded and under these circumstances "the estate should lie where it falls" and the Court should help neither party. This principle was mentioned with approval by their Lordships of the Privy Council in the case of 35 Cal 551 (6), where a passage

1. Sidlingappa v. Hirasa, (1907) 31 Bom 405=9 Bom L R 542.
2. Kamayya v. Mamayya, 1918 Mad 365=43 I C 352.
3. Shiva Narain Ram v. Phuljharia, 1919 Pat 539=52 I C 402.
4. Vilayat Husain v. Misran, 1923 All 504=72 I C 92=45 All 396.
5. Raghupati Chatterji v. Nrishingha Hari Das, 1923 Cal 90=71 I C 1.
6. Petherpermal Chetty v. R. Muniandy Servai, (1908) 35 Cal 551=4 L B R 266 (P C).

from Mayne's Hindu Law, Edn. 7, p. 595 para. 446, was quoted in extenso, and it was observed that the principle was correctly stated by the learned author. In the Bombay case the conflict between the two legal maxims nemo allegans turpitudinem suam audi endus and in pari delicto potior est conditio possidentis was stated and it was said that authority could be cited for the contention of either party who sought to invoke the aid of the legal maxim that best suited him, but their Lordships of the Bombay High Court preferred to follow the rule laid down in allegans turpitudinem suam. I have already said that the authority of the Bombay case was doubted by this Court in 1923 All 504 (4) and by the Calcutta High Court in 1923 Cal 90 (5). It was also doubted by the Lahore High Court in 1932 Lah 503 (7), where Tek Chand, J., delivering the judgment of the Full Bench, has reviewed the entire case law on the subject and has pointed out that there is no real conflict between the two maxims and that whereas the one embodies the general rule the other provides an exception:

> A person who has polluted his hands by being a party or privy to a fraudulent transaction shall not be allowed to approach the fountain of justice with his own infamy on his lips and obtain relief on the strength of such a transaction, and the moment he relies on such an agreement he will be told *nemo allegans suam turpitudinem audi endus est.*

This maxim is applicable where the plaintiff who has become a transferee under a fictitious transaction but who has not actually obtained possession of the property wants to enforce his right against the transferor who is in possession of the property. I am of the opinion that even if the object of the fictitious transaction was to cheat an innocent person and that innocent person has been cheated, the plaintiff would not be permitted to assume the individuality which was just a mere mask, and the Court in its obvious duty of masterly inaction should not help the plaintiff on the principle that a party cannot be heard to plead his own fraud and succeed on its basis. If the fraud has succeeded there is abundant authority for the proposition that the grantor or transferor who has made a fictitious transfer and has put the transferee in possession will not be allowed to recover possession inasmuch as he has by the transfer cheated a stranger and because the transaction has ceased to be in the words of Mayne "a mere mask and has become a reality" and it may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others.

The position in the present case however is slightly different, because the plaintiff is not seeking to avoid a certain transaction, but wants relief on the basis of the transaction. He alleges that there is a document of transfer in his or his predecessor's favour and possession has not been delivered to him on the basis of the document, possession may so be delivered and he says that if the defendant pleads that the transaction should not be given effect to on the ground that the transaction was brought about in order to perpetrate a fraud on creditors the defendant should not be heard on the maxim nemo allegans turpitudinem. It is under these circumstances that there is an exception to the general rule and the principle that is applicable is the principle contained in the maxim in pari delicto. The defendant will be permitted to state that the document is not supported by consideration and the document was executed in order to defraud another person, namely, the pre-emptor in the present case and on proof of the defendant's averments if it is found that the plaintiff and the defendants were in pari delicto the Court shall stay its hand and refuse its support to either confederate letting the estate lie where it falls. There is thus no real conflict between the two maxims, the first maxim, stating the general rule and the second maxim providing an exception to the general rule. In the present case therefore it is possible to apply the exception, i. e., the principle of in pari delicto in order to defeat the plaintiff's suit.

It is however said that the plaintiff in the present case is not Gajraj Singh who was a party to the fraud, but his heir Nawab Singh and he is neither pleading any fraud nor when the fraud is allowed to be proved, can it be said that he is in pari delicto. The agrument is that he is trying to enforce a transaction and the defendant should not be heard because of the application of the general maxim stated by me before. The answer to this is that the defendant is not necessarily setting up any fraud, but is putting the plaintiff to strict proof of his title and is alleging that the basis of the plaintiff's title is not supported by con-

7. Qadir Bakhsh v. Hakam, 1932 Lah 503=139 I C 17=13 Lah 713 (F B).

sideration. On the finding of the lower appellate Court that the document is without consideration the defendant's case is that the plaintiff should be non-suited. It is argued on behalf of the plaintiff that in order to state his defence fully the defendant will have to state the circumstances under which the fraud was enacted and he should not be permitted to do so as against the plaintiff who was not his confederate at the time the fraud was perpetrated. Reliance is placed on 6 Ves 52 (8) and the case of 2 Vern 188 (9), and in both these cases it was held that although the testator himself might not be able to obtain relief. there was nothing to prevent the executor from maintaining a suit. The cases are different. In those cases it was held that where a person has parted with his property in order to defraud strangers or where he has incurred liability under unlawful circumstances he would not be permitted to obtain relief, but his heirs or executor would be liable. This is not a case where Nawab Singh is seeking to obtain relief from the effects of any transaction entered into between his predecessor and the defendant by which a liability has been cast on the plaintiff's estate. The plaintiff is seeking to enforce a transaction which is not supported by consideration and whose object the Court perfectly well knows and I am of the opinion that neither Gajraj Singh nor his heir should be allowed to do so. I am fortified in my opinion by the view taken by the Punjab Chief Court in 1916 Lah 130 (10).

Reference was also made by Mr. Ghatak to the recent Privy Council case of 56 M L J 244 (11), and my attention was drawn to a passage in the report at p. 254. Their Lordships found it unnecessary to decide the point on which a forceful argument was advanced. but their Lordships held that if certain facts regarding fraud are alleged, it is the duty of the Court adjudicating on the allegation of the grantor to see that he proves by cogent evidence the averment that he makes. This case however does not help me in any way in deciding the present appeal. One simple way in which this case may be looked at is that the plaintiffs wants to enforce a document which the defendant alleges to be without consideration and the Court which is the final Court of facts has come to the conclusion that there was no consideration for the document. The plaintiff who is setting up the document must therefore necessarily fail. For the reasons given above, I dismiss this appeal with costs, but grant leave to file an appeal by way of Letters Patent.

K.S. *Appeal dismissed.*

8. Muckleston v. Brown, (1801) 6 Ves 52.
9. Matthew v. Hanbury (1790) 2 Vern 188.
10. Nand Lal v. Jethu Mal, 1916 Lah 130=33 I C 255=21 P R 1916.
11. Ma Ngwe Nang v. Maung Tha Maung, 1929 P C 55=114 I C 595=7 Rang 4=56 M L J 244 (P C).

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BENNET AND ALLSOP, JJ.

B. Roshan Lal Goswala—Plaintiff—Appellant.

v.

District Board, Aligarh and *another*—Defendants—Respondents.

Second Appeal No. 1300 of 1934, Decided on 26th March 1935, from decision of Dist. Judge, Aligarh, D/- 20th April 1934.

(a) Master and Servant—Master can terminate services of servant by mere notice without assigning cause.

The right to terminate service of a servant by mere notice without assigning cause is a general right existing in a master under the law of master and servant; and in a case based on contract the servant would have to show that the contract contained a term by which the master gave up such a right. [P 803 C 2]

(b) U. P. District Boards Act (10 of 1922), S. 65—Resolution does not dispense with necessity of contract in writing.

A mere resolution of the Board appointing a person does not dispense with the necessity of a contract in writing under S. 65, without which a Board is not bound in law: 27 *All* 592, *Relon*. *Case law referred.* [P 804 C 1]

(c) U. P. District Boards Act (10 of 1922), S. 70—"Whole time officer," meaning.

The meaning of "whole time officer" is one who gives all his time to the service of the Board, and an officer who does so would be a whole time officer even though part of his time is spent in doing the work of secretary and part in doing the work of engineer. [P 804 C 2]

(d) Master and Servant — "Office held at pleasure" and "office held during good behaviour" In former, holder is removable at sole discretion of appointiong authority—In latter case, he can be removed only for want of good behaviour.

All offices are held either "at pleasure" or "during good behaviour." Where an office is held at pleasure, the holder thereof is subject to dismissal at any time without any cause being assigned. No notice or framing of any charge is necessary; and the holder is removable at the sole discretion of the appointing authority. Where an office is held during good behaviour,

the holder thereof is appointed to all intents and purposes for life and has what is called a freehold office for his life. He can be removed from office only for want of good behaviour. In this case, notice of dismissal should be given and a charge framed and proved. [P 805 C 1]

(e) Master and Servant—All public officers and servants hold appointment at pleasure of Crown—They are liable to dismissal without cause assigned—Action for wrongful dismissal will not lie.

Except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown; and speaking generally, they are subject to dismissal at any time without cause assigned; and an action for wrongful dismissal will not be entertained by a Court of law. [P 805 C 1, 2]

(f) Master and Servant—District Board servant holds office "during pleasure" — He cannot sue District Board for wrongful dismissal—Nor for declaration that resolution removing him is null and void—U. P. District Boards Act (10 of 1922), Ss. 70 and 71.

A District Board servant is under the general disability of other public servants in that he holds his office during pleasure, and he cannot sue the District Board or the Secretary of State in a Court of law for wrongful dismissal; nor can he sue for a declaration that a resolution removing him is null and void as such a declaration would not come under S. 42, Specific Relief Act. [P 810 C 2]

Kamta Prasad—for Appellant.

Bennet, J.—This is a second appeal by a plaintiff whose suit has been dismissed by the lower appellate Court. The plaintiff was employed as secretary of the defendant District Board, and he claims for a declaration that the resolution of 16th October 1932 is void and that he has been wrongfully dismissed and that he is entitled to damages for wrongful dismissal, and he claims a large sum as damages made up of salary and leave allowances, etc., which he would have received. The lower Court finds that after his services were terminated by a resolution of the board abolishing the post of secretary and the post of engineer and creating a combined post of secretary-engineer he received four months' pay. The first question which arises is whether the appellant has any right of suit. As an abstract proposition of law such a right might arise in one of two ways; either by contract between the parties fixing the terms of service of the plaintiff or by statute fixing the terms of service of the plaintiff and giving the plaintiff a right to sue. The relief of damages claimed appears to be a claim under S. 73, Contract Act, compensation for loss or damage caused by a breach of contract. The relations between the parties are those arising from the contract to serve the District Board for the payment of a monthly salary. Now in the different Acts in India for local bodies there are provisions for the manner in which contracts must be made. For District Boards in the United Provinces it is provided in the U. P. District Boards Act, Act 10 of 1922, S. 65:

(1) Every contract made by or on behalf of a Board whereof the value or the amount exceeds Rs. 100 shall be in writing. (2) Every such contract shall be signed; (a) by the chairman or a vice-chairman and by the secretary, or (b) by any person or persons empowered under sub-S. (2) or (3) of the previous section to sanction the contract if further and in like manner empowered in this behalf by the Board. (3) If a contract to which the foregoing provisions of this section apply is executed otherwise than in conformity therewith, it shall not be binding on the Board.

The plaintiff has not based his suit on any such contract nor has he produced any such contract in Court. Section 91 Evidence Act. provides that:

in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof . . . . of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible.

(It is true that Exception I makes provision for a public officer required by law to be appointed in writing, but that is clearly for the purpose of proving merely that he was such public officer and not for proving the terms of his contract of employment).

The relations between the parties being those of contract and the value or amount exceeding Rs. 100, the contract is one to which S. 65, District Boards Act. would apply. To succeed in the present suit the plaintiff would have to produce a contract in writing signed in the manner prescribed, and containing the terms in regard to salary, leave allowances period of service, termination of service, on which his claim is based. In particular his counsel argues that the board has no right to terminate his service by mere notice without assigning cause. That is a general right existing in a master under the law of master and servant, and in a case based on contract the plaintiff would have to show that the contract contained a term by which the master gave up such a right. Learned counsel relied on S. 70 which provides:

(1) Every Board shall, by special resolution, appoint a secretary who shall be a whole time

salaried officer. (2) The appointment of the secretary and the conditions of his service shall be made in conformity with the rules framed by the local Government.

In its present form this section is derived from S. 9 of Act 1 of 1930. Learned counsel does not show any rule of the Local Government which required that the conditions of service of the secretary of a District Board should be in the form of a contract under S. 65. The rules therefore do not make the provision which would give the secretary a right to sue the board for breach of the conditions of his service. The rules contemplate that the remedy of the secretary is by way of appeal to the Local Government, and if this were not provided by the rules the right of appeal would lie under S. 82 of the Act to the Local Government. S. 65 (3) clearly provides that if a contract to which the section applies is executed otherwise than in conformity therewith, it shall not be binding on the board. A mere resolution of the board appointing a secretary. though it is in writing and signed by the chairman and by the secretary—apparently an acting secretary—would not amount to such a contract; because the conditions of service would not be set out in the resolution, and because the Act draws a distinction between resolutions and contracts. S. 65 lays down where contracts in writing are required. S. 64 lays down certain cases where such written contracts are not sufficient, and where the sanction of a resolution of the board is also necessary. Therefore a resolution does not dispense with the necessity of a contract in writing under S. 65. without which a board is not bound in law. The provisions of the law in regard to such matters have been strictly enforced by this High Court in 27 All 592 (1); where a contract with a Municipal Board, which according to S. 40 of Act 15 of 1883 and S. 47 of Local Act 1 of 1900 must be executed in a particular form, has not been so executed, no suit can be maintained against the Municipal Board in respect thereof, notwithstanding that there has been part performance of the contract and the plaintiff is claiming merely for the value of work done and materials supplied. This ruling followed 8 A C 517 (2) and 2 Q B D 463 (3). See also 30 Mad 290 (4) and 28 Bom 66 (5). From these considerations it is clear that the plaintiff has not produced any contract which would give him a right to sue in the present case. The learned counsel for appellant argued that under statute the plaintiff was entitled to a decree. He referred to S. 70, U. P. District Boards Act. 1922, as amended in 1930, and to S. 71:

A Board may by special resolution punish or dismiss its secretary, provided: (a) that such resolution is passed by the vote of not less than two-thirds of the total number of members of the Board for the time being, or (b) that it is passed by a vote of not less than one-half of the total number of such members and is sanctioned by the Local Government.

He argued that the procedure of section 71 had not been followed. That is so; but the board does not claim that the secretary was dismissed, and the resolution is not one of dismissal, but of abolition of the office of secretary and the office of engineer and the combination of the two offices. Section 81 provides:

Subject to the provisions of this Act or of any rule a Board may appoint one person to discharge the duties of any two or more offices.

Counsel argues that S. 70 (1) provides that the secretary shall be a whole time officer; and that therefore his office shall not be combined with that of engineer or any other office. This interpretation is not that given in The law of Municipal Corporations in British India. by P. D. Aiyangar. 1924, p. 126:

The term "whole time" officer is used in contradiction to "part-time" officer. If a whole-time officer chooses to undertake some work which may be profitable to him, financially or otherwise in his spare time then, provided it does not render him less efficient for the performance of the duties of his whole-time office he does not break this condition of his appointment.

The meaning of whole time officer is one who gives all his time to the service of the board, and an officer who did so would be a whole time officer even though part of his time was spent in doing the work of secretary and part in doing the work of engineer. S. 70 does not say that the secretary shall be a whole time secretary, but that he shall be a whole time salaried officer. The argument of counsel is that the District Boards Act and rules make provision for the ap-

1. Radha Krishna Das v. Municipal Board of Benares, (1905) 27 All 592=2 A L J 321=1905 A W N 111.
2. Young & Co. v. The Mayor and Corporation of Royal Leamington Spa, (1883) 8 A C 517.
3. British Insulated Wire Co. v. Prescot Urban District Council, (1895) 2 Q B D 463=64 L J Q B 811=59 J P 552=44 W R 224=73 L T 383.
4. Raman Chetti v. Municipal Council, Kumbakonam, (1907) 30 Mad 290.
5. Abaji Sitaram v. Trimbak Municipality, (1904) 28 Bom 66=5 Bom L R 689.

pointment, conditions of service, and dismissal of the secretary, and that under one of those rules laid down in a Government Letter removal should also be under S. 71, and he claims that the plaintiff has a right to receive damages because his service has been terminated otherwise than by dismissal under S. 71 in the manner laid down by that section. The assumption by counsel is that the plaintiff had a right to hold his office during good behaviour. It is true that in certain parts of the British Dominions such provision has been made by statute. But there is no such provision in the District Boards Act, 1922, or in any similar Act in India, or for public or Government servants in India. Under S. 89 it is provided:

Every officer or servant of a Board shall be deemed to be a public servant within the meaning of the Penal Code; and in the definition of "legal remuneration" in S. 161 of that Code, the word "Government.' shall, for the purposes of this section, be deemed to include a Board.

The preamble states:

An act to make better provision for Local Self-Government in rural areas of the United Provinces. Whereas it is expedient to make better provision for Local Self-Government.

Government of India Act, 1919, section 96-B (1) provides:

Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India, holds office during His Majesty's pleasure.

This then is the general provision for all Government servants in India, that they hold office during His Majesty's pleasure, and not "during good behaviour." The District Boards Act 1922, does not contain any provision that a different rule was to be set up for servants of District Boards from the general rule for all Government servants. The situation is well-expressed in Aiyangar's Law of Municipal Corporations in British India, page 124:

All offices are held either "at pleasure or "during good behaviour." Where an office is held at pleasure, the holder thereof is subject to dismissal at any time without any cause being assigned. No notice or framing of any charge is necessary; and the holder is removable at the sole discretion of the appointing authority. Where however an office is held during good behaviour, the holder thereof is appointed to all intents and purposes for life and has what is called a free-hold office, for his life. He can be removed from office only for want of good behaviour. In this case, notice of dismissal should be given and a charge framed and proved. It is well-known that except where it is otherwise provided by statute all public officers and servants of the Crown hold their appointment at the pleasure of the Crown; and speaking generally, they are subject to dismissal at any time without cause assigned; and an action for wrongful dismissal will not be entertained by a Court of law. All officers and servants of local bodies do hold public offices and are expressly stated to be public servants by the several Acts creating the said local bodies. The Acts contain express provisions regarding their appointment and dismissal. Except where a particular appointment is stated to be held during good behaviour, all officers and servants of local bodies would, according to the true intent and meaning and the legal construction of the enactments, hold their respective offices only at pleasure. They are accordingly removable from their offices without any notice being given and without any cause being assigned. They would be exactly in the same position as the officers and servants of the Crown. . . . Most, if not all, of the local bodies have made rules and regulations relating to the grant of pensions, gratuities, etc. These rules and regulations generally do not constitute a contract between the parties. . . . If the rules are not complied with, the remedy of the party concerned is not by a law suit but by way of appeal departmentally to higher authorities. He cannot have a right of action in a Conrt of law for wrongful dismissal against the local body concerned.

The authorities for this passage are contained in (1895) A C 229 (6), (1908) 1 K B 63 (7), 1917 Mad 578 (8), 16 I C 922 (9), 9 Bing 692 (10), (1915) 3 K B 580 (11), 1918 Mad 710 (12), (1918) 2 Ch 96 (13), (1918) W N 102 (14) and (1920) 3 K B D 663 (15). (1895) A C 229 (6) is a ruling by their Lordships of the Privy Council on appeal from the Supreme Court of Western Australia. Dr. Smith was appointed by Government to act as medical officer during a definite period, in the absence of a Dr. Rogers on leave. After he had been so acting for over a year an order was passed by the Governor on 9th July 1888 that his tenure of office would cease at the end of the year. This was in conse-

6. Shenton v. Smith, (1895) A C 229=64 L J P C 119=43 W R 637=72 L T 130.
7. Wright v. Marquis of Zetland, (1908) 1 K B 63=77 L J K B 152=97 L T 867=24 T L R 48.
8. Gnana Sambanda v. Manikkavasaka, 1917 Mad 578=34 I C 57=40 Mad 177.
9. Ramdas v. Secy. of State, (1913) 16 I C 922.
10. Smyth v. Latham, (1833) 9 Bing 692=3 M & S 251=2 L J Ex 241=1 C & M 547=3 Tyr 509.
11. Notley v. London County Council, (1915) 3 K B 580=85 L J K B 113=113 L T 1110=80 J P 23=13 L G R 1346.
12. Chellam Ayyar v. Corporation of Madras, 1918 Mad 710=42 I C 513.
13. Meek v. Port of London Authority, (1918) 2 Ch 96=87 L J Ch 376=16 L G R 483=34 T L R 420=82 J P 225.
14. Hales v. The King, (1918) W N 102.
15. Leaman v. The King, (1920) 3 K B D 663=89 L J K B 1073=36 T L R 835=124 L T 159.

quence of blame attached to him at a coroner's inquest. He presented a petition of right making the Colonial Secretary the defendant, and the jury found that the plaintiff was led to believe that he would hold the office during good behaviour as long as the office existed; and that Government had not given reasonable notice, and had no reasonable cause to dismiss him. and they assessed damages at £ 200. In appeal the two Judges of the Supreme Court differed on the questions of law. On appeal by the defendant to the Privy Council, the arguments for the plaintiff were similar to those in the present case before us. It was argued that:

The Civil Service Regulations contained provisions as to the procedure to be adopted by the Governor in case he desires to suspend or dismiss an officer from his office. The published regulations must be deemed to have formed part of the contract between the Crown and the respondent, and he could only be lawfully dismissed in accordance with the procedure prescribed thereby. This case ought to be treated on the same footing as if it were a question between subject and subject, being between a local Government and a subject. The Colonial Government is not the Crown, and dealt with the respondent on the same footing as a private corporation. It does not possess the immunities of the Crown, nor has it the same discretionary power of dismissing public servants.

Their Lordships did not accept these arguments; they held that a Colonial Government is on the same footing as the Home Government as to the employment and dismissal of public servants and held that Dr. Smith had no right to sue. On pp. 234 and 235 it was stated:

They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind. Dr. Smith did in fact make such an official appeal to the Secretary of State. . . . As for the regulations, their Lordships again agree with Stone, J. that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants. . . . They are alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of a contract with those servants. . . . The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as to seriously impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government to whom the regulations have been addressed can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the regulations is amenable, not to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case

That the same principle applies to local self-Government bodies is shown in (1915) 3 K B 580 (11). The plaintiff brought an action in the King's Bench Division claiming a declaration that a resolution of the defendants purporting to dismiss the plaintiff from his office of district surveyor was illegal and void and that plaintiff was entitled to hold the said office notwithstanding the resolution, and claiming an injunction against the defendants. The plaintiff had held the office from 1875 to 1915. The plaintiff argued that the power to dismiss must be exercised judicially and reasonably and not arbitrarily. That district surveyors had judicial functions and were not servants of the defendants though appointed by them. It was held that under S. 32, Metropolitian Buildings Act, 1855 the defendants may:

by order, at their discretion . . . dismiss or suspend any future district surveyor. . . . In my judgment the words perfectly clearly denote and describe an office held at the pleasure of this body. . . Of course, if there were anything in the Act of 1855 beyond the words I have referred to, which pointed to some tenure, such as a freehold tenure or tenure dum se bene gesserit. or subject to any notice, or anything of that kind, I should very readily construe the words "at their discretion," and "may dismiss" as being subject to those terms and should hold that the defendants were, in exercising their discretion, to carry and work out that tenure and give effect to it. . . I must hold that this action fails because the County Council have power to terminate this gentleman's tenure of office at their pleasure.

The language of the different District Board Acts may be examined from this point of view. N. W. P. and Oudh Local Boards Act, Act 14 of 1883, section 34 stated:

(1) Every District Board and every Local Board shall, from time to time, appoint one or more of the members, or, with the sanction of the Commissioner of the division, any other person or persons, to be its secretary or secretaries, and may remove any person so appointed.

U. P. District Boards Act. Act 3 of 1906 stated in S. 30:

(1) Every Board shall, from time to time, at a special meeting, appoint one or more of its members, or, with the sanction of the Commissioner, any other person or persons, to be its secretary or secretaries. 34. In the absence of a written contract to the contrary, every officer or servant

employed by a Board shall be entitled to one month's notice before discharge or to one month's wages in lieu thereof, unless he is discharged for misconduct or was engaged for a specified term and discharged at the end of it.

Act 10 of 1922 provided:

70. Every Board shall by special resolution appoint a secretary, who shall be a whole-time salaried officer, and prescribe, subject to the provisions of S. 85, the salary and other conditions of his appointment.

This has been amended by Act 1 of 1930 to state:

70 (1) Every Board shall by special resolution appoint a secretary who shall be a whole-time salaried officer. (2) The appointment of the secretary and the conditions of his service shall be made in conformity with the rules framed by the Local Government. 71. A Board may by a special resolution punish or dismiss its secretary provided: (a) that such resolution is passed by a vote of not less than two-thirds of the total number of members of the Board for the time being, or (b) that it is passed by a vote of not less than one-half of the total number of such members and is sanctioned by the Local Government.

It is to be noted that this section entitles the board to dismiss its secretary at pleasure, and that the secretary holds his office at pleasure of the board. just as any other public servant. That no distinction can be drawn between a servant of a board and other public servants in this respect is shown by the fact that the Secretary of State for India in Council is also made a party to this suit, and as already pointed out S. 96-B (1), Government of India Act 1919, makes the tenure of every servant of the Crown in India "during His Majesty's pleasure." The only provision made by S. 71 as regards the way in which the right is to be exercised, and there is no limitation of the right to dismiss at pleasure. The lower appellate Court finds that the resolution was passed by 19 members out of 21 present, two not voting. and that the total number of members was 34. If the resolution had been one of dismissal under S. 71. the irregularity would have been a matter for the plaintiff to bring to the notice of Government on appeal, as an appeal is allowed by the rules and the Act. But on the principle of (1895) A C 229 (6), where irregularities were found in the dismissal, such irregularities cannot give a right to sue in a Court of law. Further the finding of the lower appellate Court is that the resolution was not one of dismissal under S. 71 but it was a resolution under S. 81 which provides:

Subject to provisions of this Act or of any rule, a Board may appoint one person to discharge the duties of any two or more offices.

A resolution under this rule does not require a two-thirds majority of the total number of members. The finding on this point is correct, and there is nothing in the Act to the contrary. The resolution against which the suit is directed is the resolution of 16th October 1932 stating:

The Board resolves that the post of the Secretary and the Engineer be abolished and a new post designated as Secretary-Engineer be created, on Rs. 250—15—350, and the services of both the incumbents be dispensed with owing to the abolition of their posts.

In the District Board Manual, page 279, certain qualifications are necessary for an engineer. The secretary therefore could not hold the combined post. The necessary consequence of the resolution was that the service of the secretary terminated. On p. 146 of the Manual there is a rule made by Government:

The removal of a secretary from the post of secretary without his written consent is a dismissal within the meaning of S. 71 of the Act, whether the secretary is thereby removed from the Board's service or is transferred to another post in the Board's service.

The secretary has however not been removed from the post of secretary but the post itself has been abolished, and the secretary is not technically qualified to fill the combined post of secretary-engineer. Even on the assumption that the case would come under this rule of Government, on the principle of (1895) A C 229 (6), irregularities in an order of dismissal do not give a public servant any right to sue in a Court of law. In (1908) 1 K B 63 (7), a scheme under the Endowed Schools Act, 1869 provided that the head master of an endowed school might "at pleasure" dismiss all assistant masters in the school. The plaintiff sued for damages for wrongful dismissal without notice. The jury found that by custom assistant masters were entitled to a term's notice of dismissal. The Court of Appeal held that such a custom was excluded by the terms of the scheme, and therefore the plaintiff was not entitled to notice of dismissal, and that in any case the action was not maintainable against the Governors. On p. 69 the judgment of the Court of Appeal stated:

Clause 30 is as follows: The Governors may at pleasure dismiss the headmaster without assigning cause, after six calendar months' written notice given to him in pursuance of a resolution passed at two special meetings held at an interval of not less than 14 days, such resolution being affirmed at each meeting by not less than two-thirds of the governors present and voting on the question. It seems to me that the

provision that dismissal at pleasure shall be carried out or expressed by a resolution passed at two special meetings is not inconsistent with dismissal at "pleasure" any more than if it was said that the dismissal must be in writing or under seal. It is a mere mode of the expression of the pleasure or will of the Governors without assigning cause that the head master shall be dismissed.

This ruling shows that even where provisions exist as in S. 71, District Boards dismissal is still a dismissal "at pleasure" Act, that a special resolution and a two-thirds majority are required, the sure" because no cause has to be assigned for the dismissal. And where the office is held "at pleasure" then on the principle of (1895) A C 229 (6) no action will lie for an order of dismissal which is made not in accordance with rules. In 16 I C 922 (9) the plaintiff, a clerk in a Collector's office, sued for a declaration that he had been wrongfully dismissed and for arrears of salary. He was prosecuted and acquitted. Without giving him any opportunity to explain or answer the charges, the Collector after his acquittal dismissed him on account of some other facts not elicited at the trial. The judgment of Mukerjee, J., on page 78 stated:

I am clearly of opinion that the plaintiff ought to have been heard before he was dismissed from Government service. The Collector wholly misunderstood the scope and effect of the rules on the subject, when he held that as the plaintiff had been prosecuted, he need not be called upon to show cause why he should not be dismissed.

But on p. 80 Mukerjee, J., held:

It is now firmly settled that, except where it is otherwise provided by statute, as in (1896) A. C. 575 (16), all public officers and servants of the Crown hold their appointments at the pleasure of the Crown: (1896) 1 Q. B. 116 (17) and all, in general, are subject to dismissal at any time without cause assigned. In (1896) 3 Ch. D. 164 (18), (1898) A. C. 469 (19). 11 Moo. P. C. 288 (20), (1895) A. C. 229 (6), (1877) 2 C. P. D. 445 (21) and 3 F. & F. 527 (22), nor will an action for wrongful dismissal be entertained. As Sir William Anson puts it (Law and Custom of the Constitution, Vol. 2, Part 1, p. 221, Edn. 3, 1907), all offices are held either "at pleasure or during good behaviour," and, unless it is otherwise stated, their occupants hold "at pleasure." This principle has been repeatedly recognized in the Courts of this country: 33 Cal 669 (23), 9 I. C. 858 (24) and 27 Bom. 189 (25). It is plain therefore that the plaintiff was liable to dismissal at any time without cause assigned. What the Crown could do independently of any inquiry and without the assignment of any reason, cannot very well be questioned in a Court of law on the ground that the inquiry has not been satisfactory or in a proper form, or that the reason assigned is unsound or open to criticizm. It is thus impossible to hold, as his tenure of office was so precarious, that the plaintiff can successfully claim any relief against the Crown. . . . The plaintiff is not entitled to a declaration that his dismissal has been in contravention of the rules, because it does not fall within the scope of S. 42, Specific Relief Act, nor, can it admittedly lead up to any consequential relief against the Crown which the Court is competent to grant. S. 42, as was explained in 39 Cal. 704 (26), does not sanction every form of declaration but only a declaration that the plaintiff is entitled to a specific legal character or right as to property.

The reasoning given in this judgment applies to the relief of a declaration asked for by the present plaintiff that the resolution of 16th October 1932 is void, and such a declaration cannot be granted under section 42, Specific Relief Act. In (1896) 1 Q B 116 (17), it was decided that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. Lord Esher, M. R., quoted a passage from the judgment of Lord Watson in DeDohse v. Reg (decided in Court of Appeal on 2nd June 1885, by Brett, M. R., Baggallay, L. J., and Bowen, L. J., in the House of Lords on 25th Nov. 1886 by Lord Halsbury, L. C. and Lords Blackburn, Watson and Fitz Gerald—unreported —Ed.):

In the first place it appears to me that no concluded contract is disclosed . . . ; and in the second place, I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further, I am of opinion, that if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country, and could not derogate from the power of the Crown.

This dictum was followed in (1918) W N 102 (14), where a clerk claimed to have been engaged in the Admiralty subject to a week's notice. In (1920) 3 K B 663 (15), plaintiff sued on a contract by petition of right, alleging that he was enlisted in 1914 for one year or the duration of the

16. Gould v. Stuart, (1896) A C 575=65 L J P C 82=75 L T 110.
17. Dunn v. Queen, (1896) 1 Q B 116.
18. In re Tufnell, (1876) 3 Ch D 164=45 L J Ch 731=24 W R 915=34 L T 838.
19. Young v. Adams, (1898) A C 469= 67 L J P C 75=14 T L R 373=78 L T 506.
20. Ex parte Robertson, (1858) 11 Moo P C 288.
21. Grant v. Secy. of State, (1877) 2 C P D 445= 46 L J C P 681=25 W R 848=37 L T 188.
22. Dickson v. Combermere, (1863) 3 F & F 527.
23. Voss v. Secy. of State, (1906) 33 Cal 669.
24. King v. Secy. of State, (1911) 9 I C 858.
25. Cursetji v. Secy. of State, (1903) 27 Bom 189.
26. Deokali Koer v. Kedar Nath, (1912) 39 Cal 704=15 I C 427.

war at 6s. a day, and received a pay book showing this amount and was so paid till June 1916, when he was informed that he had in fact been enlisted as a "time serving soldier" for seven years at 1 shilling a day and he was compelled to refund by deduction the excess pay he had drawn since 1914. On discharge in 1920 he brought this petition. He referred to the Manual of Military Law, Ch. 10, paragraph 18. p. 189 where it is stated:

The enlistment of the soldier is a species of contract between the Sovereign and the soldier, and under the ordinary principles of law cannot be altered without the consent of both parties.

On p. 668 Acton, J., held:

It by no means follows that it vests in the soldier the right to enforce by proceedings in a Court of law the payment of the sums to which he claims to be entitled in respect of his services.

It was held that the engagement was voluntary only on the part of the Crown. Against all this authority, learned counsel for the appellant, after having an interval for research, was only able to cite four rulings which laid down that corporate bodies were not exempt from the jurisdiction of civil Courts—a proposition that no one denies—and one ruling relating to a suit by a District Board servant. The four rulings did not deal with cases of servants. but with other matters with which the present suit is not concerned. The solitary ruling relating to a servant is reported in 1933 All 826 (27), and is by a Single Judge, Young, J. The circumstances were very similar to the present case. A District Board (Shahajahanpur) by a resolution dismissed its secretary, alleging the economic situation and the desirablity of amalgamating the offices of the engineer and the secretary, and secondly that the secretary was unsatisfactory, incompetent, and had been creating friction among the members of the Board. Next day the secretary filed a suit in the Court of the Munsif for an injunction restraining the defendants (apparently the District Board) from interfering with the discharge of his duties as secretary and prohibiting them from illegally discharging him from office. The ruling states:

I would like to note here that though in the ordinary case of a master and servant an injunction certainly would not lie restraining a master from dismissing his servant; the remedy of the servant if he has been wrongly dismissed, would be for damages: but in the case of a District Board they are governed by a statute. Under S. 71, District Boards Act (10 of 1922) the Board may punish or dismiss a secretary subject to the rules made under the authority of the statute by the Local Government. The rules in accordance with the statute have been framed by the Local Government. R. 3 enacts as follows: "No officer or servant shall be dismissed without a reasonable opportunity being given to him of being heard in his own defence." It is clear therefore that it would be open for a dismissed servant to allege that the rule had not been complied with and that therefore he was not legally dismissed from his office. He would then be in a position to ask the Court for an injunction.

The ruling proceeds to state that the Munsif issued and withdrew an interim injunction, that on appeal the District Judge stayed the order of the Munsif to cancel the interim injunction that the chairman disobeyed it by appointing the engineer as secretary. that the District Judge committed the chairman and the engineer to the civil prison for six months for disobedience, and on apologies being given the learned Single Judge remitted the imprisonment and fined the chairman Rs. 500 (though O. 39, R. 2 does not authorise fine) and held that the engineer was not guilty of contempt of Court. Now the ruling of Young, J., cannot be taken as any authority on the question of whether a suit will lie by a servant of a District Board against the board, because it apparently never occurred to him or to the learned counsel in that case that any question could arise that the servant of a District Board had no such right. He quotes no authority on the subject nor does he attempt to distinguish between the case of a servant of a District Board and any other public servant. It is true that the judgment recognises the rule of law that an injunction does not lie to restrain a master from dismissing a servant. But the learned Judge thought that because the board was governed by a statute and by rules of the Local Government therefore an injunction could issue. There is nothing to this effect in the Specific Relief Act, Act 1 of 1877. which provides in S. 56 (f) that an injunction cannot be issued to prevent the breach of a contract, the performance of which would not be specifically enforced; and in section 21 (b) that a contract cannot be specifically enforced:

which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms.

27. Sheo Narain v. District Judge, Shahjahanpur, 1933 All 826=148 I C 123.

Illustrations to this (b) show that the contract of personal service cannot be specifically enforced. In 6 Bom 266 (28) it was held that for this reason a Court would not decree specific performance of an agreement that plaintiffs should be the agents of a company. In 13 I C 868 (29), it was laid down:

Under Ss. 21 and 57, Specific Relief Act, a limited liability company cannot be restrained by injunction from dispensing with the services of managing agents, even when the contract of service provides that the managing agents are only to be removed in a specified manner and after a specified time. The remedy of the managing agents for dismissal if wrongful is a suit for damages.

The judgment therefore puts the District Board in a worse position than an ordinary master or a limited liability company. It is difficult to see why this should be so, in view of the principle that public servants should be removeable at pleasure in the interests of the public, and that they should not have a right to sue for wrongful dismissal. If we examine the rules on p. 135 of the U. P. District Board Manual to which the learned Single Judge referred, we find that the rule quoted by him would not apply in the present case because the footnote to R. 3 says:

This rule shall not apply to cases in which a Board discharges an officer or servant for some other reason than a fault committed by him.

In the face of the numerous rulings already set out which show that public servants have no right to sue in a Court of law for wrongful dismissal the solitary ruling of a learned Single Judge, in which the point was not even considered, cannot prevail. The fact that Government controls a District Board in these matters is shown by the provision in S. 71 (b) that where the secretary is punished or dsimissed by special resolution by a vote of not less than one-half of the total number of such members (as in the present case) the sanction of Government is required. If on the other hand the case was regarded as one of combination of offices under section 81, then there is the control of the Commissioner over all proceedings of a board under S. 164 (d), and the Commissioner could report the matter to Government for orders. There is no doubt that the ultimate authority under the District Boards Act and the rules is the Local Government, and therefore there seems to be no reason to consider that the servant of a District Board holds his position in any way differently than any other public servant who holds his position "at pleasure." If there had been any intention to create a different tenure, a provision would have been inserted in the Act. The provision in S. 71 is not such a provision, and is intended to create a check on the way in which a board works—either two-thirds majority of the total number, or one-half and the sanction of the Local Government for the dismissal of a secretary or his punishment. But the creation of such a check does not give the secretary a right to sue even if the case came under S. 71. It is for the Local Government and not for the Courts to see that the Board has acted in accordance with the section in a case coming under the section.

As regards the general law of master and servant, even if the plaintiff did come under it, all that he would be entitled to claim would be reasonable notice or salary in lieu of notice. In the present case the four months pay received after abolition of his post would be ample in lieu of notice. The conclusion therefore is: a District Board servant is under the general disability of other public servants in that he holds his office "during pleasure," and he cannot sue the District Board or the Secretary of State in a Court of law for wrongful dismissal; nor can he sue for a declaration that a resolution removing him is null and void as such a declaration would not come under section 42, Specific Relief Act.

Allsop, J.—I have had the advantage of seeing the judgment of my learned brother. In my opinion the resolution of the board amounted to an order of dismissal. The board is not empowered to abolish the office of secretary and although it purported to do this, that was not in effect the result of its resolution that there should be a joint office of secretary and engineer. Neither the office of secretary nor the office of engineer was abolished. The resolution was that the two offices should be held by one person. In order that this resolution should be carried into effect, it was necessary that either the secretary or the engineer for the time being should be dismissed. The board dismissed the secretary and appointed the engineer to hold both offices.

The fact that the secretary was dismissed does not however necessarily

28. Nusserwanji v. Gordon, (1881) 6 Bom 266.
29. N. C. Sarkar & Sons v. Baraboni Coal Concern Ltd., (1912) 13 I C 868.

lead to the inference that he was entitled to institute a suit against the board. No doubt, the order of dismissal should have been by means of a resolution passed by a majority consisting of two-thirds of the members of the board but the question is whether the secretary can enforce any remedy in a Court of law because the resolution was passed by a majority of less than the requisite number of members. I agree with my learned brother that he could not. It is unnecessary to reiterate the arguments with which I am in agreement. The powers of the board are exercised subject to the general control of the Local Govment and it is for the Local Government in its discretion to compel the board to exercise those powers in a proper manner. I do not consider that the provision that a secretary should be dismissed only by a resolution passed by a certain majority gives the secretary a right to institute a suit against the board. He can doubtless appeal to the Local Government if his dismissal is not warranted.

It is difficult to see what cause of action the appellant can possibly have. It is clear that there can be no decree for specific performance of a contract of personal service. There can be no injunction compelling a board or anybody else to employ a particular person. Indeed, as the learned Judge of the lower appellate Court has pointed out, the appellant did not even seek an injunction against the board. If the appellant is suing for damages on the basis of a contract, the most that he could expect would be salary for a certain period in lieu of notice. It has been found that he received his salary for a period of four months after his dismissal and that is amply sufficient to compensate him. The learned Judge of the lower appellate Court has also pointed out that the secretary sought a declaration which could not be in any case granted, because it would have been fruitless. The appellant informed the chairman of the board that he accepted the resolution and accordingly he actually gave over charge to his successor and had not been carrying on the duties of secretary for a considerable period when he instituted the suit. Even if he obtained a declaration, that would not in any way benefit him. In my opinion there is no force in the appeal and I would dismiss it under O. 41, R. 11.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 811

SULAIMAN, C. J. AND BENNET, J.

Kapildev Malaviya and *others*—Applicants.

v.

Chief Justice and *Judges of the High Court, Allahabad*—Opposite Parties.

Privy Council Appeal No. 38 of 1934, Decided on 11th February 1935, for leave to appeal to His Majesty in Privy Council, against the order of Thom and Harris, JJ., reported in A. I. R. 1935 All. 1.

(a) Contempt—Proceedings for contempt of High Court—Notice to show cause why non-applicants should not be convicted and punished—One of accused being advocate—Conviction and fine imposed—Application for leave to appeal to Privy Council—Held proceedings were of criminal nature and S. 109, S. 110 or S. 112 Civil, P. C., has no application.

A Division Bench of the High Court took cognizance of contempt committed by the publication of an Advocate's article. The Bench ordered notices to be issued to the Advocate as well as the Editor and the Printer and the Publisher of the paper to show cause why they should not be convicted and punished for offence of contempt of Court. But the notice that was issued by the office to the Advocate was written out on a printed form which had the words "Civil Side Jurisdiction" printed on it. The notice was issued under the signature of the Deputy Registrar, and the printed words were not struck out, but the word "Revisional" was added. The contents of the notice however warned the Advocate to appear personally to show cause why he should not be convicted and punished for the offence of contempt of the High Court committed by the publication. The advocate and other accused were convicted and fined. Thereupon an application was filed for leave to appeal to the Privy Council:

Held: that the proceedings were in the exercise of the inherent jurisdiction of the High Court and of a criminal nature and that merely because the Advocate was an officer of the High Court, the proceeding against him was not of an administrative character. The conviction and the fine imposed were themselves sufficient to show at least that the proceeding was not of a civil nature and that Ss. 109, 110 or 112, Civil P. C. had no application. [P 813 C 1]

Held further: that the Advocate could not possibly have been misled by the issue of the notice on a printed form used for notices on the civil side. A mere misdescription in the notice issued by the office could not in any sense make the proceeding one of a civil nature. The form used for the notice was wholly immaterial for the purposes of deciding what the nature of the jurisdiction exercised was, and that the misdescription was of too trivial a nature and cannot possibly confer civil Jurisdiction on the High Court: *Case law referred*. [P 812 C 2; P 813 C 1]

(b) Contempt—Contempt of Court—Division Bench holding that contempt has been committed—Application for leave to appeal to Privy Council—Order of Division Bench that contempt has been committed is final.

Where a Division Bench has held that contempt has been committed and an application for leave to appeal to the Privy Council has been filed, the Division Bench has exclusive jurisdiction to decide the question whether contempt has been committed, and its order is final; and the question cannot be reconsidered in such application and leave cannot be granted.

[P 814 C 1]

Tej Bahadur Sapru, P. N. Sapru, M. N. Raina, G. S. Pathak, S. N. Verma and *Ajudhiya Nath*—for Applicants.

Muhammad Ismail — for Opposite Parties.

Sulaiman, C. J.—This is an application for leave to appeal to His Majesty in Council from an order convicting the applicants, an Advocate and Editor and a Printer and Publisher of the offence of contempt of Court, and sentencing the advocate to a fine of Rs. 150 and ordering each of the three persons to pay Rs. 100 as costs. The offence is found to have been committed on account of the publication of an article by him headed "A scandalous citation" in the Leader. The counsel for the applicant contends that his application for leave falls under S. 109, Civil P. C., and urges before us that the order of the High Court has been passed in the exercise of its civil jurisdiction, particularly as the original notice issued to him was headed "Civil Side Revisional Jurisdiction."

The learned Government Advocate takes preliminary objection that no application for leave to appeal lies inasmuch as: (1) contempt is a criminal matter and the punishment is in the exercise of the criminal jurisdiction of the High Court, and (2) that the inherent jurisdiction exercised by this Court as a Court of record is exclusive and the order passed is final.

The first question for consideration is whether proceedings for contempt of the High Court are at all in the nature of a civil proceeding. A Division Bench of this Court took cognizance of contempt committed by the publication of the advocate's article. The Bench ordered notices to be issued to the advocate as well as the Editor and the Printer and the Publisher of the paper "to show cause why they should not be convicted and punished for the offence of contempt of this Court." In the order itself as signed by the Judge, there was no suggestion that the notice was being issued in the exercise of any Civil Jurisdiction. On the other hand, as the opposite party were called upon to show cause why they should not be convicted and punished for the offence of contempt, the order was prima facie in the exercise of the criminal jurisdiction or the inherent jurisdiction of this Court. The office numbered the case as "Miscellaneous Case No. 435 of 1934", and on the day's list also the case was shown simply as "Miscellaneous Case No. 435 of 1934" without mentioning that it was a Miscellaneous Civil case. But the notice that was issued by the office of the advocate was written out on a printed form which had the words "Civil Side Jurisdiction" printed on it. The notice was issued under the signature of the Deputy Registrar, and the printed words were not struck out, but the word "Revisional" was added. The contents of the notice however warned the advocate to appear personally to show cause why he should not be convicted and punished for the offence of contempt of the High Court committed by the publication. The advocate could not possibly have been misled by the issue of the notice on a printed form used for notices on the Civil Side. No particular form of the notice is prescribed by the rules of this Court. The advocate had been called upon to appear in order that he may have an opportunity to show cause. We are therefore unable to hold that a mere misdescription in the notice issued by the office could in any sense, make the proceeding one of a civil nature. The advocate could not have been under any misapprehension as to the true character of the proceeding. We are of opinion that the form used for the notice is wholly immaterial for the purposes of deciding what the nature of the jurisdiction exercised was and that the misdescription was of too trivial a nature and cannot possibly confer civil jurisdiction on the High Court.

We have not the least doubt in our minds that the proceedings were in the exercise of the inherent jurisdiction of this Court and of criminal nature. We would not say that merely because the advocate was an officer of this Court, the proceeding against him was of an administrative character. The conviction and the fine imposed are themselves sufficient to show at least that the proceeding was not of a civil nature. In 5 Moore P C N S 110 (1),

1. In the matter of Edward Hutchinson Pollard, (1868) 5 Moore P C N S 110.

their Lordships clearly laid down that the contempt of Court was "a criminal offence."

In (1893) A C 138 (2), the last two paragraphs of the report of their Lordships at p. 149 indicated that the sentences passed amounted in effect to a general committal for contempt and was of a punitive charactor. This view has, of course, been followed in India: 1914 Cal 69 (3). It has been held by a Full Bench of this Court that the proceedings to punish contempt of Court is in the exercise of the inherent jurisdiction vested in a Court of Record, and the procedure is summary: see 1926 All 623 (4). In the contempt of Courts Act of 1926, express power has been conferred to punish contempt of subordinate Courts, but no necessity has been felt to confer any jurisdiction for punishing contempt of the High Court, which has always been assumed to exist.

It is therefore clear that S. 110, Civil P. C., has no application to such a case. As defined in S. 2, Civil P. C., "decree" is the formal expression of an adjudication which conclusively determines the rights of the parties and "order" is a decision of a Civil Court. Not only therefore S. 109 is in terms inapplicable, but S. 112, sub-S. (2) expressly makes the Code inapplicable to matters of criminal jurisdiction. We also agree with the learned Government Advocate that the matter was of an exclusive jurisdiction, and the order is final. In 3 Moore P C 361 (5), their Lordships expressed the opinion that "they can make no order respecting the fine imposed by the Court below upon Mr. Smith." But their Lordships rescinded the order for striking him off the rolls. In 8 Moore P C 47 (6), at p. 54, their Lordships of the Privy Council laid down as the opinion not only of the members of the committee, who heard the petition but also of the other members who usually attended, that they could not interfere with such a subject and remarked:

> In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and, unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone the same power must be conceded to be inherent in that Court . . . . we are of opinion that it is a Court of Record, and that the law must be considered the same there as in this country; and therefore that the orders made by the Court in the exercise of its discretion imposing these fines for contempts are conclusive and cannot be questioned by another Court, and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders. All we can say is that we have no jurisdiction to entertain such a petition impugning the propriety of such orders, and praying the remission of the fines.

These cases were quoted with approval by their Lordships of the Privy Council in 10 Cal 109 (7). Nor have we any power to certify this case as being otherwise a fit one for appeal to His Majesty in Council. The question for consideration was not so much of jurisdiction as of an interpretation of the passage objected to. The Bench in construing its implications took into consideration the various circumstances attending its publication. The article had been written by an advocate of standing and repute practising in the High Court; special importance and significance would be attached to it by the public reading the article; the Leader has a wide circulation in this country, and the article would have been widely read; the affidavit filed by the advocate was considered by the Bench not to be so candid as that of the others; there was no apology or expression of regret and it was not suggested in the advocate's explanation that the reference was not to the present members of the High Court Bench. They took into account the fact that the article was written in connexion with the elections to the Bar Council under this very High Court, and came to the conclusion that the assertion that the raising to the Bench of a comparatively "undeserving" lawyer "is a fairly frequent occurrence in our judicial history" amounted to an unwarranted defamation of the High Court likely to lower its prestige in the eyes of the public and to shake their confidence in its capacity to administer justice, and did not agree that the repetition of the alleged claim of the members of the Bar to select Judges

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2. In the matter of a Special Reference from the Bahama Islands, (1893) A C 138.
3. Legal Remembrancer v. Matilal Ghose, 1914 Cal 69=20 I C 81=14 Cr L J 321=41 Cal 173 (SB).
4. Hadi Husain v. Nasir Uddin Haidar, 1926 All 623=97 I C 108=48 All 711 (SB).
5. Magnus Smith v. The Justices of Sierre Leone, (1841) 3 Moore P C 361.
6. William Rainy v. The Justices of Sierre Leone, (1852-53) 8 Moore P C 47.
7. Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court, Bengal, (1884) 10 Cal 109=10 I A 171 (PC).

"with better results" was innocent. The Bench remarked:

We have given careful consideration to all that learned Counsel has urged in defence of his clients and with some knowledge of the conditions which exist and of the effect that such an article is likely to produce in the minds of the public, we are clearly of opinion that the passage in respect of which notice to the opposite parties has been issued constitutes a contempt of Court, of which the High Court in the interests of the administration is bound to take cognisance.

They held that:

We are clearly of opinion that the words in the passage convey unwarranted and defamatory aspersion on the character and ability of a number of Judges of the High Court who have recently been elevated to the Bench . . . . . We are of opinion that it tends to lower the High Court in the eyes of the public.

In our opinion, on the question whether the allegation amounted to a contempt of Court or not the Division Bench had exclusive jurisdiction and its order is final. We must therefore decline to grant leave to appeal to His Majesty in Council. The application is dismissed with costs. We assess the cost of the Crown counsel at Rs. 100.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 814

ALLSOP, J.

Emperor

v.

Jafar Khan and *others* — Opposite Parties.

Criminal Ref. No. 105 of 1935, Decided on 8th April 1935, by the Sessions Judge, Shahjahanpur, D/ 25th January 1935.

(a) Criminal P. C. (1898), Ss. 342 and 439 —Order of remand that trial should continue from stage of framing of charge—Accused examined after remand—But prosecution not re-cross-examined though they were cross-examined after framing of charge—Held no interference in revision was justifed.

A direction in the order for remand was that the trial should continue from the stage at which the charge had been framed. One of the grounds taken against the order which was now in question was that although the accused were examined after the remand, the witnesses for the prosecution were not re-cross-examined. They had already once been cross-examined after the charge had been framed; but it was contended that as the order of remand directed that the trial should continue after the framing of the charge, there was obviously a further right to cross-examine:

Held: that this was a most technical argument and it was certainly not one upon which any interference in revisional jurisdiction would be justifiable. [P 814 C 2; P 815 C 1]

(b) Criminal P. C. (1898), S. 439—Revisional application is not to be regarded as second appeal on question of law—Distinction between revision and appeal pointed out.

There is a distinction between a revision and an appeal. In the latter the appellant is given a statutory right to demand an adjudication upon a question of law or on a question of fact or on both. When a matter comes up in revisional jurisdiction the applicant has no right whatsoever beyond the right of bringing his case to the notice of the Court. It is for the Court to interfere in exceptional cases where it seems that some real and substantial injustice has been done. That is the main point which the Court has to consider. A revisional application is not to be regarded as in some sort a second appeal on a question of law.

[P 815 C 1, 2]

Lakshmi Narain Gupta — for the Crown.

M. A. Aziz—for Opposite Parties.

Order.—This is an application in revision which has been referred to this Court by the learned Sessions Judge with the recommendation that the convictions and sentences passed on the applicants should be set aside.

One of the appellants was fined Rs. 60 for the offence of voluntarily causing grievous hurt. The other two were fined Rs. 20 each for voluntarily causing simple hurt. The grievous hurt was a fracture of the skull. It appears that there was a fight over irrigation in which the applicants beat the complainant. The reference is due to alleged irregularities in procedure. The case was tried by a Bench of Honorary Magistrates. They convicted the accused but on appeal to the District Magistrate a re-trial was ordered upon the ground that the accused, although they had been examined at one stage, had not been examined after all the witnesses for the prosecution had been heard. After remand, the order was passed which is the subject of this reference. The direction in the order for remand was that the trial should continue from the stage at which the charge had been framed. One of the grounds taken against the order which is now in question is that although the accused were examined after the remand, the witnesses for the prosecution were not re-cross-examined. They had already once been cross-examined after the charge had been framed; but it is said that as the order of remand directed that the trial should continue

after the framing of the charge, there was obviously a further right to cross-examine. This is a most technical argument and it is certainly not one upon which any interference in revisional jurisdiction would be justifiable.

The other alleged irregularity is that the judgment was signed by three of the Honorary Magistrates one of whom had not been present on certain dates when proceedings took place. It is not disputed that two of the Honorary Magistrates would form a quorum and that two of them were present throughout the hearings. Reliance has been placed on the case of 1934 All 144 (1). That case is authority for the proposition that it is an irregularity for an Honorary Magistrate to sign a judgment if he has not been present throughout the proceedings. It is also authority for the proposition that this is an irregularity which would not necessarily vitiate the trial. In that particular case the learned Judges came to the conclusion that there had been a substantial failure of justice because they thought that an Honorary Magistrate who had taken part in the deliberations and had signed the judgment might be presumed to have influenced his colleagues and if he had been absent during some of the hearings, he was not really in a position to arrive at a just conclusion. The question whether in any particular case a substantial failure of justice has been occasioned is a question of fact and not of law and each case must be decided upon its own merits. In the present case the Honorary Magistrates have explained that the Magistrate who had not been present on all the hearings was present on the date when the judgment was delivered and that he inadvertently signed it and that he had taken no real part. In these circumstances it cannot be said that any failure of justice had taken place.

It must be remembered that there is not only a question of the application of Ss. 529 and 530, Criminal P. C. This is a matter which has come in exercise of revisional jurisdiction and not as the result of an appeal. It is very important and would save much waste of the time of the Courts if it was thoroughly realized that there is a distinction between a revision and an appeal. In the latter the appellant is given a statutory right to demand an adjudication from the Court either on a question of fact or on a question of law or upon both. When a matter comes up in revisional jurisdiction the applicant has no rights whatsoever beyond the right of bringing his case to the notice of the Court. It is for the Court to interfere in exceptional cases where it seems that some real and substantial injustice has been done. That is the main point which the Court has to consider. A revisional application is not to be regarded as in some sort a second appeal on a question of law.

There is no reason at all for interference in this case. The applicants have had their cases before the Courts and they have been thoroughly considered. The sentences were extremely light and the applicants were lucky in that the injuries which they caused did not have more serious results. I am not prepared to interfere and I reject the reference.

K.S. *Reference rejected.*

1. Dasrath Rai v. Emperor, 1934 All 144=1934 Cr C 210=152 I C 158=36 Cr L J 38=56 All 599.

A. I. R. 1935 Allahabad 815

GANGA NATH, J.

Chhotey Lal—Applicant.

v.

Tinke Lal and *another* — Opposite Party.

Criminal Revn. No. 287 of 1935, Decided on 4th April 1935, from order of Offg. Dist. Magistrate, Shahjahanpur, D/- 13th March 1935.

Criminal P. C. (1898), S. 528— It is desirable that notice should be given to opposite party before transfer — Omission to give notice is mere irregularity and is not sufficient to set aside order of transfer.

Though S. 528 does not provide for any notice to the opposite party, yet it is desirable that a notice should be given to the opposite party before an order of transfer is paseed. But a mere omission to give notice will not make the order illegal and would be no ground to set aside the order. The omission to give notice is a mere irregularity and is not a sufficient ground for setting aside the order of transfer : 1923 *Pat* 228 ; 1926 *Lah* 156 ; 3 *All* 749 and 1929 *All* 932, *Dist.* [P 816 C 1]

(b) Criminal P. C. (1898), Ss. 369 and 528 — Principle therein applies to final orders which are in nature of judgment — Order of transfer is not in nature of judgment and hence can be altered.

Although S. 369 refers in express terms to judgments under Ch. 26 of the Code, still it is clear that the principle laid down therein applies

also to final orders which are in the nature of judgment. The section does not apply to orders which are not in the nature of judgments. The order of transfer cannot be regarded as an order in the nature of judgment and hence can be altered after it is once passed and signed.

[P 816 C 2]

Saila Nath Mukerji—for Applicant.

Order.—This is an application in revision by Chhotey Lal against the order of the District Magistrate of Shahjahanpur, transferring the applicant's case from the Court of Mirza Sultan Ahmad Beg, Sub-divisional Magistrate, Shahjahanpur, to that of Mr. Frank Rawat, Magistrate. Frist Class, Shahjahanpur. Two grounds have been taken by the applicant: (1) that no notice was given to the applicant before the order of transfer, and (2) that the District Magistrate had no power to review his former order. Though S. 528, Criminal P. C., does not provide for any notice to the opposite party, yet it has been laid down by all the High Courts that it is desirable that a notice should be given to the opposite party before an order of transfer is passed. At the same time, it has been held by several High Courts that a mere omission to give notice will not make the order illegal and would be no ground to set aside the order. The omission to give notice is a mere irregularity and is not a sufficient ground for setting aside the order of transfer: vide. 1923 Pat 228 (1) and 1926 Lah 156 (2). The learned counsel for the applicant relies on two cases of this Court: 3 All 749 (3) and 1929 All 932 (4). In both these cases the transfer application was made after the prosecution evidence had been finished and the learned Magistrate, who transferred the case did so without giving any reason in his order. In 1929 All 932 (4), the trial of the accused had proceeded in one Court. The complainant and his witnesses had been examined and the witnesses had been tried and tested by cross-examination and the trial Court had framed a charge against the accused presumably on the ground that a prima facie case had been made out. It was held that the case ought not to be removed from the file of the trial Magistrate and transferred to another Magistrate unless a very strong case had been made out to justify the transfer. Similarly in 3 All 749 (3), the evidence of the complainant and his witnesses had been taken and no reason was given by the Magistrate.

In this case, the evidence of the parties has not even begun and the learned District Magistrate has given reasons for the transfer. He states:

In view of the fact that the Magistrate has already been trying these Arya Samaj cases and the accused says he will call the Magistrate as a witness, I transfer the case to Mr. Rawat for disposal. If the accused wanted to produce the Magistrate before whom the case was as his witness, the Magistrate could not try the case himself.

As regards the second ground, S. 369, Criminal P. C., relates only to the alteration of judgment. Although this section refers in express terms, to judgments under Chap. 26 of the Code, still it is clear that the principle laid down therein applies also to final orders which are in the nature of judgment. The section does not apply to orders which are not in the nature of judgment. The order of transfer cannot be regarded as an order in the nature of a judgment. Generally an order in the nature of a judgment is one which is passed on full inquiry and after hearing both parties.

Such an order cannot be altered after it is once passed and signed. There was no illegality, if the Magistrate changed his mind and subsequently passed the order against which this application for revision has been filed. It does not appear why the applicant insists on his case being tried by the Magistrate from whose Court the case has been transferred. If the accused had asked for the transfer of the case to the Court of Mr. Rawat and if the case had then been transferred to his Court, there might have been a good ground for complaint. There is no reason for interference. It is therefore ordered that the application be rejected.

K.S. *Application rejected.*

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1. Gobinda Swain v. Emperor, 1923 Pat 228=83 I C 345=25 Cr L J 1385=2 Pat 333.
2. Bagh Ali v. Mohammad Din, 1926 Lah 156=93 I C 75=27 Cr L J 411=6 Lah 541.
3. Umrao Singh v. Fakir Chand, (1881) 3 All 749 =1881 A W N 53.
4. Jageshar v. Emperor, 1929 All 932=1929 Cr C 660=120 I C 261=31 Cr L J 30.

**** A. I. R. 1935 Allahabad 817**

(Full Bench)

NIAMAT-ULLAH, BENNET AND RACHHPAL SINGH, JJ.

Bishan Sarup—Plaintiff—Appellant.

v.

Musa Mal and *others*—Defendants—Respondents.

Second Appeal No. 51 of 1933, Decided on 17th April 1935, from decision of Addl. Sub-Judge, Aligarh, D/- 31st August 1932.

(a) Court-fees Act (1870), S. 5 — Taxing officer can make reference only in regard to payment of the court-fee in the High Court.

Per *Bennet, J.* (*in Order of Reference*)—The jurisdiction of the taxing officer to make a reference under S. 5 of the Act is in regard to the payment of the court-fee in the High Court. [P 818 C 1]

(b) Court-fees—Appeal filed in High Court—Insufficiency of court-fee in lower Courts alleged—Jurisdiction lies with Bench.

Per *Bennet, J.*(*in Order of Reference*)—Where an appeal is filed in the High Court, the jurisdiction in regard to the alleged insufficiency of the court-fees in the lower Courts lies with a Bench under S. 12 (2), Court-fees Act. [P 818 C 1]

**** (c) Court-fees — Declaratory suit — Suit capable of falling under S. 39 or S. 42, Specific Relief Act—Plaintiff treating suit as one falling under S. 42 — Court cannot treat suit as one falling under S. 39 for purposes of court-fee, though it may dismiss it under S. 42 if it finds that further relief should have been asked** (Per *F. B.*; *Bennet, J.*, contra).

Per *Full Bench.*—Where a plaint is so worded as to disclose a suit falling either under S. 39 or S. 42, Specific Relief Act, it is not open to a Court to treat the suit as one falling within the purview of S. 39, if the plaintiff desires it to be construed as one under S. 42. The plaintiff is at liberty to construe the suit as one under S. 42. If on a perusal of the plaint the Court considers that it is one in which further relief should have been asked for, then it will refuse to grant a declaration. The Court cannot compel the plaintiff to superadd a prayer for consequential relief when he has not in fact asked for such a relief. Hence where plaintiff claims a declaration that a certain registered deed is void and does not affect his interests and deliberately avoids claiming consequential relief such as cancellation of it, he need not pay ad valorem court-fee on the subject matter, but it is enough if he pays a court-fee of Rs. 10 under Art. 17 (3), Court-fees Act: *Case law discussed.* [P 829 C 1]

Per *Bennet, J.*—Such a case cannot arise; for such a hypothetical case, S. 6, Court-fees Act will apply and ad valorem court-fee should be paid. A relief to have a written instrument adjudged void or voidable comes under S. 39 and requires an ad valorem court-fee under Art. 1, Sch. 1, Court-fees Act. It is immaterial whether the plaint asks for the relief of cancellation or not, because if adjudged void or voidable, the written instrument is cancelled so far as the plaintiff is concerned. [P 834 C 1]

(d) Court-fees—Court has ample power to decide substance of plaint for determining court-fees payable.

Per *Rachhpal Singh, J.*—A Court has ample power to decide for the purpose of determining the court-fee to be paid, whether in substance a plaint is one in which (1) a mere declaratory relief is claimed, or (2) declaratory relief combined with a consequential relief is claimed, or (3) declaratory relief plus substantive relief is claimed. [P 826 C 1]

(e) Declaratory suit—Plaintiff deliberately avoiding any reference to consequential relief—Court cannot refuse to admit plaint on ground that relief is not claimed and court-fee thereon not paid (Per *F. B.*; *Bennet, J.*, contra).

Per *Full Bench.*—A plaintiff putting forward a defective plaint does so at his own risk. When a plaint is filed, what the Court has to see is whether it is a suit in which the plaintiff asks for a mere declaration without any consequential relief or whether he asks for a declaration with consequential relief. In the first case the Court cannot compel the plaintiff to pay more than Rs. 10, even if it is of opinion that the suit is defective because no consequential relief has been asked for. The Court is under the law bound to receive the plaint. If a plaint deliberately avoids any reference to consequential relief, the Court cannot refuse to admit the plaint. Under S. 6, Court-fees Act, the Courts are enjoined among other things not to receive documents insufficiently stamped. When a plaint in a declaratory suit is presented, the Court has only to see whether in substance the plaint is one on which an ad valorem court-fee has to be paid or only a duty of Rs. 10. The Court is under no obligation to insist on giving advice to the plaintiff presenting the plaint that he should amend his plaint so as to pray for a consequential relief. [P 827 C 1]

Per *Bennet, J.*—The word in S. 6 is "shall." Hence the Court and the plaintiff have no option and an ad valorem court-fee must be paid. [P 834 C 1]

B. Malik and *Jagdish Swarup* — for Appellant.

Muhammad Ismail—for the Crown.

Order of Reference.

Bennet, J.—This is a reference by the Taxing Officer to me as Taxing Judge under S. 5 Court-fees Act. The reference embraces two matters: firstly, whether the court-fee paid on the memorandum of S. A. No. 51 of 1933 by the plaintiff-appellant is sufficient, and secondly, whether the court-fee paid by the plaintiff in the trial Court and in the lower appellate Court is sufficient. Learned counsel has argued that on the strength of a ruling of a Bench of this Court, of which I was a member, in 1934 All 805 (1), the

1. Mitthu Lal v. Chameli, 1934 All 805=150 I C 653=57 All 71.

jurisdiction in regard to the alleged insufficiency of the court-fees in the lower Court lies with a Bench under S. 12 (2), Court-fees Act. I accept that view. The jurisdiction of the Taxing Officer to make a reference under S. 5 Court-fees Act, is in regard to the payment of the court-fee in the High Court. This section shows that the question relates only to this Court as the section uses the words "any fee under this chapter." Chapter 2 deals with fees in the High Courts and in the Court of Small Causes of Presidency Towns. It does not deal with the court-fee payable in other Courts and in the present case the suit was brought in the Court of a Munsif and the appeal was brought in the District Court. Now, the question at issue is whether the fee should be that of a declaratory suit or an ad valorem court-fee. The plaint asked for the following relief:

"It may be declared that by virtue of the purchase made under the sale-deed, dated 24th October 1931, in favour of defendant 1, and under the sale-deed, dated 21st October 1931, in favour of defendant 2, which are null and void and ineffectual as against the plaintiff and the joint family property—defendants 1 and 2 did not acquire any right to any part of the houses mentioned at the foot hereof."

Learned counsel desired to rely on a ruling of a Bench of this Court reported in 1931 All 369 (2). That was a suit for cancellation of a compromise and decree. The plaintiff amended his plaint to the effect that there should be declaration that the petition of compromise and the decree were ineffectual against the plaintiff and he was not bound thereby. It was held that the plaint as amended was sufficiently stamped and that the suit was to obtain a declaratory decree where no consequential relief was prayed, and therefore the suit fell under Sch. 2, Court-fees Act, Art. 17 (3). The present suit, differs because the declaration is desired not in regard to a decree, but in regard to a written instrument. The present suit clearly comes under S. 39 Specific Relief Act which provides that

Any person against whom a written instrument is void or voidable . . . . may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

The section further provides that a copy of the Court's judgment shall be sent to the Registering Officer and the fact of cancellation shall be noted on a copy of the instruments in the Sub-Registrar's books. The granting of a decree therefore under S. 39, Specific Relief Act, involves the consequential relief that the document is cancelled. On the other hand, a declaratory suit in regard to a decree does not come under S. 39 and does not involve the same consequential relief. Learned counsel was not able to produce any ruling showing that a suit under S. 39 Specific Relief Act, in regard to a written instrument does not require an ad valorem court-fee. The contrary in fact has been held in 1935 A L J 133 (3), in which it was held that in a similar suit for a declaration to declare a sale-deed void, Art. 17 (3), Sch. 2, Court-fees Act, did not apply and that Art. 1, applied and that suit required an ad valorem court-fee. There is also a Full Bench decision of this Court reported in 1932 A L J. 684 (4). This lays down that where a suit is for the cancellation of an instrument under S. 39, Specific Relief Act the relief is not a declaratory one. It falls neither under S. 7 (4) (c) nor under Sch. 2. Art. 17 (3), but under Art. 1, Sch. 2, Court-fees Act. This Full Bench settles the matter finally.

Accordingly I hold that the plaintiff-appellant must pay an ad valorem court-fee in this Court within six weeks from this date. The matter in regard to the court-fees in the two lower Courts will be referred to a Bench of two Judges and I may be a member of that Bench.

Opinion.

Niamatullah, J.—The plaintiff paid a court-fee of Rs. 20 on two declaratory reliefs. The Stamp Reporter construed the reliefs as those for cancellation of instruments, on which ad valorem court-fee on the value of the subject-matter was payable in the lower Court. The case was laid for decision before a Division Bench, which referred two questions for decision by a Full Bench. The reliefs in question were claimed by the plaintiff on the allegation that he and his brother Komal Jha formed a joint Hindu family owning, inter alia, two houses, that Komal Jha sold one of them by a deed, dated 24th October 1931, to the first defendant, and sold the other by a deed dated 21st October 1931, to the second defendant, that Komal Jha had no right to execute the aforesaid sale-deeds, which are "null and

2. Radha Krishna v. Ram Narain, 1931 All 369 =131 I C 604=53 All 552.

3. Akhlaq Ahmad v. Karam Elahi, 1935 All 207 =153 I C 599=1935 A L J 133.

4. Kalu Ram v. Babu Lal, 1932 All 485 = 139 I C 92=54 All 812=1932 A L J 684 (FB).

void and ineffectual", that the plaintiff is in possession of the houses in dispute and is entitled to have it declared that the purchasers (defendants 1 and 2), did not acquire any right to the houses in dispute by virtue of their respective purchases, which are void against the plaintiff and the joint family. After these allegations, the plaintiff proceeded to claim the following reliefs:

It may be declared that by virtue of the purchase made under the sale deed, dated 24th October 1931, in favour of defendant 1, and under the sale deed, dated 21st October 1931, in favour of defendant 2, which are null and void and ineffectual as against the plaintiff and the joint family property, defendants 1 and 2 did not acquire any right to any part of the houses mentioned at the foot hereof.

The plaintiff treated these reliefs as of declaration and paid a court-fee of Rs. 20, i. e., Rs. 10 in respect of each relief. No question was raised in the lower Courts. Eventually the plaintiff's suit was dismissed on the merits. He appealed to this Court, where the question arose for the first time on the report of the Stamp Reporter as to whether the reliefs are those for cancellation of the two sale-deeds referred to in the plaint. A reference to S. 42, Specific Relief Act, with its illustrations (to which I shall advert later), will show that a plaintiff is entitled to sue for a declaration that a certain transfer, being void or voidable at his option, does not affect his right in the property to which it relates. S. 39 of that Act, on the other hand, provides that any person against whom a certain instrument is void or voidable may sue to have it adjudged void or voidable, and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled. S. 40 of the same Act, provides for partial cancellation of an instrument "where it is evidence of different rights or different obligations." Seemingly the two sections overlap each other, and the same relief may be considered to be one for declaration or for concellation. "Declaring" and "adjudging" are expressed by the same word in Urdu, namely, "istiqrar", so that, where a plaintiff claims an "istiqrar' that a document is void against him and against his interests, he can be understood to be claiming a declaration that the transfer evidenced by a certain deed is void and ineffectual against him and against his interest. He may also be understood as suing for the instrument being adjudged void against him, and therefore claiming the relief of cancellation. As held in 1932 A L J 684 (4), it is not necessary for the plaintiff to ask for the document being delivered up and cancelled, which is for the Court to direct. In these circumstances, questions frequently crop up in this Court on office reports in cases in which declaratory suits were entertained in the lower Courts and disposed of as such. The Stamp Reporter maintains in all such cases that the relief claimed by the plaintiff is one for cancellation, and he points to the relief claimed by the plaintiff as one amounting to a demand for the instrument being adjudged void. The plaintiff, on the other hand, protests against his suit being treated as one for cancellation, and lays stress on the fact that he claims no more than a declaration that the transfer evidenced by a certain instrument, which is characterised as void or voidable, does not affect his interests. The present case is an instance in point. Ex facie, the relief as worded in the original plaint may be so rendered in English as to make it arguable that it is a relief of cancellation. As against this, it can be urged, with at least equally good reasons, that the plaintiff is claiming no more than a declaration of his right to the property conveyed by the sale-deeds, which are characterised as void and not affecting his rights. In this state of the matter, the Division Bench, before which the case was originally laid, referred the following two questions for decision by a Full Bench:

(1) Where a plaint is so worded as to disclose a suit falling either under S. 39 or S. 42, Specific Relief Act, is it open to a Court to treat the suit as one falling within the purview of S. 39, Specific Relief Act, if the plaintiff desires it to be construed as one under S. 42, Specific Relief Act ? and (2) Whether the court-fee payable on the plaint and the memorandum of appeal in the lower appellate Court in this case should be ad valorem on the value of the subject-matter, or Rs. 10 only under Art. 17 (3), Sch. 2, Court-fees Act ?

The answer to the first question will largely depend upon the scope of section 42, Specific Relief Act. Does that section permit a suit for a declaration that the plaintiff has a right to a certain property which is not affected by the transfer evidenced by a certain instrument ? If it does and the plaint in a given case, read as a whole, can be construed as a claim for a declaration of that kind, there can be no rea-

son why the plaintiff's desire to have it treated as a suit for declaration and not as one for cancellation should not be given effect to.

The Court-fees Act, which was passed in 1870, does not make any specific provision in respect of a suit for cancellation. S. 7 (4) (c) provides for a suit "to obtain a declaratory decree or order where consequential relief is prayed." Sch. 2, Art. 17, provides a fixed fee of Rs. 10 for a suit "to obtain a declaratory decree where no consequential relief is prayed." The Specific Relief Act was passed seven years after the Court-fees Act, and statutory provision was made for the first time in respect of suits for cancellation (Ss. 39 and 40) as distinct from suits for declaration (S. 42). Before the passing of the Specific Relief Act, a suit for cancellation was treated by this and other High Courts as one for a declaratory relief, where consequential relief was prayed, so that court-fee was payable on the value put by the plaintiff on the relief sought by him: see the cases noted in 5 All 331 (5), in which it was held for the first time by a Full Bench of five Judges that the relief of cancellation of an instrument, contemplated by S. 39, Specific Relief Act, was in the nature of a relief for a declaratory decree, in which no consequential relief was claimed. This view does not appear to have been questioned till comparatively recently, when another Full Bench of five Judges considered the question in 1932 A L J 684 (4), in which the plaintiff sued for cancellation of a decree passed on the basis of a compromise in a suit brought on a mortgage-deed executed by a member of a joint Hindu family of which the plaintiff was a member. The question was whether the suit should be considered to be one for a simple declaratory relief or for a declaratory relief with a consequential relief. It was held that

Where a suit is for the cancellation of an instrument under the provisions of S. 39, Specific Relief Act, the relief is not a declaratory one. It falls neither under S.7 (vi), (c), nor under Sch. 2, Art. 17 (iii), but under the residuary Article Sch. 1, Art. 1, Court-fees Act,

which provides for ad valorem court-fee on the value of the subject-matter. The Court proceeded to hold

The court-fee in respect of the prayer for cancellation of the decree is payable under Sch. 1, Art. 1, on the value of the decree. As the compromise has merged in the preliminary decree, and the latter has merged in the final decree, we consider that the cancellation of the compromise, preliminary decree and the final decree are not "distinct subjects" within the meaning of S. 17, but in reality only one subject.

It should be noted that in that case there was no ambiguity and there was no question whether the suit was for cancellation or for declaration. The plaintiff intended to claim, and expressly claimed, for cancellation of a decree, but maintained, on the authority of 5 All 331 (5), that for purposes of court-fees all suits for cancellation are suits for declaration, in which no consequential relief is claimed. It should also be observed that a decree was treated as an instrument, within the meaning of S. 39, Specific Relief Act. The question was not prominently raised, and it is difficult to say what the decision of the Court would have been if it had been argued that a decree could not be an instrument within the meaning of that section. This question was subsequently raised in another Full Bench case, 1933 A L J 673 (6), in which it was held that where the plaintiff merely asks for a declaration that the previous decree is not, in any way, binding on him and is altogether void and ineffectual, the suit was one for declaratory relief only and fell under Art. 17 (3), Sch. 2, Court-fees Act, and the court-fee of Rs. 10 was sufficient. It was observed that:

The case of a decree stands on a different footing, because a suit to avoid it does not strictly fall under S. 39, Specific Relief Act. Strictly speaking, it would not even fall within the scope of S. 42, Specific Relief Act. Where the plaintiff chooses to ask for a definite relief for the cancellation of a decree or for the setting aside of that decree in addition to a declaration that the decree is not binding upon him, he is professedly asking for something more than a mere declaratory decree. At the stage at which the question of court-fee arises, it is immaterial to consider whether such a relief is superfluous, redundant or useless, or even impossible to be granted. Obviously, he has asked for more; and so long as he does not amend his plaint and abandon this relief, he can be called upon to pay court-fee for the relief asked for.

In the case noted last the relief of cancellation of decree had been asked for, and the learned Judges, therefore treated it as a suit for a declaration that the decree was void and not binding on the plaintiff, on which a court-fee of Rs. 10 was considered to be sufficient under Art. 17 (3), Sch. 2, Court-fees Act.

In this state of authorities I am bound to follow the later Full Bench rulings in preference to 5 All 331 (5),

5. Karam Khan v. Daryai Singh (1883) 5 All 331 =1883 A W N 55 (FB).

6. Sri Krishna Chandra v. Mahabir Prasad, 1933 All 488=149 I C 198=55 All 791=1933 A L J 673 (FB).

and to hold that where a plaintiff expressly claims the relief of cancellation such as is contemplated by S. 39, Specific Relief Act, the suit is not one for a declaratory relief with or without consequential relief, and that the relief of cancellation is itself a substantial relief on which ad valorem court-fee under Art. 1, Sch. 1, is payable. I however find nothing in these cases which justifies the view that though the plaintiff does not expressly claim the relief of cancellation, but a mere "istiqrar" (declaration or adjudication) an alienation evidenced by an instrument is void against him and does not affect his interest, the relief claimed by him must be construed as one for cancellation despite his emphatic disclaimer.

It was argued by the learned Government advocate that if the plaintiff makes a specific reference to an instrument in the relief paragraph of his plaint characterising it as void or voidable and asks for a declaration that it is not binding upon him he must be taken to be claiming the relief of cancellation under S. 39, Specific Relief Act, inasmuch as he virtually asks for the document being adjudged void which is the only claim which he need make in a suit for cancellation. It is pointed out that it is the Court which is given the discretion to order that the instrument be "delivered up and cancelled" whether the plaintiff asks for it or not. Reliance is placed on the case reported as 1932 A L J 684 (4), wherein it was observed in reference to the terms of S. 39, Specific Relief Act, and the illustrations appended to it that

The relief is available even to persons other than parties to an instrument and in respect of both void and voidable instruments. It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled. Even though no relief of cancellation is asked for, a Court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it merely adjudged void or voidable would not be adequate for his purpose.

I fully accept the correctness of this view. The learned Judges did not lay down that even where a plaintiff expressly states that he does not claim cancellation, but only a declaratory relief contemplated by S. 42, Specific Relief Act, the Court should nevertheless treat the suit as one for cancellation and compel the plaintiff to pay enhanced court-fee. The learned Judges further observed that:

A relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one.

It is argued that, where a plaintiff asks for a declaration that an instrument is void and does not affect his interests, the Court may adjudge the instrument to be void and order it to be delivered up and cancelled and that in so far as there is a possibility of such a result, the suit should be treated as one for cancellation, as laid down in the dictum last quoted. I am unable to accept this contention because if the plaintiff makes it clear in the plaint or subsequently by an amendment or by a statement in the nature of pleadings that his suit is not one under S. 39, but under S. 42, there is no possibility of the Court ordering the instrument to be delivered up and cancelled under S. 39, which is not ex hypothesi relied on. I may note that in the case before the Full Bench the plaintiff had expressly claimed the relief of cancellation of a decree, and any observations therein made in reference to cases in which the relief of cancellation is not expressly claimed are in the nature of obiter dicta and not binding; but I am prepared to accept even such dicta, as, it was far from the intention of the learned Judges to hold that it was open to the Court to treat a suit as one under S. 39, though in form it could be one under S. 42, and though the plaintiff maintains and desires that his suit should be treated as one for declaration under S. 42, Specific Relief Act.

The learned Government Advocate seemed to suggest that S. 42, Specific Relief Act, merely contemplates cases in which a declaration of a right to property or to any legal character is claimed without reference being made to any instrument and that if a document is specifically referred to in relation to the plaintiff's right which he seeks to be declared, the suit ceases to be one for a declaration and becomes one for cancellation of the instrument. This view of S. 42 is refuted by the illustrations appended to it and is otherwise incorrect. A person's rights may depend upon the validity or invalidity of a deed affecting them, and it may be impossible to declare his right without adjudicating upon the validity of such deed. Illustration (c)

to S. 42 permits a suit for declaration that a certain covenant is void for uncertainty. The covenant, assuming it to be in writing, must be referred to in order to declare that it is void. Similarly, illustration (d) permits a suit for a declaration that an alienation made by the holder of a life-interest is void against a reversioner. The deed by which the alienation was made, must of necessity be referred to in granting the declaration. In this connexion S. 40, Specific Relief Act, which provides for partial cancellation, has a material bearing. If the argument above referred to is correct, the declaration amounts to a partial cancellation of the instrument by which the property is alienated. The declaration which the Court can grant in such a case, is that the deed is void, except as regards the life-interest of the alienor. If the argument noted above is correct, the relief amounts to a partial cancellation of the deed and to that extent the suit is not one for declaration. The same is the case with Illustration (e). Illustration (f) permits a suit for a declaration that an adoption is invalid. If the adoption is evidenced by a registered instrument, such a suit—if the argument in question is correct—will be one for cancellation and cease to be a suit for declaration. I am clearly of opinion that it is permissible for a plaintiff to obtain a declaration under S. 42, Specific Relief Act, that a certain instrument is void against him and does not affect his rights.

It seems to me clear that the scope of S. 39, Specific Relief Act, is distinct from that of a suit under S. 42 of that Act. If the plaintiff desires the cancellation of an instrument he asks for its complete annulment, and if the Court grants such relief, the instrument ceases to be a subsisting deed. It is delivered up and cancelled. A note is to be made in the Registration Office that it has been annulled. When a deed is cancelled, everything which is done by the executant thereof is undone by the Court. For all practical purposes the contents of the deed wholly or in part are, so to say, effaced. If the plaintiff seeks such a relief, the suit is one under S. 39, Specific Relief Act. But the plaintiff may not be advised to seek a relief of such a drastic character, and it may be enough for his purposes to seek the relief of a limited nature described in S. 42. The object of such a relief is to obtain a recognition of the plaintiff's right to property, and the void or voidable character of an instrument comes under consideration incidentally for determining the plaintiff's right. In taking such a course the plaintiff foregoes all the advantages conferred by the relief of cancellation and subjects himself to certain limitations imposed by S. 42. It should be noted that S. 39, Specific Relief Act, does not in terms provide that, where a plaintiff is able to claim a further relief, the Court shall not grant the adjudication claimed by him. Cases are easily conceivable in which a plaintiff may claim a relief of cancellation and may not claim any other relief, though he may be able to do so. S. 39, does not expressly provide, as is done by S. 42, that his suit should, on that account, be dismissed. A plaintiff may obtain the cancellation of an instrument which he establishes to be forged, and may not claim any relief of injunction restraining the defendant from enforcing his supposed rights thereunder. Of course the relief being discretionary, the Court may not grant the relief of cancellation in the circumstances of a given case. It may also be that a plaintiff omitting to claim a further relief may be subsequently barred by O. 2, R. 2, Civil P. C. These are however matters beyond the purview of S. 39, which itself does not compel a plaintiff to seek a further relief. On the other hand, section 42, Specific Relief Act, entitles a plaintiff to ask for a comparatively limited relief, namely, that an instrument is void against him and does not affect his interests. Such a relief, if granted, has not the effect of completely annulling the document wholly or in part. The plaintiff merely safeguards his rights. The instrument will subsist and be effective for all purposes other than those declared by the decree. In certain cases, besides claiming a declaratory relief, the plaintiff is in a position to claim also the relief of cancellation or the setting aside of a deed. In such cases, the suit may be liable to be dismissed.

That the relief that a certain sale is void against the plaintiff and does not affect his rights is not a relief of cancellation, but only a declaratory relief has been held by their Lordships of the Privy Council in 25 Cal 179 (7), where their Lordships observed as follows:

Then the learned Judge holds that the suit is barred by Art. 12, Limitation Act, because it is, or ought to be, one to set aside the sale of 22nd October 1884. But the suit is founded on the

7. Moti Lal v. Karrabuldin, (1898) 25 Cal 179=24 I A 170=7 Sar 222 (PC).

fact that prior to that sale a valid sale of the same interests had been made to Masih and that Moti took nothing because nothing was left to pass to him. The sale is not set aside but is found not to affect the rights of the plaintiff derived from Masih. The sale does not purport to pass the rights of Masih or of the plaintiff, but those of the mortgagee Agha and the mortgagors Yusuf and Nasim, against whom Masih established his prior rights. Between setting aside a sale and holding that the plaintiff's rights are not affected by it there is a wide difference.

In this passage their Lordships have clearly brought out the essential distinction between the cancellation or setting aside of a sale and the declaration that it does not affect the plaintiff's interests. Where the relief of declaration is granted, the sale is not set aside. It may or may not convey the interests of the person making it. If the person making it has no interest to transfer, no interest is conveyed to the transferee. All that the plaintiff prays for, and the Court declares, is that the plaintiff's interest is not thereby conveyed or in any way, affected. Applying this dictum to the case before us, the plaintiff merely seeks a declaration that the deeds impugned by him do not convey or affect the interest of the plaintiff or the joint family, of which he is a member. He does not go further and ask the Court to annul the deed. It is still open to the transferee to rely upon it against the executant thereof for a personal relief against him.

Where a plaint is not ambiguous or equivocal and the plaintiff expressly claims the relief of cancellation of an instrument, or on a proper construction of the plaint as a whole, the Court arives at a conclusion that the suit is one for cancellation, and the plaintiff sticks to the allegation contained therein, no question can arise and court-fee for cancellaton must be paid. Such was the case in 1935 A L J 133 (3), decided by a Division Bench of which I was a member. I adhere to the view taken by me in that case.

It seems to be an unheard of procedure that the Court should force upon a plaintiff a frame of the suit which he is not willing to adopt. If the allegations contained in his plaint are such as to make it possible to hold that the suit is one for a declaration, the plaintiff is entitled to have it treated as such. If necessary, the Court should direct the plaintiff so to amend it as to leave no doubt that the suit is one for declaration. After a plaintiff has declared unequivocally, by amendment or otherwise, that he desires no more than a declaratory relief of the nature described in S. 42, the Court must proceed on that footing for all purposes of court-fee, leaving the plaintiff to take the consequences of his own action in deliberately instituting a declaratory suit where a suit for cancellation would have been more appropriate. If the question arises in the trial Court, the plaintiff is entitled to make it clear by his pleadings what the nature of his suit is. If the question arises in a Court of appeal, the position is not different in cases of ambiguously worded plaints. Consideration of the frame of the suit for the purposes of court-fee and that for the purposes of decision of the suit must be kept severely apart. If the plaintiff says that he deliberately limits his relief to declaration, no impediment should be thrown in his way for that purpose. When the Court comes to consider the merits of the case, it must pin down the plaintiff to his choice; and if he has made an error in that respect, he must take the consequences. But in determining the court-fee payable, the Court should not allow its mind to be influenced by the consequences which might, in its opinion, follow from the plaintiff's action. Nor should the Court be influenced by the consideration that the plaintiff is actuated by motives of economy and is evading payment of court-fee by not suing for cancellation and suing only for a declaration. It is perfectly legitimate for the plaintiff to avoid the payment of higher court-fee by so framing his suit as to diminish his liability in that respect.

Section 6, Court-fees Act, cannot subject a plaintiff to liability to pay court-fee for a relief which he does not ask for. If he claims both the reliefs of declaration and cancellation as he may in certain cases, he must pay for both; but where, on the construction of his plaint in the light of his averment, the Court comes to the conclusion that the plaintiff claims a declaratory relief and not cancellation of an instrument, there is nothing in section 6, which justifies a demand for two fees.

I have already referred to the substance of the plaintiff's claim as laid in the plaint, and it is, at least possible to construe it as a suit for declaration. In answering the second question I shall have the occasion to go further and hold that it is a suit for declaration; but in answering the first, I content myself with holding that it is, at

least, consistent with the hypothesis that it is a suit for declaration. The plaintiff's counsel stated before us that his suit is one for declaration and should be treated as such, and that he will take all the consequences resulting from that frame of the suit. It was treated as a suit for declaration in both the Courts below. In these circumstances, it is not open to us to treat the suit as one for cancellation—a relief which the plaintiff disclaims. This view is supported by a number of decisions of this Court. In 1931 All 369 (2), decided by a Bench of which King, J., was a member, the same view was taken. It should be noticed that in 1932 A L J 684 (4), the judgment of the Full Bench case was delivered by King, J. In 1932 All 560 (8), decided by a Division Bench of this Court of which my brother Bennet was a member, it was held that, for the purposes of determination of the court-fee, actual relief asked for should be looked into, and it is entirely besides the consideration of the Court whether the suit is likely or not to fail because the plaintiff did not ask for a consequential relief. In 1933 All 350 (9), observations to the same effect were made. It was a case of a decree; but the actual decision did not rest on that ground. In 1934 All 56 (10), decided by a Bench of this Court of which my brother Rachhpal Singh and myself were the members, the same view was taken.

My view finds support from the latest Full Bench case, 1933 A L J 673 (6). The learned Chief Justice, who delivered the judgment of the Full Bench, observed as follows:

> Obviously the Full Bench 1932 A L J 684 (4) did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court can call upon him to pay the court fee on the consequential relief, which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree, but also asks for a relief which he calls 'consequential' relief, the mere fact that he calls it so would not prevent the Court from demanding full court-fee, if in reality the additional relief claimed was a substantial relief and not a mere consequential relief; we do not think that the observation was intended to go further than this.

For the reasons stated above, I answer the first question in the negative and hold that it is not open to the Court to treat the suit as one for cancellation contrary to the assertion of the plaintiff which is not inconsistent with the substance of the plaint.

The second question depends upon the right construction of the plaint, which should be considered as a whole. In my opinion, the relief claimed by the plaintiff is a declaration of his right to the property transferred by the third defendant, and that the transfers evidenced by the sale-deeds executed by the latter did not affect the plaintiff's rights or the rights of the joint family, of which he is a member. The plaintiff intended to claim a relief of declaration and no more, and he expressed his intention in words which did not take the case out of the category of declaratory suits. He could not avoid reference to the sale-deeds in asking for the declaration of his right, and a mere reference to the sale-deeds cannot make the suit otherwise than one for declaration. I have already referred to the illustrations to S. 42, which clearly contemplate a relief couched in terms employed by the plaintiff in this case. If the plaintiff had made no reference to the "sale-deeds" in the relief paragraph of the plaint and had mentioned only the "sales" which are detailed in the body of the plaint, there would have been no substantial difference. It cannot be the law that, if the plaintiff avoids a reference to the deed in the last paragraph of the plaint, but attacks it in the earlier parts of it, the suit is one for declaration otherwise it is a suit for cancellation. If such be the law, it can be very easily circumvented. The plaintiff can make every necessary allegation in the earlier paragraph of the plaint and so word the reliefs as to avoid pointed reference to the deed itself. I hold that the court-fee of Rs. 10, for each of the two reliefs claimed by the plaintiff was sufficient under Art. 17 (3), Sch. 2, Court-fees Act, and that ad valorem court-fee on the value of the subject-matter is not the proper court-fee.

Rachhpal Singh, J.—The two questions which are referred to the Full Bench are:

> (1) Where a plaint is so worded as to disclose a suit falling either under S. 39 or S. 42, Specific Relief Act, is it open to a Court to treat the suit as one falling within the purview of S. 39, Specific Relief Act, if the plaintiff desires it to be construed as one under S. 42, Specific Relief Act? (2) Whether the court-fee payable on the plaint and the memorandum of appeal in the lower appellate Court in this case should be ad valorem on the value of the subject-matter, or

8. Brij Gopal v. Suraj Karan, 1932 All 560=141 I C 112.
9. Lakshmi Narain Rai v. Dip Narain Rai, 1933 All 350=148 I C 152=55 All 274.
10. Abdul Samd Khan v. Anjuman Islamia, Gorakhpur, 1934 All 56=149 I C 802.

Rs. 10 only under Art. 17 (iii), Sch. 2, Court-fees Act ?

In the opinion of the learned Judges who referred this case to a Full Bench, there appeared to be some divergence of opinion as regards the construction to be placed on the earlier Full Bench rulings in 1932 A L J 684 (4) and 1933 A L J 673 (6), which was indicated by the judgment in 1935 A L J 133 (3).

Section 7, sub-Cl. (4) (c), Court-fees Act, enacts that in suits to obtain a declaratory decree or order where consequential relief is prayed, the court-fee shall be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. And for this purpose it is enjoined that in such a suit the plaintiff shall state the amount at which he values the relief sought. Art. 17, Cl. (3), Sch. 2, prescribes that a court-fee of Rs. 10 shall be paid in suits which are instituted to obtain a declaratory decree where no consequential relief is prayed for.

Section 6, Court-fees Act, enacts that:

Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in Schs. 1 or 2 to this Act annexed shall be filed, exhibited or recorded in any Court of justice, or shall be received or furnished by any public officer, unless in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

It will be seen that the section imposes a duty on Courts to see that no document which is chargeable with court-fee under the Schs. 1 and 2, Court-fees Act, is received or issued unless the requisite court-fee has been paid.

Now, when a plaint in which a declaratory relief is asked for is presented to a Court, it has to decide whether the case is one in which a plaintiff seeks to obtain a decree or order where a consequential relief is prayed or is the case one where he seeks a mere declaratory decree without praying for a consequential relief ? If the case appears to be one in which the consequential relief is prayed, then, the court-fee payable will be ad valorem on the amount at which the relief sought is valued in the plaint or memorandum of the appeal in accordance with the provisions of S. 7, sub-Cl. (4) (c), Court-fees Act. On the other hand where the plaint or the memorandum of appeal shows that the plaintiff seeks to obtain a declaratory decree with no consequential relief then the court-fee will be Rs. 10 with reference to the provisions of Art. 17, Cl. (3), Sch. 2, Court-fees Act. When a plaint is presented to a Court in which a declaratory relief is sought the first thing which it has to decide is whether the court-fee paid is sufficient. In order to decide this question the Court must look into the allegations made in the plaint and for the purpose of deciding the question of sufficiency or otherwise of the court-fee paid, it will be assumed that the allegations made in the plaint are correct. The Court at that stage is not entitled to go into the question of truth or falsity of the case set up by the plaintiff. In 1933 All 350 (9), a Bench of two learned Judges of this Court observed that:

Question of court-fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under S. 42, Specific Relief Act, or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint.

In 87 I C 660 (11), it was remarked that:

The determination of the category to which a suit belongs must depend upon the relief which the plaintiff prays for because court-fees must be determined with reference to the prayer contained in the plaint. The Court must ascertain what the plaintiff actually asks for in his plaint and must not speculate what may be the ulterior effect of his success.

It appears to me that it is a well settled rule of law now that Courts have ample power to decide on averments in the plaint whether the remedy for consequential relief has been sought. A plaint may on the face of it show that the plaintiff is only seeking to obtain a declaratory decree without asking for any consequential relief. But the substance of the plaint may demonstrate that as a matter of fact he is asking not only for a mere declaration, but for consequential relief as well. The Court will look to the substance and not merely to the form of the plaint. It is now further well settled that if the plaint shows that a plaintiff is asking not only for a mere declaration, but also for a consequential relief, then, he must pay ad valorem court-fee. In 1932 A L J 684 (4), the Full Bench made the following observations:

The Court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of S. 7, Court-fees Act. If a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief, but a substan-

11. Venkata Ramani Iyer v. Narayanaswami Iyer, 1925 Mad 713=87 I C 660.

tive relief, it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief.

I have no doubt that a Court has ample power to decide, for the purpose of determining the court-fee to be paid, whether in substance a plaint is one in which: (1) a mere declaratory relief is claimed, or (2) declaratory relief combined with a consequential relief is claimed, or (3) declaratory relief plus substantive relief is claimed.

The next question which we have to consider is whether a Court can insist that a plaintiff should frame his suit in such a manner so as to include a prayer for a consequential relief. On the decision of this question would depend the answer to be given to the first question referred to the Full Bench. In 39 Cal 704 (12), Sir Lawrence Jenkins, C. J., delivering the judgment of the Full Bench observed:

It is a common fashion to attempt an evasion of court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful, it cannot be touched, but the devise does not merit encouragement or favour.

In 87 I C 660 (11), the learned Judge of the Madras High Court held that.

Where a plaintiff is bound to ask both for a declaration and the setting aside of a document but prays merely for declaration, the suit must be treated for purposes of court-fee as one for a declaration. It is not for the Court to say that the plaintiff should have framed his plaint differently and that if he had done so a higher court-fee would have been payable and that, therefore the plaint before the Court should be treated as containing a prayer which it does not in truth contain. If a plaintiff contents himself with asking for a declaration, where he ought to ask for a declaration and consequential relief, the suit is liable to be dismissed not by reason of the improper valuation of the suit, but because it infringes the provisions of S. 42, Specific Relief Act.

In 110 I C 752 (13), a Bench of two learned Judges of the Madras High Court held that:

In the case of an enactment for revenue purposes such as the Court-fees Act, it cannot be said that it is not open to parties to avail themselves of any camouflage that the law allows or does not forbid for escaping liability for court-fees.

In 80 I C 544 (14), a Bench of two learned Judges of the Patna High Court decided that:

The question of court-fee must be decided on the plaint; and though it is open to the Court in the case of a suit for a declaration to say that the plaintiff has really asked for a consequential relief, though he has tried to conceal it by casting the reliefs in a particular form, it is not open to the Court to say that the plaintiff should have asked for a consequential relief and should have paid the proper court-fee as in such a suit, the plaintiff is entitled to have the case made by him in the plaint tried by the Court, although he takes the risk that if it is subsequently found that he could have asked for a consequential relief, his suit is liable to be dismissed.

In 1931 All 369 (2), a Bench of two learned Judges of this Court held that:

The question of court-fee must be decided on the plaint and the decision is not affected by the question whether the suit is maintainable under S. 42 or by any action subsequently taken by the plaintiff to obtain an injunction otherwise than by amendment of the plaint.

In 1932 All 316 (15), it was held that:

The question of court-fees must be decided with reference to the plaint as it is and not as it ought to have been. If, having regard to the nature of his claim, plaintiff ought to have claimed consequential relief and has not done so, his suit might fall under the proviso to S. 42, Specific Relief Act; but the Court cannot say that the plaintiff should have claimed consequential relief and not having done so, he should be deemed to have claimed the consequential relief and was therefore liable to pay an ad valorem court-fee on the consequential relief.

In 1935 A L J 133 (3), we find the following observations:

If a plaintiff deliberately prays for a mere declaration that an instrument is void and if the circumstances of the case are such that the document can be completely annulled, he is, at least, "able" to have the instrument adjudged void, which implies that a copy of the decree annulling it shall be sent to the Registration Office for a note to be made on the copy therein retained, so that anyone searching and inspecting the Registration Office may at once find out that the document, though subsisting at one time, was subsequently annulled. In such a case his suit may be dismissed, being barred by the proviso to S. 42, Specific Relief Act. But, for all purposes of court-fee, it is not open to a Court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation.

In 1933 A L J 673 (6) my Lord the Chief Justice who delivered the judgment of the Full Bench, made the following observations:

The learned Advocate for the respondents has relied strongly on a passage in 1932 A. L. J. 684 (4), at p. 690 where it was remarked that if a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court-fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. Obvi-

12. Deokali Koer v. Kedar Nath, (1912) 39 Cal 704=15 I C 427.
13. Pathuma Umma v. Aliyammakkanath Moideen, 1928 Mad 929=110 I C 752.
14. Thakur Narayan Singh v. Dildar Ali Khan, 1925 Pat 210=80 I C 544=3 Pat 915.
15. Mohammad Ismail v. Liyaqat Husain, 1932 All 316=140 I C 191.

ously, the Full Bench did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court can call upon him to pay court-fees on the consequential relief, which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree but also asks for a relief which he calls "consequential" relief, the mere fact that he calls it so would not prevent the Court from demanding full court-fee, if in reality the additional relief claimed was a substantive relief and not a mere consequential relief. We do not think that the observation was intended to go further than this.

A perusal of the above-mentioned cases makes it abundantly clear that it is perfectly open to a plaintiff to frame his suit in such a manner so as to avoid a prayer for a consequential relief. S. 42, Specific Relief Act, enacts that:

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief; provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

It appears to me that at the time when the question as regards the sufficiency or otherwise of the court-fee paid arises, the Court is fully competent to find out as to whether or not any consequential relief has been claimed in reality. If it finds that consequential relief has been claimed then certainly the plaintiff will be liable for payment of ad valorem court-fee. But if, on the other hand, the plaintiff deliberately takes care not to ask for a consequential relief then it is not the function of the Court to insist that the consequential relief should have been asked. Where consequential relief has been deliberately omitted, it would be wrong to say that a plaintiff should be deemed to have asked for that relief when he studiously refrains from asking it. It may be that later on the Court may come to the conclusion that it was a case in which a further relief than a mere declaration of title should have been asked. In that case the penalty is provided for by the proviso of S. 42, Specific Relief Act, which enacts that the Court may refuse to make a declaration. Whenever there is a case of this description it is always open to the Court to throw out the suit on the ground that "further relief than a mere declaration of title should have been asked for." A large number of defective suits are instituted but there is no law under which the duty of giving advice to a party instituting the suit has been imposed upon the Courts. A plaintiff putting forward a defective plaint does so at his own risk. I think that the correct view is that when a plaint is filed then what the Court has to see is whether it is a suit in which the plaintiff asks for a mere declaration without any consequential relief or whether he asks for a declaration with consequential relief. In the first case the Court cannot compel the plaintiff to pay more than Rs. 10 even if it is of opinion that the suit is defective because no consequential relief has been asked for. The Court is under the law bound to receive the plaint. The powers of a Court not to receive documents are defined in S. 6, Court-fees Act. If a plaint deliberately avoids any reference to consequential relief, then I do not see how having regard to the provisions of S. 6, Court-fees Act, the Court can refuse to admit the plaint. Under section 6, Court-fees Act, the Courts are enjoined among other things not to receive document insufficiently stamped. When a plaint in a declaratory suit is presented the Court has only to see whether in substance the plaint is one on which an ad valorem court-fee has to be paid or only a duty of Rs. 10. The Court is under no obligation to insist on giving advice to the plaintiff presenting the plaint that he should amend his plaint so as to pray for a consequential relief. I further apprehend that the Court has no power to do so. The power of Courts in the matter of the rejection of plaints are governed by R. 11, O. 7, Civil P. C. If it appears that the plaintiff's valuation is fictitious it can compel him to make it correct, and on failure to do so, it can reject it. In considering the question of sufficiency or otherwise of the court-fee to be paid, the Court is to confine its attention strictly to the provisions of the Court-fees Act, and there is no need to refer to the provisions of any other Act.

The important question for consideration is whether the two Full Bench rulings reported in 1932 A L J 684 (4) and in 1933 A L J 673 (6) lay down a contrary proposition. In my opinion they do not. I will first take up the Full Bench ruling in 1932 A L J 684 (4). That was a suit in which there was a clear prayer for the cancellation of an instrument and for the cancel-

lation of a compromise and decree and therefore S. 39, Specific Relief Act, was clearly applicable. In that case the plaintiff also claimed a substantive relief though clothed in a garb of declaratory decree with a consequential relief. Two points were decided by that Full Bench ruling. One was that where a suit was for cancellation of an instrument under S. 39, Specific Relief Act, the relief was not a declaratory one and it fell neither under S. 7 (4) (c) nor under Sch. 2, Art. 17 (3) but under the residuary Article, Sch, 1, Art. 1. The other was that the Court was entitled to see what was the nature of the relief and if satisfied that it was not a mere consequential relief but a substantive relief, it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. The question as to whether the Court could compel a plaintiff to sue for consequential relief when he had deliberately refrained from doing so was not before the Full Bench for consideration. On the other hand, from a perusal of the referring order in that case it would appear that it was one in which the frame of the suit included a prayer for consequential relief. This will appear from the following observations on p. 686 where it was remarked:

> The appellant has relied upon 1931 All. 369 (2). But this ruling does not help him, as in that case the plaintiff sued for a mere declaration that a decree was not binding upon him and he deliberately omitted a prayer for cancellation of the decree. In the present case there is an express prayer for the cancellation of the decree: so the ruling has no application.

This being so I am unable to hold that the Full Bench ruling in 1932 A L J 684 (4) is an authority for holding that even though the plaintiff deliberately avoids seeking consequential relief he can nevertheless be compelled to add a prayer for a consequential relief so as to make him liable for payment of a higher court-fee. It appears to me that while a Court has full power to decide whether consequential relief has been sought by the plaintiff, it cannot compel the plaintiff to superadd a prayer for consequential relief when he has not in fact asked for such a relief. I might state here that in this Full Bench case there are observations that a relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the registration office for a note to be made by the registering officer in his book, is much more than a mere declaratory relief and that it is a substantial relief: see 1933 A L J 673 (6). It appears to me however that the remarks made on this point in 1932 A L J 684 (4) are obiter dicta and are not binding on us. The reason is very obvious. It is important to bear in mind that the questions which were referred to a Full Bench in 1932 A L J 684 (4) were only these:

> **1. What provisions of the Court-fees Act determine the court-fee payable in respect of relief No. 1, i. e. that the mortgage deed in suit may be declared void and ineffectual as against the plaintiff and that it may be cancelled?**
>
> **2. What provisions of the Court-fees Act determine the court-fee payable in respect of relief No. 2, i. e., that the specified compromise and decree may be cancelled.**

Answers given by the Full Bench to these two questions were as follows: (1) Relief No. 1 is governed by Sch. 1, Art. 1. (2) Relief No. 2 is a consolidated relief (and not a distinguished relief) and it also falls under Sch. 1, Art. 1. These were the only two points decided by the Full Bench in 1932 A L J 684 (4). The Full Bench was not called upon to decide the question as to whether a plaintiff who asks for a mere declaratory decree without consequential relief can be compelled to add a prayer for that consequential relief. This will be clear from the observations made by my Lord the Chief Justice in 1933 A L J 673 (6), where it was observed:

> **Obviously, the Full Bench did not intend to lay down that where the plaintiff deliberately omits to claim a consequential relief and contents himself with claiming a mere declaratory decree, the Court can call upon him to pay court-fees on the consequential relief, which he should have claimed although he has omitted to do so. What was held was that if the plaintiff does not ask for a mere declaratory decree but also asks for a relief which he calls "consequential" relief, the mere fact that he calls it so would not prevent the Court from demanding full court-fee, if in reality the additional relief claimed was a substantive relief and not mere consequential relief. We do not think that the observation was intended to go further than this.**

It therefore appears to me that the observations in 1932 A L J 684 (4) that in every case where the relief to have a registered instrument adjudged void or voidable is claimed, then it amounts to more than a mere declaratory relief are obiter dicta. The question whether a plaintiff is asking for a mere declaratory decree without consequential relief or asks for a decree with consequential relief will depend on the allegations made in the plaint in each

case and no general rule can be laid down which would cover all cases.

For the reasons given above, I would answer the two questions referred to the Full Bench as follows: Answer to question No. 1: It is not open to a Court to treat the suit as one falling within the purview of S. 39, Specific Relief Act, if the plaintiff desires it to be construed as one under section 42, Specific Relief Act. The plaintiff is at liberty to construe a suit as one under S. 42, Specific Relief Act. If on a perusal of the plaint the Court considers that it is one in which further relief should have been asked for, then it will refuse to grant a declaration. Answer to question No. 2: Where the plaintiff deliberately seeks the relief of declaration and further deliberately avoids claiming consequential relief, such as the cancellation of an instrument, the court-fee on the plaint and the memorandum of appeal in the lower appellate Court should be Rupees 10 only in each Court under Art. 17 (3), Sch. 2, Court-fees Act, and not ad valorem court-fee on the value of the subject-matter.

Bennet, J.—This is a reference in regard to the court-fee paid by the plaintiff in the trial Court and as appellant in first appeal. The plaint sets out that the plaintiff is a minor and that plaintiff and his brother Komal formed a joint Hindu family owning four houses left by their father, and Komal executed two sale deeds of his half share in two houses without legal necessity, but that plaintiff is in possession of the houses. A declaratory court-fee of Rs. 20 was paid. The relief asked was:

(a) It may be declared that by virtue of the purchases made under the sale deed dated 24th October 1931, in favour of defendant 1, and under the sale deed dated 21st October 1931, in favour of defendant 2, which are null and void and ineffectual against the plaintiff and the joint family property, defendants 1 and 2 did not acquire any right to any part of the houses mentioned below.

The question raised is whether the plaint comes under Court-fees Act, Sch. 2, Art. 17 (3) as a plaint "to obtain a declaratory decree where no consequential relief is prayed" or whether it comes under the residuary Article, Art. 1 Sch. 1, plaint "not otherwise provided for in this Act." In the former case a fee of Rs. 10 is sufficient for each declaration. In the latter case an ad valorem court-fee must be paid on the value of the subject-matter.

Two issues were framed by the referring order: (1) Where a plaint is so worded as to disclose a suit falling either under section 39 or section 42 of the Specific Relief Act, is it open to a Court to treat the suit as one falling within the purview of S. 39, Specific Relief Act, if the plaintiff desires it to be construed as one under S. 42, Specific Relief Act? (2) Whether the court-fee payable on the plaint and the memorandum of appeal in the lower appellate Court in this case should be ad valorem on the value of the subject-matter, of Rupees 10 only under Art. 17 (3), Sch. 2, Court-fees Act?

The questions which have been argued concern the construction of sections 39 and 42, Specific Relief Act, and how far this present Bench of three Judges is bound by the recent Full Bench rulings of five Judges in 1932 A L J 684 (4) and of three Judges in 1933 A L J 673 (6). In the former case the first question referred was:

What provisions of the Court-fees Act determine the court-fee payable in respect of relief No. 1, i. e., that the mortgage deed in suit may be declared void and ineffectual as against the plaintiffs, and that it may be cancelled ?

On p. 688 an earlier Full Bench ruling of five Judges was considered, 5 All 331 (5) and was overruled in the following words:

The report of the case is very brief and the judgment is also very short. The original plaint in the vernacular is not available in this Court. If the learned Judges meant to lay down that a suit for cancellation of an instrument under the provisions of S. 39, Specific Relief Act, was a mere declaratory suit under Sch. 2, Art. 17 (iii), then with great respect we are unable to agree with that view. The only reported cases brought to our notice in which this ruling has been followed are 1889 A. W. N. 124 (16) and 1 O. C. 123 (17). We may point out that the Full Bench ruling has been expressly dissented from by some of the other High Courts, vide 23 Mad. 490 (18), 29 Bom. 207 (19) and 3 P. L. J. 194 (20).

The ruling then proceeds to set out the two sections, 42 and 39, Specific Relief Act, and contrasts them. Of section 39 it is stated:

It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable, and need not in express terms ask for it to be delivered up and cancelled.

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16. Hira Lal v. Wali Bhagat, (1889) A W N 124.
17. Durga Bakhsh v. Mirza Mohamad Ali Beg, (1898) 1 O C 123.
18. Samiya Mavali v. Minammal, (1900) 23 Mad 490=10 M L J 240.
19. Parvatibai v. Vishwanath Ganesh, (1905) 29 Bom 207=6 Bom L R 1125.
20. Noowooagar Ojain v. Sridhar Jha, 1918 Pat 482=45 I C 238=3 P L J 194.

It is to be noted that the ruling did not say that the amount of the court-fee depended on whether the plaintiff asked for cancellation or not; on the contrary, the ruling implies that asking for cancellation makes no difference

even though no relief of cancellation is asked for, a Court may grant cancellation also.

When the ruling sums up the conclusion it does so without reference to a prayer for cancellation:

A relief to have registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one.

The argument made for the plaintiff that this ruling only deals with a case where the plaint also asks for cancellation, and not with a case like the present where cancellation is not asked for, appears to be incorrect, as the ruling shows that the fact that cancellation was asked for was treated as merely incidental and not as a determining factor. The ruling clearly distinguished any suit for having a written instrument adjudged void or voidable from a declaratory suit. The ruling proceeds to state:

We may note that S. 39, Specific Relief Act, is in Ch. 5 which is headed: 'Of the cancellation of instruments.'

Whereas there is a separate Ch. 6 headed "Of declaratory decrees." Obviously the legislature intended to draw a distinction between a decree adjudging a written instrument void or voidable, which may result in its cancellation, and a mere declaratory decree. Though the Specific Relief Act was passed some years after the Court-fees Act, the distinction existed before the Specific Relief Act was passed and it cannot be said that for the purposes of the Court-fees Act a relief for adjudging an instrument void is of a declaratory nature. On p. 690 it is stated:

In our opinion where a suit is for the cancellation of an instrument under the provisions of S. 39, Specific Relief Act, the relief is not a declaratory one. It falls neither under S. 7 (iv) (c) nor under Sch. 2, Art. 17 (iii), but under the residuary article, Sch. 1, Art. 1, Court fees Act.

In 1933 A L J 673 (6) there was a decision by a Full Bench of three Judges, including the learned Chief Justice, in a case where no written instrument was concerned, but where the plaintiff asked for a declaration that a previous decree in suit, in which he was represented by a guardian, was not binding upon him. It was held that this was a suit for a mere declaratory decree and came under Sch. 2, Art. 17 (3). On p. 677 reference was made to 1932 A L J 684 (4) and it was stated:

On the other hand, there is no doubt that so far as suits relating to the cancellation of instruments are concerned, the Full Bench on p. 689 clearly held that a relief to have a registered instrument adjudged void or voidable with the possible result of its being delivered up and cancelled and a copy of the decree being sent to the Registration Office for a note to be made by the Registering Officer in his books, is much more than a mere declaratory relief. It is undoubtedly a substantial relief of a nature differing from a declaratory one. It was clearly pointed out that it was not incumbent on a plaintiff to ask in express terms a relief for the instrument to be delivered up and cancelled and that he might merely ask for its being adjudged void or voidable. Nevertheless, a suit which falls under S. 39, Specific Relief Act, was held not to be a suit for obtaining a mere declaratory decree, but one for obtaining a substantive relief not otherwise provided for.

The following differences between Ss. 39 and 42 may be set out: (1) S. 39 is in Ch. 5 headed "Of the Cancellation of Instruments." S. 42 is in Ch. 6 headed "of declaratory decrees." If a suit under S. 39 was a suit for a declaratory decree, why was that section not included in the chapter on declaratory decrees? (2) S. 39 deals with written instruments, S. 42 does not refer to written instruments. S. 42 refers only to suits by a person to have a declaration of his title "to any legal character, or to any right as to any property." That is, S. 42 is for a declaration of the rights of the plaintiff. But S. 39 is for adjudication that a written instrument is void or voidable and that defendants derive no rights from it. (3) Under S. 39 the Court may order cancellation. There is no such result possible under S. 42.

Of the illustrations to S. 42, (d) and (e) deal with cases where instruments are mentioned. In these cases a person with a limited interest makes an alienation, and a reversioner may obtain a declaration that the alienation will be void beyond the life-time of the executant. But the alienation is valid for the life-time of the executant and operates on the whole property for that period. Such a suit cannot come under Ch. 5 because there is no present right of the plaintiff to have the instrument adjudged void or voidable. The concern of the plaintiff is only with the future and not with the present, and hence he is only entitled to a mere declaration and not to any sub-

stantive relief. These cases differ from those provided for in S. 40 which deals with an instrument which may be adjudged void or voidable at the time of suit as regards some of the rights and obligations under it and held good as regards others. The difference is that in the illustrations (d) and (e) to S. 42 there are no rights and obligations which can be adjudged void or voidable at the time of suit, only for the future can a declaration be granted that the rights, valid at the time of suit, will cease to exist on the happening of a certain contingency, the termination of the life of the executant.

In regard to the argument that illustration (f) may refer to an adoption by a Hindu widow evidenced by registered instrument, it is sufficient to say that the illustration does not mention any such instrument, and an adoption cannot be made by a written instrument but must be made by certain ceremonies. An instrument which merely recited that an adoption had taken place would not legally effect the adoption by such recital. Ch. 5 refers to instruments, meaning thereby legal documents which have a legal effect, and not mere statements. As regards illustration (c) where A covenants that if he in future becomes entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts, it is not correct to argue that the covenant must be in a written instrument such as is contemplated by Ch. 5, and illustration (c) does not mention a written instrument. Another argument was that the Full Bench in 1932 A L J 684 (4) treated a decree as an instrument within the meaning of S. 39, Specific Relief Act. There were two questions referred to, the first dealing with cancellation of a mortgage deed, and only in regard to this is S. 39 mentioned. The second question dealt with the cancellation of a compromise and a decree, and the ruling begins to consider this second question on p. 690 from the words "as regards the second relief. . ." It is only in regard to the cancellation of the compromise that it is stated to be similar to the cancellation of the mortgage deed. The next paragraph considers the decree and says that "cancellation" is not the correct word, and the word should be "setting aside." No reference is made to S. 39 in regard to the decree.

I may note that it is incorrect to describe the reference as involving the question whether it is open to a Court to compel a plaintiff to ask for consequential relief if the plaint has asked for a mere declaration. Of course a Court cannot act in such a manner. No one has suggested that it could, and that is not the case for the learned Government Advocate, nor is that the question in the first issue referred to us. That question deals with the construction of the plaint as it stands, and whether it is for the Court or for the plaintiff to construe it. The contest is not one between a mere declaration without consequential relief and one with consequential relief. It is a contest between a mere declaration and a substantive relief. Another argument is that for the purpose of deciding whether the court-fee is sufficient or not the Court should confine its attention to the provisions of the Court-fees Act and should not refer to the provisions of any other Act. The Court-fees Act in Sch. 2, Art. 17 (3) fixes a court-fee for suit for "a declaratory decree where no consequential relief is prayed." But the Court-fees Act does not define what is a declaratory decree. Therefore it is necessary to refer to an Act which does define a declaratory decree, that is the Specific Relief Act, to see whether the plaint asks for a declaratory decree.

In regard to the plaintiff's argument that cancellation must be asked for in the plaint, otherwise the suit is for a mere declaration, it is to be noted that if an instrument is adjudged void so far as the plaintiff is concerned, even though there is no order that it be given up and cancelled, still the effect of the order is that, so far as the plaintiff is concerned, the instrument is cancelled and no longer exists. It is for this reason also that a suit under S. 39 is not a suit for a mere declaratory decree. It may be pointed that if the plaintiff obtained a decree on his present plaint to the effect that the instruments were void, then the Court would undoubtedly order cancellation as the instruments would serve no purpose whatever. The present is not a case such as mentioned in S. 40 where an instrument is evidence of different rights or different obligations, when a Court may cancel part and allow the residue to stand.

The rule laid down in these two Full Bench rulings has been interpreted to cover a plaint where the relief is asked that a written instrument should be adjudged void, although no relief of cancellation was asked, in 1934 A

L J 955 (21). On p. 956 it is stated in the judgment delivered by the learned Chief Justice:

> There is no doubt that the plaintiff in asking for a declaration that the compromise, dated 20th November 1919, was improper and void as against the plaintiff, was asking for the cancellation of the instrument.

And an ad valorem court-fee was payable under S. 1, Art. 1. A similar view was taken by Niamatullah, J., and by Collister, J., in 1935 A L J 133 (3) as regards the particular plaint in that case which only asked for the sale deed executed by the plaintiff, a pardanashin woman, to be declared void and ineffectual against her on the ground that she did not mean to execute it. Collister, J., based his opinion on general grounds (p. 137):

> It appears to me that the observations by the Full Bench in 1932 A L J 684 (4) though more or less obiter, since there was a prayer for cancellation, are authority for the proposition that a suit under S. 39, Specific Relief Act, for avoiding an instrument, even if there be no prayer for cancellation, carries with it by implication a prayer that the Court may further use the discretion given to it by S. 39, so as to order the said instrument to be delivered up and cancelled.

I do not think it is correct to describe the rule laid down by the Full Bench as "more or less obiter," because I consider that the Full Bench had jurisdiction to consider which of the factors in the case referred to them were the determining factors, and the Full Bench held that the relief of asking for the instrument to be adjudged void or voidable was the determining factor and not the relief of asking for cancellation: see p. 689:

> It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled.

Niamatullah, J., on the other hand held on p. 138:

> To my mind it is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of S. 39, Specific Relief Act. It may be that such a suit is, in certain circumstances, liable to be dismissed under the proviso to S. 42 of that Act on the ground that the plaintiff being, able to seek a further relief (e. g., cancellation) than a declaration, omits to do so.

The same view has been expressed by Niamatullah, J., and Rachhpal Singh, J., in 1934 All 56 (10). This ruling referred to two decisions subsequent to the Full Bench decision in 1932 A L J 684 (4) which were mentioned as authority for the distinction on which the ruling was based. These decisions were 1933 All 350 (9) and 1933 A L J 673 (6). Both these rulings deal with cases where a declaration was asked for in regard to a decree, and it was held that such a declaration came under Sch. 2, Art. 17 (3). In the ruling 1933 A L J 673 (6) at p. 677 where the Full Bench considered the law relating to written instruments, the Full Bench relating in 1932 A L J 684 (4) was interpreted in a sense contrary to the sense placed on it in 1934 All 56 (10) where it is confined to a case where the plaintiff sues for the relief of cancellation. It was held that the plaintiff not having sued for cancellation, but only for a "declaration" that a deed of gift by a third party to defendant 1 was illegal and ineffectual as against the plaintiff and that the defendants had no right to interfere with the possession of the plaintiff, the declaratory court-fee under Art. 17 (3), Sch. 2, was sufficient.

Learned counsel for plaintiff also relied on 38 Mad 922 (22), that was a case where a creditor obtained a decree on a hypothecation bond executed by the father of a joint Hindu family and the plaintiffs who were then minors as they alleged, sued for a declaration that the debt was not binding on the family and that the decree was a nullity, and for an injunction to restrain the defendant from executing the decree. It was held that mere declaratory court-fee under schedule 2, Art. 17 (3) was not sufficient, and fee must be paid under S. 7 (4) (c) for a declaratory decree with consequential relief. That case is distinguishable from those with which we have been dealing because in that case the mortgage had merged in the decree in the mortgage suit. With great respect to the learned Judges of this High Court who have drawn this distinction between (1) a suit for "declaration" that a written instrument is void or voidable with an implication that the plaintiff wants cancellation, and (2) a suit for "declaration" that a written instrument is void or voidable if the plaintiff desires it to be construed as not asking for cancellation, the result being that ad valorem court-fees are due on (1) but not on (2). I find that I cannot agree with this view and I think that this view is opposed to what has been laid down by the Full Bench of five Judges of this High Court in 1932 A L J 684 (4) and I consider that the rule laid down there governs

21. Suraj Ket Prasad v. Chandra, 1934 All 1071 =153 I C 517=1934 A L J 955.

22. Arunachalam Chetty v. Rangaswamy Pillai, 1915 Mad 948=28 I C 79=38 Mad 922 (F B).

the present case. The rule that the Court has to construe such plaints and decide whether the plaint falls under (1) or (2) is a rule which would be highly artificial and difficult in practice. Moreover, the rule appears to vary considerably, In 1935 A L J 133 (3), at p. 138, it was stated that the Court had to construe the plaint for this purpose:

> In each case the question is one of construction of the plaint and of ascertaining the relief which the plaintiff is claiming.

But in the first question referred in the present case, the suggestion is that it is not open to the Court to construe the plaint for this purpose if the plaintiff desires it to be construed as one under S. 42, Specific Relief Act. For ascertainment of court-fee, rules ought to be clear and precise. The rule laid down by the Full Bench in 1932 A L J 684 (4) is quite clear and precise and can be understood by anyone and easily applied. It was there laid down that if a suit comes under S. 39, Specific Relief Act, an ad valorem court-fee must be paid, and that it does not matter whether the plaint asks for cancellation or not. This rule is based on the essential distinction between suits under S. 39 and S. 42. Suits under S. 39 are not in Ch. 6 which treats of declaratory suits, and the word "declaration" is not used in S. 39. The words are "have it adjudged void or voidable."

Suits under Ch. 5 may perhaps result in a decree that the written instrument is void or voidable without an order for delivery and cancellation. But such a decree does in effect cancel the instrument so far as the plaintiff is concerned, and it appears that for this reason the second paragraph of S. 39 would always apply, and on making such an adjudication the Court should always send a copy of its decree to the registering officer where the instrument has been registered. The words used in this second paragraph are "the Court shall also send a copy of its decree to the officer," etc. The reason why this is always necessary is in order that anyone to whom the defendant offers to transfer the property should be able from a search in the registering office to ascertain that there had been a decree by which a Court had adjudged that the instrument did not affect the rights of a certain person. The first question referred may now be considered. The question postulates that a plaint may be "so worded as to disclose a suit falling either under S. 39 or S. 42, Specific Relief Act." I do not think that a suit can be so worded, because S. 39 deals with written instruments and S. 42 does not. The cause of action for S. 39 is the execution of the written instrument. The cause of action for S. 42 is the denying or being interested to deny the plaintiff's title to some legal character or right. If the plaint is to come under S. 39 at all, it must ask the Court to adjudge that a written instrument is void or voidable. If it does ask that, then the plaint is clearly one under S. 39, and the addition of any other relief for a declaration under S. 42 would not alter its character as a plaint under S. 39. If the plaint does not ask the Court to adjudge a written instrument void or voidable, and if it is not necessary for the Court to do so in order to grant the relief for which the plaint asks, then the plaint does not come under S. 39. My first answer to question No. 1 is therefore that such a case could not arise.

As the question assumes that such a question could arise, I will proceed to answer it as a hypothetical case, in which it is assumed that a plaint could be so worded that the plaint could be read as falling under S. 39 for adjudging a written instrument void or voidable, or under S. 42, for some other declaration without adjudging a written instrument void or voidable against the plaintiff. The reply to this hypothetical question is contained in S. 6, Court-fees Act:

> No document of any of the kinds specified as chargeable in Sch. 1 or 2 shall be filed, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

Schedule 1 is headed "Ad Valorem Fees." Sch. 2 is headed "Fixed Fees." The last few lines therefore mean "not less than either the ad valorem fee or the fixed fee," where the document would come under either Schedule. This section lays down for such a document that it must satisfy two minima, one under each Schedule. The fee of Rs. 10 complies with the rule that it is not less than that indicated by the second schedule. But how can it be said that it is not less than that indicated by Sch. 1? The fee must satisfy both schedules where the document can come under either. If the section had meant that it would be sufficient it the fee satisfied one schedule only, it would have stated:

> Unless in respect of such document there be paid a fee of an amount not less than that indi-

cated by either of the said schedules, whichever is least, as the proper fee for such document.

It is not possible to read these words into S. 6 when the words are not there. Without these words the section clearly indicates that where a document comes under either schedule, the court-fees must not be less than what each schedule prescribes. There are no rulings on this section on this point, or at least none were produced. My second answer therefore to the hypothetical case question one is that S. 6, Court-fees Act, would apply, and as the word in that section is "shall," the Court and the plaintiff have no option and the court-fee under S. 39, an ad valorem court-fee, must be paid.

The second question deals with the present case and asks whether the plaint and memorandum of appeal in the lower appellate Court require an ad valorem court-fee or fixed fee. I consider that an ad valorem court-fee is required for the following reasons: (1) The present case is governed by the Full Bench ruling in 1932, A L J 634 (4). (2). A relief to have a written instrument adjudged void or voidable comes under S. 39, Specific Relief Act, and require an ad valorem court-fee under Art. 1, Sch. 1, Court-fees Act. (3). It is immaterial whether the plaint asks for the relief of cancellation or not, because if adjudged void or voidable, the written instrument is cancelled so far as the plaintiff is concerned.

By the Court.—The first question referred to this Full Bench is answered in the negative. On the second question it is declared that the court-fee paid in the lower Courts was sufficient.

K.S. *Questions answered.*

A. I. R. 1935 Allahabad 834

KENDALL, J.

Raza Husain and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No 950 of 1934, Decided on 26th March 935, from order of Sess. Judge, Saharanpur, D/- 30th September 1934.

(a) Criminal P. C (1898), Ss. 253 and 258 —Charge framed—Magistrate finding accused not guilty but inadvertently referring to S. 253 instead of S. 258—Order is one of acquittal and not of discharge

In a case in which charge has been framed, the Magistrate finds the accused not guilty but by inadvertence refers to S 253 instead of S. 258, the order does not become any the less an order of acquittal because of that inadvertence, if the whole of the procedure shows that the order must be regarded as one of acquittal and not of discharge : 1 *A L J* 415, *Rel on.* [P 835 C 1]

(b) Criminal P. C. (1898), Ss. 253 and 350 —Charge framed against accused—Magistrate succeeded by another Magistrate—Accused discharged under S 253—Held accused is acquitted and no further inquiry can be held—Even if de novo trial is ordered, charge framed by predecessor should not be ignored

Where a Magistrate framed charges against an accused person and was succeeded by another Magistrate who recommenced the case under S. 350, Criminal P. C., and upon re-examining the complainant discharged the accused under S 253 :

Held : the accused was acquitted and that no further inquiry could be held into the case : 1915 *Mad* 23, *Foll.* [P 835 C 2]

Held further: that even if a de novo trial was ordered and the Bench proceeded under S. 350, they could not, in doing so, ignore the charge which had been drawn by their predecessor, and that the order which they recorded was indeed as it purported to be an order of acquittal and not of discharge. [P 836 C 1]

H. Faruqi—for Applicants.

Mahmadullah aad *G. S. Pathak*—for the Crown.

Order.—The facts from which this application has arisen are briefly as follows: Two persons filed a criminal complaint under Ss. 403, 406 and 411, Penal Code, against the present applicants, Raza Husain and Ibn Hasan, who are father and son. The Subdivisional Magistrate in whose Court the complaint was filed drew up a charge against both the applicants, but he was subsequently transferred without completing the trial of the case, and his successor transferred the case to a Bench of Magistrates having powers of the first class. The Bench recorded some further evidence for the prosecution and passed an order on 17-19 April 1934 which purported to be an order under S. 253 Criminal P. C. The complainants made an application in revision to the Sessions Judge on the ground that the accused should, on the evidence, not have been discharged, and the Sessions Judge after discussing the evidence in some detail passed an order in which he held that the dismissal of the complainants case by the lower Court was quite unjustifiable as the evidence which had been produced by the complainants "did make out a prima facie case against the accused." He therefore set aside the order discharging the accused and sent back the case to the District Magistrate with a direction that a further enquiry should be made by another Magistrate.

The principal ground on which the application has been argued is that the order of the Bench of Magistrates was not an order of discharge, in spite of the reference to S. 253, but an order of acquittal. The whole of the evidence produced on behalf of the prosecution had been recorded either by the original Magistrate who took up the case, namely the Sub-divisional Magistrate, or by the Bench to whom the case was subsequently transferred the statements of the accused had been recorded. The whole of the evidence was discussed in the Magistrates' order of 17-19 April 1934 and the conclusion to which they came was that the case between the parties was a matter of accounts, that it was of a civil nature and that the accused must be "acquitted" (sic) under section 253, Criminal P. C. In referring to S. 253, the Bench neglected to take into account the fact that a charge had been drawn up against the accused. They were considering not whether the evidence justified the framing of a charge but whether it justified the conviction or the acquittal of the accused. The fact that no evidence had been brought on behalf of the accused did not stand in the way of their recording an order of acquittal. If any authority is necessary for this proposition, it is to be found in the case of 1 A L J 415 (1), S. 258, Criminal P. C., provides that:

> If in any case under this Chapter in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal.

And if the Magistrate by inadvertence refers to S. 253 instead of S. 258 of the Code, the order does not become any the less an order of acquittal because of that inadvertence, if the whole of the procedure shows that the order must be regarded as one of acquittal and not of discharge. Chap. 21 sets forth the procedure to be followed in warrant cases, and it shows that the accused shall be discharged under S. 253 if, upon taking all the evidence under S. 252 and examining the accused, the Magistrate finds that no case has been made out which would warrant his conviction. If however the evidence does appear to be sufficient to warrant a conviction and is unrebutted, a charge is to be framed under S. 254 and thereafter the accused is put on his trial. When a charge has once been framed under S. 254 it must be followed either by an acquittal or a conviction. It follows therefore that the Magistrate in this case proceeded on the basis of the charge already drawn and acquitted the present applicants and did not, as is urged on behalf of the opposite party merely discharge them.

It has been very forcibly argued by Mr. Pathak that in the present case what acually happened was that after the charge had been drawn a denovo trial was ordered, and the Bench Magistrates were proceeding under S. 350 Criminal P. C. It should be mentioned that the case has been referred back to the Sessions Judge in order to ascertain whether any definite orders quashing the charge or ordering a denovo trial were passed, and it appears that there were no such definite orders. The Sessions Judge appears to have inferred that there was in effect a quashing of the charge and a de novo trial. If so, Mr. Pathak argues, the Bench Magistrates could under S. 350 "resummon the witnesses and recommence the enquiry or trial" and the effect of this would be to "wipe out" the charge. This matter has been discussed in several cases to which I have been referred, namely, 1933 Pesh 78 (2), 1919 Pat 578 (3), 1919 Pat 311 (4), 1922 Lah 49 (5); and in these the view has been expressed that the effect of ordering a de novo trial is that the whole of the proceeding from the very beginning must be gone through again, and if a charge has been framed, it is wiped out.

A different view however has been taken by this Court in 9 All 52 (6). The Bench was not then discussing the effect of S. 350, Criminal P. C., but it clearly laid down the principle that when once the charge has been framed in a warrant case and a plea has been taken, the enquiry is turned into a trial which can only be concluded by an acquittal or conviction. In 1915 Mad 23 (7), a Bench of the Madras High Court held that where a Magistrate framed charges against

1. Sayid Khan v. Emperor, (1901) 1 A L J 415.

2. Abdul Hakim v. Abdul Aziz, 1933 Pesh 78=1933 Cr C 1311=146 I C 443=35 Cr L J 170.
3. Daroga Choudhury v. Emperor, 1919 Pat 578=52 I C 393=20 Cr L J 638.
4. Jago Singh v. Emperor, 1919 Pat 311=53 I C 520-20 Cr L J 820.
5. Sahib Din v. Emperor, 1922 Lah 49=66 I C 826=3 Lah 115=23 Cr L J 330.
6. Queen-Emprees v. Chotu, (1886) 9 All 52=1886 A W N 281 (FB).
7. Sri Ramulu v. Nalam Krishna Row, 1915 Mad 23=25 I C 1001=15 Cr L J 673=38 Mad 585.

an accused person and was succeeded by another Magistrate who recommenced the case under S. 350, Criminal P. C., and upon re-examining the complainant discharged the accused under S. 253, the accused was acquitted and that no further enquiry could be held into the case. The facts are very similar to the case before me now and relying on the authority of the Full Bench of this Court and of the Madras High Court, I must hold that even if a de novo trial was ordered and the Bench proceeded under S. 350, Criminal P. C., they could not, in doing so, ignore the charge which had been drawn by their predecessor, and that the order which they recorded was indeed as it purported to be an order of acquittal and not of discharge. This being so, the Sessions Judges had no jurisdiction to order a further enquiry, and I therefore allow the application, set aside the order of the Sessions Judge and direct that the order of the Bench Magistrate must be regarded as one of acquittal and must stand.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 836

GANGA NATH, J.

Hanuman Prasad and *another*—Plaintiffs—Appellants.

v.

Mendwa and *others* — Defendants—Respondents.

Second Appeal No. 751 of 1933, Decided on 23rd April 1935, from decision of Addl. Sub-Judge, Banda, D/- 25th April 1933.

Riparian Rights — Each proprietor has right to use water of stream flowing past his land equally with other proprietors.

Every riparian proprietor has a natural right to use the water of a stream which flows past his land equally with other proprietors; to have the water come to him undiminished in flow, quantity and quality, and unaffected in temperature; and to go from him without obstruction: *Wright* v. *Howard*, 1 *L J* (*O S*) *Ch* 94, *Rel on.* [P 837 C 1]

Where the plaintiffs' natural right has been interfered with by the acts done by the defendants in raising their dam and sluices and damages had been caused to the working of the plaintiffs' machines and the defendants have raised their dam and sluices only recently and have not acquired any prescriptive right to continue to do so, plaintiff's suit for damages and injunction should be allowed. [P 837 C 2]

S. S. Shastry—for Appellants.

Domodar Das—for Respondents.

Judgment.—This is a plaintiffs' appeal and arises out of a suit brought by them against the defendants-respondents to claim Rs. 600 damages and for an injunction restraining the defendants from ever raising their dam and sluices to such an extent that the level of water under the plaintiffs' hydro flour mills may become less than eleven inches from the last stair of the ghat and to order the defendants to lower down their dam and sluices. The plaintiffs' case was that they are the zamindars of mahal Sarju Prasad, village Kapseti, through which the river Paisuni flows. They have had their water mills on the bank for the last 20 years which are worked by the stream. The defendants have also got their mills in village Bankat two miles down on the bank of the same river. In September 1929, the defendants raised their dam and sluices thereby sending back the water and causing obstruction to the working of the plaintiffs' mills. The water had accumulated under the plaintiffs' hydro flour mills to the extent of one foot and seven inches over and above the ordinary level and consequently out of the plaintiffs' five mills only one worked in November 1929 and since April 1930 only three have been working. The water used to flow formerly 11 inches lower under the last step of the ghat. The defendants contended that the plaintiffs' mills had been working for the last 15 or 16 years, that the plaintiffs had not acquired any right of easement that the defendants had not done any act by which any damage might have been caused to the plaintiffs and that the land under the plaintiffs' mills had depressed. Both the Courts below have found on documentary and oral evidence that the defendants had raised their dam and sluices. Mr. Chandra Mohan Nath Raina, Tehsildar, Mr. Maula Bakhsh, engineer, and Bhagwan Saroop, overseer, were produced. Their evidence showed that on account of their dam by the defendants, water accumulated at the causeway. The Munsif also inspected the locality and he came to the conclusion that the defendants' dam as well as sluices had been recently raised. The learned Additional Subordinate Judge agreed with the finding of the learned Munsif.

It was also found by both the Courts below that on account of the accumulation of water near the blades of the plaintiffs' mills, the mills did not work properly. On the evidence of Moti Ram Engineer, Irrigation Department, the lower Court found that on account of

the raising of the dam by the defendants the water level of the stream near the plaintiffs' mills became higher than the natural level. The learned Additional Subordinate Judge has remarked:

> The above remarks clearly show that if the defendants be allowed to work their mills with the raised dam and sluices the machinary of the plaintiffs' mill would not work efficiently . . . . . It is therefore proved to my satisfaction that obstruction is caused to plaintiffs' mill on account of raising of the defendants' dam.

The trial Court had decreed the plaintiffs' suit and awarded Rs. 164 damages also. The learned Additional Subordinate Judge on appeal dismissed the suit on the finding that the plaintiffs wanted to divert the water of a natural stream for the purpose of working five mills for which the plaintiffs had no natural right. He was of the opinion that the plaintiffs had no natural right to dam up the river and to divert the flow of the water for the working of the mills. As would appear from the plan prepared by the engineer, the hydro flour mills of the plaintiffs are situated inside the natural stream and the water level is affected there by the raising of the defendants' dam and sluices. There is no artificial channel apart from the natural stream. Every riparian proprietor has a natural right to use the water of a stream which flows past his land equally with other proprietors, to have the water come to him undiminished in flow, quantity and quality and unaffected in temperature, and to go from him without obstruction. The law on the subject has been laid down in 1 L J (O S) Ch 94 (1), at p. 99:

> The law on this subject is extremely simple and clear. Prima facie, every proprietor of land on the banks of a river is entitled to that moiety of the soil of the river which adjoins to his land; and the legal expression is, that each is entitled to the soil of the river usque filum aquae. Of the water itself, there is no separate ownership; being a moving and passing body, there can be no property in it. But each proprietor of land on the banks has a right to use it; consequently, all the proprietors have an equal right: and therefore, no one of them can make such a use of it, as will prevent any of the others from having an equal use of the stream, when it reaches them. Every proprietor may divert the water for the purpose, for example, of turning a mill; but then, he must carry the water back into the stream, so that the other proprietors may in their turn have the benefit of it. His use of the stream must not interfere with the equal common right of his neighbours; he must not injure either those whose lands lie below him on the banks of the river, or those whose lands lie above him. Injury may be done to the proprietors below him, by diminishing the quantity of water which descends to him: it may be done to those above him, by turning the water up on them, so as to overflow their lands, or to disturb any of the operations in which they may have occasion to use the water as for example by diminishing the extent of its fall.

1. Wright v. Howard, (1823) 1 L J (O S) Ch 94.

The plaintiffs are claiming nothing but a natural right. The concurrent findings of both the Courts below, as stated above, will show that the plaintiffs' natural right has been interfered with by the acts done by the defendants in raising their dam and sluices and damages had been caused to the working of the plaintiffs' machines. As already stated, and found by the lower appellate Court the defendants have raised their dam and sluices only recently and have not acquired any prescriptive right to continue to do so. It is ordered that the appeal be allowed with costs, the decree of the lower Court be set aside and the decree of the trial Court be restored. A cross-objection was filed by the respondents as regards costs. As the appeal has been allowed the respondents are not entitled to any costs. Their cross-objection is dismissed with costs. Permission for Letters Patent appeal is granted.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 837

KENDALL, J.

Gopi Nath—Plaintiff—Applicant.

v.

Mt. Bekali and *others*— Defendants—Opposite Parties.

Civil Revn. No. 4 of 1935, Decided on 2nd May 1935, against decree of Small Cause Court Judge, Muttra, D/- 1st October 1934.

(a) Mortgage—Debt is separate from security — Creditor or his transferee can get judgment for debt without recourse to security — Transfer of Property Act (1882), Ss. 130 and 3.

The separation between debt and security is well established; the creditor is entitled to take a judgment for the debt without having recourse to his security.

Where a mortgage bond was transferred by an endorsement to the plaintiff and plaintiff sued on it:

Held : that the document on which suit was based cannot be regarded as a mortgage bond because the security had not been legally transferred. But there was no reason why the Court should not regard it as a simple money bond which had been transferred by the endorsement to the plaintiff and there was a legal transfer: 1931 *All* 389 (*F B*) and 1931 *P C* 245, *Rel on.*

[P 838 C 1, 2]

(b) Transfer of Property Act (1882), Ss 130 and 3—Instrument not negotiable—Endorse-

ment is sufficient to effect legal transfer.

An endorsement on an instrument which is not a negotiable instrument is sufficient to effect a legal transfer: 30 *Mad* 75 and 1924 *Lah* 684, *Rel on.* [P 838 C 1]

M. L. Chaturvedi—for Applicant.

Order.—This is a plaintiff's application against the decree and order of the Judge of the Small Cause Court of Muttra dismissing his suit. The facts are given in the judgment of the trial Court, in which it is said that the plaintiff's claim is dismissed on a technical ground, namely that the bond which has been transferred to the plaintiff by an endorsement only was a mortgage bond and could not be legally transferred, except by a registered document.

It has been argued by Mr. Chaturvedi that although the security could not be transferred, except by a registered document, yet the security is separable from the debt itself, and as the debt had been transferred to the plaintiff, he was entitled to sue without having regard to the mortgage security. There is some authority for this argument in 1931 A L J 503 (1), where an assignment of a mortgage bond was made by a Court without execution of a document. Here it is true the assignment was made by order of the Court, and not merely by transfer between individuals. But the principle appears to be the same. Similarly in 1931 A L J 804 (2) (at page 807), their Lordships of the Privy Council have remarked:

> The separation between debt and security is well established; the creditor is entitled to take a judgment for the debt without having recourse to his security.

It has been argued for the opposite party that although the debt is separable from the security the bond in the present case is not a debt, but is an "actionable claim" as defined in S. 3, T. P. Act, and consequently under S. 130 of that Act it can only be transferred "by the execution of an instrument in writing signed by the transferor or his duly authorised agent." The bond in suit has not been transferred by a separate instrument in writing. There is however authority for holding that an endorsement on an instrument which is not a negotiable instrument is sufficient to effect a legal transfer. I have been referred to 30 Mad 75 (3) and also to the case reported as 78 I C 163 (4). These are both cases where a document which was held to be not a negotiable instrument was transferred merely by endorsement on the document.

I have not been shown any authority on the other side to show that such an endorsement will not effect a legal transfer. I think that the trial Court was wrong in dismissing the suit. The document on which it is based cannot be regarded as a mortgage bond because the security has not been legally transferred. But there is no reason why the Court should not regard it as a simple money bond which has been transferred by the endorsement to the plaintiff. I therefore allow the application, set aside the decree and order of the trial Court dismissing the suit, and direct that the suit be readmitted on its original number and disposed of according to law, as there are other issues which have not been determined by the trial Court. Costs will abide the result.

K.S *Application allowed.*

1. Ram Saran Das v. Yudbishtar Prasad, 1931 All 389=133 I C 904=53 All 786=1931 A L J 503 (F B).
2. Imperial Bank of India v. Bengal National Bank, Ltd., 1931 P C 245=134 I C 651=58 I A 323=59 Cal 377=1931 A L J 804 (P C).
3. Rama Iyer v. Venka achellam Patter, (1907) 30 Mad 75=16 M L J 554.
4. Nanak Chand Kishori Lal v. Ram Sarup Gujar Mal, 1924 Lah 684=78 I C 163.

A. I. R. 1935 Allahabad 838

HARRIES AND RACHHPAL SINGH, JJ.

Govind Singh—Appellant.

v.

Ram Prasad and *another*—Respondents.

First Appeal No. 223 of 1933, Decided on 25th April 1935, from order of Dist. Judge, Shahjehanpur, D/- 7th October 1933.

Guardians and Wards Act (1890), Ss. 19 and 25—Father of minor alive and not proved to be unfit to be guardian—Court cannot declare him or any person as guardian—But it can order person who has custody of minor to hand over her to anybody or father under S. 25.

As long as the father of the minor is alive and is not proved to be unfit to be guardian of the minor, the Court cannot make an order appointing him or anybody else as guardian. But it can order the person who has custody of the minor to hand the minor to the custody of the father. The proper procedure for the father is to apply under S. 25 and not to ask for declaration under S. 19: 1927 *All* 581, *Applied*: 1914 *P C* 41, *Rel on.* [P 839 C 1, 2]

N. C. Sen—for Appellant.

Baleshwari Prasad—for Respondents.

Harries, J.—This is an appeal against an order of the District Judge of Shahjehanpur appointing Ram Prasad the guardian of his infant daughter. Ram Prasad, a Brahmin by caste, applied to the Court to be appointed as the guardian of Mt. Man Piari who was then about five years of age. He alleged that the little girl was his illegitimate daughter conceived in adulterous intercourse between him and Mt. Sukh Dei now deceased. Mt. Sukh Dei was the legal wife of the appellant Govind Singh, but the learned Judge has found that at the time of conception of Mt. Man Piari Mt. Sukh Dei was living with Ram Prasad and that Govind Singh had no access to her. In those circumstances the learned Judge found as a fact that Mt. Man Piari was the daughter of Ram Prasad and that the appellant Govind Singh was not related to her in any way. For about eleven months before these proceedings were brought Mt. Man Piari had been living with Govind Singh, but the record is silent as to how she came to live with him. According to the learned Judge the little girl appeared to be living quite happily with Govind Singh and it is not suggested that she had been ill-treated or neglected in any way by him. On the other hand no suggestion has been made in these proceedings that the father Ram Prasad is in any way unfit to have the custody of his own illegitimate daughter. The learned Judge after considering these facts came to the conclusion that the proper person to act as guardian for Mt. Man Piari was her father Ram Prasad and he accordingly made an order declaring Ram Prasad as such guardian.

Against that order this appeal has been preferred and it is contended that by reason of S. 19, Guardians and Wards Act, such an order could not be made. S. 19, Guardians and Wards Act provides that nothing in this Chapter shall authorise the Court to appoint and declare a guardian of the person of a minor whose father is living and is not in the opinion of the Court unfit to be guardian of the person of the minor. It is not suggested that Ram Prasad the father of the minor is in any way unfit to be guardian of this little girl and that being so it is contended that the Court cannot make an order appointing him or any body else as guardian. It is said that the father is the natural guardian, and where he is a fit and proper person to be a guardian of the minor no order appointing a guardian can be made by any Court.

This view of the section has been taken by a Bench of this Court in 25 A L J 585 (1). In that case the father of an infant applied to be appointed as guardian but the Court held that an order appointing him as such guardian was invalid by reason of section 19, Guardians and Wards Act. This case followed an earlier decision of the Privy Council in 38 Mad 807 (2). Having regard to these authorities we are bound to hold that Ram Prasad could not be appointed guardian of his illegitimate daughter Mt. Man Piari and therefore that the order made by the learned District Judge cannot be supported.

It is clear from the fact that Ram Prasad brought these proceedings that he desires the custody of his infant illegitimate daughter and in our view the proceedings for custody of this little child should have been brought under S. 25, Guardians and Wards Act. Under that section where a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian. Had an application been made under this section, an order directing Govind Singh to hand over the little girl to Ram Prasad should have been made.

In 25 A L J 585 (1), previously cited a Bench of this Court, though taking the view which we do that an order appointing the father as guardian of the person of the minor could not be made, made an order directing that the minor be placed or taken into the custody of the father and further made it clear to the person in whose custody the minor was that if the minor was not delivered into the custody of the father within fifteen days, proceedings would be issued against her for contempt of Court.

It appears that a similar order should be made in this case. As we have pointed out previously, nothing is suggested against Ram Prasad, the father. Before the learned Judge could have appointed him as guardian, he

1. Ulfat Bibi v. Bafati, 1927 All 581=102 I C 103 =49 All 773=25 A L J 585.
2. Annie Besant v. Narayanah, 1914 P C 41=24 I C 290=41 I A 314=38 Mad 807 (P C).

had to consider the matters which are laid down in S. 17, Guardians and Wards Act. He must have been satisfied that it was in the interest of the child that she should return to her father otherwise he would not have made the order which he did. Further we are satisfied that it is in this little child's interest to return to her father. It is true that the little child is happy with Govind Singh, but a child of tenders years is happy with any person who treats it kindly. We have no reason to doubt whatsoever that this little child will be perfectly happy the moment she returns to her father and will be well cared for by him. A father is entitled to the custody and companionship of his own child unless, of course, it can be shown that the child would suffer by being placed in such custody. We are satisfied that so far from the child suffering by being placed in the custody of her father she will actually benefit by it. In those circumstances we propose to make the order which was made in 25 A L J 585 (1), that is, an order under S. 25 directing that Mt. Man Piari be placed or taken into the custody of her father the respondent Ram Prasad within three months from the date of this order. The appellant Govind Singh must hand over the child to Ram Prasad in the Court of the District Judge of Shahjehanpur in the presence of the presiding officer within three months from the date of this order. Further the appellant Govind Singh must understand that if he does not within this period of three months hand over the child to Ram Prasad, notice will be issued against him to show cause why he should not be committed for contempt of Court and dealt with according to law for disobedience of this order.

The order appointing Ram Prasad guardian cannot, of course, stand and is set aside and the order which we have indicated above substituted for it. Each party will bear its own costs of this appeal. Let a copy of this order be sent to the District Judge of Shahjehanpur.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 840

ALLSOP, J.

Mt. Shyama—Appellant.

v.

Shankar—Respondent.

First Appeal No. 40 of 1934, Decided on 23rd April 1935, from order of Dist. Judge, Jhansi, D/- 5th February 1934.

Guardians and Wards Act (1890), S. 25—Application by husband for delivery of his minor wife to him—Husband proved to have ill-treated her - Minor girl happy with father—Held husband was not entitled to custody of minor.

The leading principle in dealing with a minor under the Guardians and Wards Act is to look to the interests of the minor himself. If those interests are not affected in any way, it then may be considered whether any other person has, under the law to which the minor is subject, certain rights of custody or so forth. But those rights in other persons cannot be enforced unless the well-being of the minor is not affected by such enforcement.

Where the husband was found to have ill-treated his minor wife and the girl was living quite happy with her father:

Held: that it was not to the interests of the minor that she should be given into the custody of her husband, and as such, his application for same should be rejected. [P 841 C 1]

L. W. Clarke—for Appellant.

G. S. Pathak—for Respondent.

Judgment.—The appellant Mt. Shyama is said to be a minor about 17 or 18 years of age. She was married to the respondent Shanker. The latter made an application that he should be appointed guardian of Mt. Shyama and that she should be placed in his custody under S. 25, Guardians and Wards Act. The learned Judge does not appear to have intended to pass any order on the subject of appointing Shanker as the guardian of the minor, but he has passed an order that she should be delivered up to Shanker whom he treats as her natural guardian.

The appellant is now living with her father Sukh Lal. She was married to Shanker in the year 1929 and lived with him unhappily for a period of about three months. She then went home to her father and stayed with him for three years. In the meanwhile there were a series of panchayats and eventually the respondent appeared at one of these in December 1932. He promised not to ill-treat the girl and was fined a small sum of money. The girl was then returned to his custody. Soon after, it was found that he had again been ill-treating her and he and his father were both fined in a criminal Court for wrongfully confining her in a room.

In these circumstances it does not appear to me that it can be said that it is to the interests of the minor to be given into the custody of this man. The Judge has considered the rights of Shanker in this matter. I must emphasise that the leading principle in dealing with a minor under the Guardians

and Wards Act is to look to the interests of the minor himself. If those interests are not affected in any way, it then may be considered whether any other person has, under the law to which the minor is subject, certain rights of custody or so forth. But those rights in other persons cannot be enforced unless the well-being of the minor is not affected by such enforcement.

The question here is not of the rights of the husband Shanker which he can enforce if he wishes to do so, by instituting a suit for the restitution of conjugal rights, but of the benefit and welfare of the minor. The minor was very nearly of full age and she stated quite definitely that she did not wish to live with her husband. Her wishes should be respected as far as possible. There is no reason for supposing that her welfare is not perfectly safe in the hands of her father in whose custody she at present is. In these circumstances it seems that the order of the Court below was not justifiable. I therefore allow the appeal and reject the application of the respondent who will pay the costs of the appellant.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 841

KENDALL, J.

Makund Ram Katholia—Defendant—Applicant.

v.

Harbans Lal—Plaintiff and *another* Defendants—Respondents.

Civil Revn. No. 701 of 1934, Decided on 2nd May 1935, against order of Munsif, Moradabad, D/- 10th April 1934.

Civil P. C. (1908), S. 152—Entry in decree made on application of party and after hearing objection of opposite party—Court cannot correct such entry on application of opposite party behind back of applicant.

Where the entry in the decree to which objection was made by the opposite party had been made deliberately by the Court on the application of the applicant after due consideration of the circumstances:

Held: it may have been right or it may have been wrong, but it was not an error that could be corrected by an order passed under S. 152 behind the back of the applicant without giving him an opportunity of being heard. [P 841 C 2]

M. L. Verma—for Applicant.

Order.—The facts out of which this application has arisen are as follows: The plaintiff-opposite-party brought a suit for sale on foot of a mortgage. The property mortgaged was alleged to be one-third of a house but as that house had been subject to partition the mortgagee also prayed for a relief for a sum of Rs. 467 which had passed by sale of a decree into the hands of the present applicant, who was not a member of the family which owned the joint house which was subject to the mortgage. According to the applicant, he was not a necessary party to the suit as he had nothing to do with the mortgaged property. The Court gave a decree against the defendants for sale of such of the property as was in their hands. The present applicant made an application for the amendment of the decree about two months later, claiming that he had nothing to do with the mortgaged property, and had merely obtained a decree for Rs. 467 against some of the members of the family. The Court considered the matter and passed an order as the result of which the amount of Rs. 467 was excluded from the property against which the relief was given. About one and a half years later the decree-holder, the opposite-party, made an application which virtually amounted to an application for a reversal of the order passed before, namely that the sum of Rs. 467 should again be included in the property against which relief was to be given by the decree. The Munsif, without issuing notice to the present applicant, and on the very next day, passed an order purporting to be an order under S. 152, Civil P. C., to the effect that the mistake in the decree was only clerical, and directed that it should be corrected.

The present application is made on the ground that the correction now ordered is not in conformity with the judgment of the Court, and that the applicant had had no notice of the opposite-party's application.

The question of whether the decree as it now stands is in accordance with the judgment is not by any means a simple one. What is quite certain is that if there was a mistake in the decree as it stood before it was corrected on the application of the opposite-party, the mistake was not a clerical one. On the contrary, the entry in the decree to which objection was made by the opposite-party had been made deliberately by the Court on the application of the applicant after due consideration of the circumstances. It may have been right or it may have been wrong, but it was not an error that could be corrected by an order passed under S. 152, Civil P. C., and the applicant has therefore every rea-

son to complain if the order was passed behind his back and without giving him an opportunity of being heard.

I therefore allow the application, set aside the order of the trial Court dated 10th April 1934 amending the decree, and direct that the matter be disposed of after the applicant has been given an opportunity of being heard in opposition to the opposite party's application for amendment.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 842

KENDALL, J.

Tirkha —Defendant—Applicant.

v.

Ghasi Ram — Plaintiff — Opposite Party.

Civil Revn. No. 2 of 1935, Decided on 1st May 1935, against order of Judge, Small Cause Court, Muzaffarnagar, D/- 13th October 1934.

(a) Practice — Amendment — Court not having jurisdiction over subject matter of plaint—It has no right to direct amendment of plaint—Jurisdiction.

A Court has no right to direct the amendment of a plaint when it has no jurisdiction over the subject-matter of the plaint. Hence where a suit is filed in a Court for a sum beyond the jurisdiction of the Court, the Court has no right to allow amendment of the plaint reducing the amount claimed so as to bring it within the pecuniary jurisdiction of the Court : 1931 *Mad* 8; 1931 *Mad* 67; 1928 *Mad* 384 and 38 *Mad* 262, *Rel on.* [P 842 C 2]

(b) Provincial Small Cause Courts Act (9 of 1887), S. 25—Question of jurisdiction involved — High Court should interfere though equity is in favour of opposite party.

Where the question of jurisdiction is involved, and it is by no means a trivial one, the High Court should interfere in revision, even though the equities may be in favour of the opposite party. [P 843 C 1]

A. P. Pandey—for Applicant.

Order.—This is a defendant's application for the revision of an order and decree passed by the judge of the Small Cause Court of Muzaffarnagar, decreeing the plaintiff's suit, which was based on a bahikhata account which had been adjusted and a balance struck on 24th June 1931. The suit was filed by the plaintiff on 2nd July 1934, a date which immediately followed the Civil Court vacation, so that if everything had been in order the suit would not have been barred by limitation on that date. The suit however was one for a sum of Rupees 553-8-0, that is to say, it was beyond the pecuniary jurisdiction of the Court. If it had been returned to the plaintiff then and there for presentation to the proper Court, and he had amended the plaint so as to bring it within the pecuniary jurisdiction of the Court and filed it again on the same day, he would in fact have been entitled to succeed. What happened however was that the suit was registered, and it was stated in defence that the Court had no jurisdiction to deal with it. A written statement was filed on 17th August in which the defendant raised a plea that the Court had no jurisdiction, and the plaintiff then made an application for an amendment of the plaint by reducing the sum claimed to Rs. 500. This application was allowed on 10th September, and the Court then proceeded to try the suit. Questions of jurisdiction and limitation were raised by the defendant, but the Court has decided these in the plaintiff's favour by the argument that the effect of amending the plaint on 10th September 1934 was to give the Court jurisdiction with retrospective effect from 2-7-34, when the plaint was originally filed. It will be observed that this argument is circular because the Court had no jurisdiction to allow the amendment of the plaint on 10th September 1934, until it had first passed the order of that date by which it provided itself with jurisdiction with effect from 17th July 1934.

The law appears to be quite clear. The order allowing the amendment of the plaint was passed without jurisdiction, and there is some authority for holding that in such circumstances the order must be vacated. In 1931 Mad 8 (1) and 1931 Mad 67 (2) a very similar matter has been dealt with. In the case before the Bench it was remarked:

> If a Court finds that it has no jurisdiction then to say that it has jurisdiction, to ask the plaintiff to amend his valuation with a view direct him to pay additional court-fees and then return the plaint would seem to suggest that the Court not having jurisdiction has got jurisdiction to do something which is prima facie the duty and function of the proper Court.

In 1928 Mad 384 (3), a similar decision was given by a single Judge of the Madras High Court. I have not been shown any authority of this Court, and for the opposite party Mr. Shastri has only been able to point to such cases as that of 33 Mad 262 (4) where

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1. Varada Pillai v. Thillai Govindaraja Pillai, 1931 Mad 8=129 I C 254.
2. Ramanna v. Amireddi, 1931 Mad 67=129 I C 826.
3. Govindaraja Naicker v. Kassim Sahib, 1928 Mad 384=108 I C 542.
4. Karumbar Pandrapandram v. Audimula Ponnapandaram, (1910) 33 Mad 262=3 I C 725.

a plaintiff to whom a plaint was returned for a proper valuation altered the valuation as directed and struck out some of the property in order to bring the suit within jurisdiction of the Court, and it was held that there was nothing illegal in the amendment and that it was competent to the Court to accept such amended plaint. There is no doubt that the plaintiff has a right to amend his plaint when it has been returned to him by the Court. But the question here is whether a Court has any right to direct the amendment of a plaint when it has no jurisdiction over the subject matter of the plaint.

If it could be held that the order passed by the Court on 10th September 1934 was not an order to amend the plaint, but an order directing the plaint to be returned to the plaintiff, that might possibly have been allowed, but the result would have been that the plaint after amendment would take its date from the date when the plaintiff presented it after amendment, and not from the date on which it was originally filed in a Court which had no jurisdiction to accept it.

The only argument on behalf of the opposite party which has impressed me at all is that there are equities in favour of the plaintiff opposite party and that the High Court will not always interfere in revision under Section 25, Small Cause Courts Act, merely on the ground that the trial Court has made some technical error or may even have violated some provision of the Limitation Act. The question here is not only one of limitation, but of jurisdiction, and it is by no means a trivial one. To refuse to allow the application would be to lay down by implication at any rate an extremely dangerous and illegal rule of procedure. I therefore allow the application for the reasons given and direct that the decree and order of the trial Court be set aside and the plaintiff's suit be dismissed with costs in both Courts. Mr. Shastri has asked that the plaint may be returned to the trial Court, which may return it to the plaintiff for presentation to the proper Court, and this may be done.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 843

NIAMATULLAH AND BENNET, JJ.

Ram Adhin—Applicant.

v.

Lachmi Narain—Opposite Party.

Misc. Ref No. 80 of 1935, Decided on 9th May 1935, from order of Munsif (East) Allahabad, D/- 31st January 1935

Agra Tenancy Act (1926), S. 3—Land having grove on it in possession of proprietor himself who planted trees is agricultural land.

The land which has a grove on it and is in possession of the proprietor himself who planted the trees is agricultural land within the meaning of the U. P. Government Notification No. 577/I-A-93 published in Gazette of 26th July 1932. [P 844 C 1]

S. N. Gupta—for Opposite Party.

Niamatullah, J.—This is a reference under O. 46, R. 1, Civil P. C., by the Munsif of Allahabad. The question on which the Munsif entertains some doubt is whether the land on which the owner thereof has planted a grove is "agricultural land" for the purposes of the Government Notification No. 577/I-A-93 published in the U. P. Gazette of 26th July 1932. The expression "agricultural land" has been defined in that notification to mean, inter alia, land as defined in the Agra Tenancy Act, 1926. The definition of "land" given in S. 3, Agra Tenancy Act 3 of 1926, is as follows:

Land means land which is let or held for agricultural purposes, or as grove-land or for pasturage. It includes land covered by water used for the purpose of growing sighara or other similar produce, but does not include land for the time being occupied by dwelling-houses or manufactories or appurtenants thereto.

The proprietor of a land fit for cultivation may make one of two uses of it. He may either let it to another person for cultivation or may cultivate it himself. In the latter case it is his sir or khudkasht. Therefore two words have been advisedly used, namely "let" or "hold." Where the proprietor allows another person to cultivate his land it is appropriate to say that he has let his land. Where he cultivates it himself he can be said to hold his own land for the purposes of cultivation. Similarly where he has made a grant of his land to another person for the purpose of planting a grove he remains the owner of the land, but the person occupying it is the grove-holder and holds it from the proprietor. He may plant his own grove, in which case the land is held by him-

self. The proprietor has been termed at numerous places in the Act as "land-holder." It is not only a grove-holder who can hold the land if it has trees on it but the proprietor himself may hold it. The only difference between this class of land and his sir and khudkasht lies in the use he is making of it. In either case the land is held by himself. For these reasons we are of opinion that land which has a grove on it and is in possession of the proprietor himself who planted the trees is agricultural land within the meaning of the notification, already referred to.

Let the reference be returned with this decision.

K.S. *Order accordingly.*

A. I. R. 1935 Allahabad 844

BENNET, J.

Badruddin—Applicant.

v.

Secy. of State and *others*—Opposite Parties.

Civil Revn. No. 35 of 1935, Decided on 30th April 1935, against decree of Small Cause Court, Agra, D/- 3rd December 1934.

Railways—Person cannot compel railway company to carry goods on terms imposed by him which are contrary to rules of railway company.

The railway company cannot be compelled to carry goods on terms imposed by a proposer which are contrary to the rules of the railway company. [P 845 C 1]

Plaintiff despatched a consignment of goods from *A* to *K* at railway risk. The consignment arrived at *K* but plaintiff could not arrange for its delivery and at his request it was detained for a considerable time. The plaintiff then asked the railway company at *K* to have the goods rebooked from *K* to *A*. In accordance with rules and regulations, the railway company stated that the plaintiff should execute risk note *A* if the goods were to be rebooked. The plaintiff refused to execute risk note *A* and brought a suit for compensation against the railway company:

Held: that he had no cause of action either under the Railways Act or under the Carriers Act. When the railway company carried the goods to *K*, they fulfilled their part of the contract and that contract came to an end. [P 844 C 2; P 842 C 1]

Mukhtar Ahmad—for Applicant.

K. L. Misra and *R. K. S. Joshinwal*—for Opposite Parties.

Order.— This is an application in revision by a plaintiff whose suit has been dismissed by the Small Cause Court. The plaintiff despatched a consignment of boots and shoes from Agra Cantonment to Karachi, at railway risk. The consignment arrived at Karachi, but plaintiff could not arrange for its delivery and at his request it was detained for a considerable time. The plaintiff then asked the railway company at Karachi, to have the goods rebooked from Karachi, to Agra. In accordance with rules and regulations the railway company stated that the plaintiff should execute risk note A if the goods were to be rebooked. The plaintiff refused to execute risk note A and has brought this suit for Rs. 145 compensation against the railway company. The consigment was still lying at Karachi, in charge of the railway company when the suit was brought. The only issue framed was:

Is the suit premature and is the plaintiff entitled to any and what amount of damages ?

The Court below has held that the plaintiff has no cause of action and that the plaintiff is bound to carry out the rules of the railway company if he desires the railway company to rebook the consignment. Further the Court held that it was proved by a clerk that the boxes are no longer properly secured and that the railway company was correct in insisting on the execution of risk note A. The grounds of revision are directed against the validity of the rules of the company. I asked counsel to show under what provision of law the plaintiff had any right of action. He admitted that the Railways Act did not give any right of action to a plaintiff under these circumstances. He then referred to the Carries Act, Act 3 of 1865. That Act provides for a suit for loss or damage to property delivered to a common carrier. But it does not make any provision for a case similar to the present. Moreover S. 72 (3) Railways Act, states that nothing in the Carriers Act of 1865 shall affect the responsibility of a railway company as defined in S. 72, Railways Act. I therefore consider that counsel is doubly wrong in his reference to the Carriers Act. He then referred to the common law of England. But that is also excepted by S. 72 (3). Under S. 72, Railways Act, the responsibility of the railway administration for the loss, destruction or deterioration of goods is that of a bailee, under Ss. 151, 152 and 161, Contract Act. "Bailment" is defined in S. 148 as a delivery of goods by one person to another for some purpose.

The goods in question were delivered to the railway company for the purpose of being carried to Karachi. When the

railway company carried the goods to Karachi, they fulfilled their part of the contract and that contract came to an end.

Moreover there is no question of liability for loss, destruction or deterioration of the goods since it is not proved that any such loss, destruction or deterioration has occurred. What the plaintiff wants is that the railway company should be compelled to enter into a contract with him on the terms which he propounds. This doctrine of law is contrary to S. 2, Contract Act. The plaintiff is in the position of a proposer and it is open to the railway company to agree or not to agree to his proposal. In the present case the railway company are willing to take the goods in accordance with their rule that a risk note must be executed. Learned counsel has failed to show any provision of law under which the railway company can be compelled to carry goods on terms imposed by a proposer which are contrary to the rules of the railway company. Some further objection was made on the allegation that the evidence of the clerk was not that the boxes were improperly secured at the time when the plaintiff asked the railway company to rebook the boxes to Agra but at some later date. Any question of that nature is a question of fact which should have been brought to the notice of the lower Court and cannot be brought before this Court in revision. I consider that no case has been made out for this revision which is therefore dismissed.

K.S. *Application dismissed.*

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* A. I. R. 1935 Allahabad 845

SULAIMAN, C. J. AND BENNET, J.

Ajodhiya Pande—Defendant—Appellant.

v.

Mt. Rajna and *others* — Plaintiffs—Respondents.

Letters Patent Appeal No. 86 of 1934, Decided on 5th April 1935, against order of Kendall, J., D/- 8th March 1934, reported as 1934 All. 875.

*** Agra Tenancy Act (1901), S. 22—Death of occupancy tenant under Act of 1881—Death of widow, who has succeeded under Act of 1901—Succession is not governed by S. 22 but by personal law of deceased male occupancy tenant.**

Where an occupancy tenant dies under Act 12 of 1881 and is succeeded by his widow who dies under Act 2 of 1901, the succession is not governed by S. 22 of Act 2 of 1901 but by the personal law of the deceased male occupancy tenant: *Case law discussed.* [P 848 C 1]

Harbans Sahai—for Appellant.

N. P. Asthana—for Respondents.

Bennet, J.—This is a Letters Patent appeal by a defendant under the following circumstances: The opposite party Mt. Rajna was one of the plaintiffs in a suit asking for possession of an occupancy holding on the grounds that she was the daughter of Madho, who died sometime previous to Act 2 of 1901, that Madho had been succeeded by two widows both of whom died during the pendency of Act 2 of 1901, the last widow dying in the year 1924 and that the defendants had interfered with her possession. The defendant-appellant based his claim on two grounds, firstly that he was related to Madho and entitled to succeed Madho as a reversioner and secondly, that he was one of the zamindars, and he claimed that Mt. Rajna was not entitled to succeed to this occupancy tenancy on the death of the last widow in the year 1924. The case raises difficult points of interpretation of S. 22 of Act 2 of 1901. The learned Single Judge has held against the appellant. Various rulings have been cited and it must be admitted that the rulings are very conflicting. The question is whether an occupancy tenant dies during the pendency of Act 12 of 1881, and his widow succeeds and that widow dies during the pendency of Act 2 of 1901, who is entitled to succeed to the occupancy holding. On the one hand, various rulings have held that S. 22 of Act 2 of 1901, applies and that the widow is to be taken as the occupancy tenant for the purpose of that section and that the order of succession prescribed by that section should be followed in relation to her. On the other hand, a number of rulings have laid down that in this case S. 22 is not intended to apply and that the succession must be governed by the ordinary rules of the personal law which applies to succession to land as laid down in S. 9 of Act 12 of 1881, subject to the condition imposed by that section that no collateral relation shall succeed unless he shared in the cultivation. We confess that there is considerable difficulty in interpreting S. 22 of Act 2 of 1901, and it is not at all clear whether it was or was not intended to apply to a case of this nature. To make the section apply to a case of this nature the aid of S. 13, U. P. General Clauses Act, will have to be

invoked. S. 13 of that Act, lays down that unless there is anything repugnant in the subject or in the context words importing the masculine gender should be taken to include females. But we consider that there are things repugnant both in the subject and in the context.

As regards the subject the question is in regard to widows who in the case of Hindu widows are holding the estate of a Hindu widow in the tenancy in question. Such an estate is limited in the manner of Hindu law and the Hindu law provides a certain order of succession by the reversioners on the death of the widow. If S. 22 was intended to apply to those Hindu widows who were holding the interest of a Hindu widow when the Act came into force, then we would have expected to find a definite provision in S. 22 to that effect, but the section is entirely silent as to what is to happen in the case of such widows, and the section does not purport at all to deal with widows. Then again when we come to the question of context, we find that in this S. 22 there is a provision in sub-S. (b) for the interest to devolve "on his widow till her death or re-marriage." As a female cannot have a widow this provision is therefore repugnant to making S. 22 apply to female holders. From these considerations of the subject and the context we come to the conclusion that the table of succession in S. 22 was not intended to apply to widows who had succeeded under S. 9 of Act 12 of 1881. to the interest of a Hindu widow in the tenancy of an occupancy tenant. Act 2 of 1901 provided in section 16 that

> Every tenant having a right of occupancy under S 11 or under the corresponding provisions of Act 12 of 1881 shall be called an occupancy tenant, and shall have all the rights and be subject to all the liabilities conferred and imposed on occupancy tenants by this Act.

One of the rights under the Act is in S. 20 (2)

> The interest of an occupancy tenant subject to the provisions of this Act, is heritable.

The interest therefore remained heritable; but the Act did not contain any provision which applied to the order of inheritance in the case in question. Even under the general law apart from Tenancy Acts the interest of a tenant is heritable. In the Transfer of Property Act 4 of 1882, Chap. 5 provides that the interest of a lessee is transferable and therefore heritable; but S. 117 bars Chap. 5 applying to agricultural leases except when notified by the Local Government. In the Contract Act, S. 37 provides that

> Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

The fact that the occupancy tenancy remained heritable, but that the order of succession was not affected is also shown by S. 2 (4), Act 2 of 1901 which provided:

> All rights acquired under the enactments hereby repealed shall so far as may be be deemed to have been acquired hereunder.

The words "so far as may be" show that the provisions of Act 2 of 1901 only apply so far as may be suitable. We now examine the cases which have been cited in this appeal. In order of time comes 7 A L J 293 (1), where the occupancy tenant died under Act 12 of 1881. leaving two daughters, Mt. Shibbo poor and Mt. Dulari rich. Under Hindu law Mt. Shibbo alone succeeded, and on her death Mt. Dulari claimed against the sons of Mt. Shibbo. The Court held:

> Section 22 of the Tenancy Act purports to provide for the devolution of an occupancy holding, and if the estate of Mt. Shibbo was that of a full occupancy tenant within the meaning of the section, then there is no doubt that the holding wo 1l devolve upon her death on her two sons. Mt Dulari, the plaintiff, however, contends that Mt Shibbo had only a daughter's estate, that is, a restricted life estate in the holding which came to an end with her death.

With this part of the judgment we are in agreement and we consider that this passage was a sufficient reason for the finding that Mt. Dulari had a right to succeed as the succession in S. 22 did not apply to Mt. Shibbo as she was not a full occupancy tenant. The judgment went on to say:

> It seems to us that Mt Dulari's rights were acquired on the death of her father, that is to say prior to the passing of the present Tenancy Act, and that these rights were merely postponed during the lifetime of Mt. Shibbo. The present Tenancy Act does not propose in any way to take away the rights which had already been acquired.

We think that Mt. Dulari did not acquire rights on the death of her father, but she had a mere spes successionis or chance of succeeding, such as is mentioned in the Transfer of Property Act, S. 6 (a) as not transferable. The next case in 20 I C 7 (2); by a Single Judge, was one where the facts were identical with the case before us. An occupancy tenant was succeeded by his widow under Act 12 of 1881 and his widow died under Act 2

1. Dulari v. Mul Chand, (1910) 32 All 314=5 I C 984=7 A L J 293.
2. Mt. Sumari v. Jageshar, (1913) 20 I C 7.

of 1901. leaving a daughter who sued for possession as heir of the occupancy tenant. The defence was that under Act 2 of 1901 the daughter had no right to succeed. The learned Judge did not consider whether the provisions of Act 2 of 1901 applied to the case. He merely distinguished the ruling in 7 A L J 293 (1), on the ground that it had been held there that Mt. Dulari had acquired the right to succeed on the death of her father and that right had merely been postponed during the lifetime of her poor sister. As the daughter in the case before him had not acquired any such right of succession on the death of her father but had a mere spes successionis which might have been defeated by the birth of a posthumous son or by adoption, the learned Single Judge held that the plaintiff had no right to succeed. The judgment does not deal with the problem of what is the rule of succession in such a case. In 37 All 658 (3), an occupancy tenant died under Act 12 of 1881, and was succeeded by his widow who died under Act 2 of 1901, and her daughter took possession. The plaintiffs were brothers and nephews of the father who in the case of two of them alleged that they had been joint in cultivation with him. The Bench held in the alternative that the plaintiffs could not succeed:

"Section 22, Agra Tenancy Act, provides for the devolution of the interest of an occupancy tenant, but it is perfectly clear from the language of the section that it only provides for such devolution where the tenant dies after the passing of the Act If we regard Parbhu's widow as the full tenant of the occupancy holding, the plaintiffs have no right, because they are not the male lineal descendants of Parbhu's widow, nor did they share in the cultivation with her. If we consider that Parbhu was the last full tenant, and that his widow only succeeded to a widow's estate, then it seems to us that S. 22, of the Tenancy Act, has not provided for the devolution in such a case.

38 All 197 (4) was also a case where the occupancy tenant died under Act 12 of 1881 and he was succeeded by two daughters, Mt. Dilasi and Mt. Sumitra. Mt. Dilasi died first and then Mt. Sumitra died. Plaintiffs were the son and grandson of Mt. Dilasi and defendant was the son of Mt. Sumitra. The two lower Courts held that the plaintiff who was the son of Mt. Dilasi had a right to half the holding, and the defendant had a right to the other half. Mt. Sumitra died while Act 2 of 1901 was in force. On p. 200 it was held by the Bench:

Section 22, Agra Tenancy Act, provides that when an occupancy tenant dies his interest shall devolve as therein provided. If we regard Mt. Sumitra as the occupancy tenant within the meaning of S. 22 of the Tenancy Act the plaintiff's title fails It seems to us that we cannot regard Mt. Sumitra as the full occupancy tenant. When she and her sister succeeded they succeeded merely as Hindu ladies. There is nothing in the Agra Tenancy Act which enlarges the estate of a Hindu female in an occupancy holding in possession at the time the Act was passed beyond the ordinary estate of a Hindu female. If the Act has not provided for the devolution of the interest in an occupancy holding, where it was at the passing of the Act, in the possession of a Hindu female as such, we think that we ought to go to the ordinary Hindu law to ascertain the rights of the parties. We think that the decisions of the Courts below were correct and ought to be restored.

We consider that the law laid down in this ruling should be applied and we agree that we should go to the ordinary Hindu law to ascertain the heir and that Act 2 of 1901, does not provide for the present case. In 16 A L J 459 (5) the law is not clearly laid down. In 44 All 327 (6), an occupancy tenant died under Act 12 of 1881 and his widow died under Act 2 of 1901 and reversioners of the husband sued to eject one Baldeo Singh as her representative. On p. 331, the Bench held:

As we have stated above, the succession opened out to the estate of Ram Kirpal when the Rent Act of 1881 was in force. The actual possession of the plaintiffs, if they were then in existence, was merely postponed during the lifetime of the widow: see 7 A L J 293 (1).

We do not think that this reasoning is correct, although we agree that the Bench was correct in dismissing the plaintiffs' appeal on the ground that they had not shared in the cultivation of Ram Kirpal. In 1923 All 18 (7), a learned Single Judge put forward a different view from other rulings and held that where a male tenant died under Act 10 of 1859 and his widow died under Act 2 of 1901

Succession would open out on her death to the heirs of the last male holder and would go to the persons entitled under S. 22, Agra Tenancy Act 2 of 1901, and then in existence provided that if those persons are the daughter's sons or collateral male relatives in the male line of descent, they must be cosharers in the cultivation of the holding at the time when the last occupant died.

3. Nathu v Gokalia, 1915 All 413=30 I C 215=37 All 658.
4. Bisheshar Ahir v. Dukharan Ahir, 1916 All 344=32 I C 771=38 All 197.
5. Bhup Singh v. Jai Ram, 1918 All 384=46 I C 387=16 A L J 459.
6. Bechu Singh v. Baldeo Singh, 1922 All 84=65 I C 507=44 All 327.
7. Bhawani Bhikh v. Sidh Narain, 1923 All 18=70 I C 820.

By last occupant the Court meant the widow. We consider that the weight of judicial decision is in favour of the view which we have taken, that where an occupancy tenant dies under Act 12 of 1881 and is succeeded by his widow who dies under Act 2 of 1901, the succession is not governed by section 22 of Act 2 of 1901. but by the personal law of the deceased male occupancy tenant. The plaintiff, Mt. Rajna as a daughter of the male occupancy tenant is entitled to hold on the death of the last surviving widow. The learned Single Judge has decided in her favour. We dismiss this Letters Patent appeal with costs.

Sulaiman, C. J—Without committing myself to the view that a widow who succeeded to her husband after 1901, is not an occupancy tenant within the meaning of the Tenancy Act 2 of 1901, I agree that the preponderance of authority is in favour of the view that the succession after her death occurring before 1926, in not governed by S. 22 of Act 2 of 1901, but by the personal law of her deceased husband. The least objectionable interpretation of S. 22 is that it did not apply to such widows at all. I therefore concur in the order proposed.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 848

BENNET, J.

Mahabir Prasad—Defendant—Applicant.

v.

Raghunandan Lal—Judgment-debtor—Opposite Party.

Civil Revn. No. 695 of 1934, Decided on 17th April 1935, against order of Judge, Small Cause Court, Cawnpore, D/- 15th September 1934.

Civil P. C. (1908), S. 60 (1) (b)—"Artisan"—Utensils used by sweet-meat vendor for preparing sweets are exempt from attachment—Artisan need not be person engaged in mechanical employment—It includes person working in production of some commodity.

An artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity and whatever he uses for the production of the commodity may be considered as his tools. Hence the utensils used by a sweet-meat vendor for preparation of sweet-meats are tools even though he is employed by another to make sweets: 32 *Bom* 10, *Dist*; 1932 *All* 344 and 1924 *Bom* 294, *Rel on.* [P 848 C 2]

S. N. Verma—for Applicant.

Order.—This is an application in revision by a person who calls himself a defendant. This however is admittedly a mistake for "decree-holder." The decree-holder attached certain utensils belonging to the judgment-debtor and the judgment-debtor objected that these were exempt under S. 60 (1) (b) as the tools of an artisan. The lower Court allowed the objection on the ground that a sweetmeat vendor was an artisan when he prepared the sweetmeats himself personally. I understand this finding means that these utensils are used by the judgment-debtor for preparing sweets. There is therefore no question of an abandonment by the judgment-debtor of his occupation. Learned counsel relied merely on the statement that he was now employed in service at a shop and formerly had been a shop-keeper. He is apparently employed for the purpose of making sweets. The next argument was that such a person would not be an artisan and learned counsel relied on a ruling in 32 Bom 10 (1). That ruling laid down that certain persons who were engaged in driving engines were artisans for the purpose of the Indian Emigration Act. The ruling has no bearing whatever on the present case. There are two rulings which are similar, one quoted by the lower Court, 1932 All 344 (2) in which it was held that the utensils of a soap-maker are exempt as being the tools of an artisan. Similarly in 1924 Bom 294 (3), it has been held that articles for making jaggery sugar are exempted. I consider that an artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity and that whatever he uses for the production of the commodity may be considered as his tools. For these reasons I consider the lower Court was correct and I dismiss this application with costs.

K.S. *Application dismissed.*

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1. Emperor v. Haji Shaik Mabomed Shustari, (1908) 32 Bom 10=7 Cr L J 238=9 Bom L R 1059.
2. Bindeshri v. Banshi Lal, 1932 All 344=136 I C 280=54 All 399.
3. Laxman Mahsu v. Narhari Dadasa, 1924 Bom 294=81 I C 679.

A. I. R. 1935 Allahabad 849

KENDALL AND IQBAL AHMAD, JJ.

Aijaz Ahmad—Appellant.

v.

Nazirul Hasan and *another*—Respdts.

Order in First Appeal No. 370 of 1929, Decided on 23rd August 1934.

(a) Court-fees — Suit for declaration with consequential relief — Plaintiff cannot give arbitrary valuation in plaint.

In a suit for declaration with consequential relief, it is not open to the plaintiff to give any arbitrary valuation in the plaint and the Court is not bound to accept such valuatiou : 1932 *All* 413, *Foll.* ; 32 *Cal* 734 and 1922 *Cal* 242, *not Foll.* [P 849 C 2]

(b) Court-fees — Question as to proper valuation raised — Inquiry made by trial Court and decision based on evidence and sound reasons — Finding should not be disturbed.

Where a question as to the proper valuation has been raised, it is to be decided by the Court under the provisions of S. 12, Court-fees Act ; and where an inquiry has been made and a decision has been arrived at by the trial Court and such decision is based on evidence and good reasons are given, the finding cannot be disturbed. [P 849 C 2]

S.N.Sen & Shiva PrasadSinha-for Applt.

P.L.Banerji & A.M.Khwaja—for Respts.

Kendall, J.—On this appeal being called for hearing a preliminary objection was raised on behalf of the plaintiff-respondent that the decision of the trial Court with regard to the valuation of the suit was wrong. The suit was originally valued by the plaintiff at Rs. 2,050, but on the matter going up in appeal to the District Judge the question of the sufficiency of this valuation was raised before him, and he referred the issue back to the trial Court, which has now decided that the proper valuation is Rs. 16,800 so that the appeal from the finding of the trial Court will lie to the High Court. This is the decision that is questioned now.

It was argued by Mr. Khwaja in the first place that the Court is bound to accept the valuation stated by the plaintiff in the plaint. The suit is one that comes under S. 7, Cl. (4), Court-fees Act, of 1870, and under that section the amount of fee payable is to be computed "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal." The argument is then that the plaintiff can give an arbitrary valuation in the plaint, and that the Court is bound to accept that, and there is some authority for this view in 32 Cal. 734 (1) and 35 C L J 144 (2). There are however later decisions both of the Calcutta High Court and of our own High Court which are not in accordance with this view, and we need only refer to the recent decision in 1932 A L J 416 (3). It has further been argued that even if the plaintiff cannot be allowed to give an arbitrary valuation in the plaint, the valuation in the present suit is to be determined by the provisions of S. 7, Cl. (5), Sub-Cl. (a), because it is a suit not only for a declaration but for possession, and under Sub-Cl. (a) the valuation must be held to be ten times the revenue payable on the share of the estate which pays revenue to Government. Here again we have been compelled to dissent from the view stated by Mr. Khwaja because the suit is not one that comes under Cl. (5), S. 7, but under Cl. (4), Sub-Cl. (c), as it is a suit for a declaration with a prayer for consequential relief.

Where a question as to the proper valuation has been raised it is to be decided by the Court under the provisions of S. 12, Court-fees Act, and in the present case an enquiry has been made and a decision has been arrived at by the trial Court. We have however been asked to differ from that finding on the merits of the case. The plaintiff valued the property in suit at Rs. 2,050, but the decision of the trial Court now is that the proper value of the property is Rs. 16,800. The property is situated in Jaunpur and is a part of the land which has been permanently settled with the Government. The evidence which the trial Court had before it was that of several sale-deeds dated 1926, and it has been argued that these sale-deeds show such a variation in the value that has been assigned to the land that they are not to be relied upon as a guide. The trial Court has mentioned two sale-deeds, by comparison with one of which the property in suit would be valued at Rs. 18,200 and by comparison with the other the valuation will come to Rs. 16,800. Another sale-deed was pointed out which was in evidence but which was not referred to, in which the land has been valued at Rs. 1,000 per pie, but even according to this the property in suit would be valued at over Rs. 14,000. If we

1. Hari Shankar Dutt v. Kali Kumar, (1905) 32 Cal 734=9 C W N 690.
2. Jogendra Nath v. Toriannessa Bibi, 1922 Cal 242=62 I C 685=35 C L J 144.
3. Inayat Husain v. Bashir Ahmad, 1932 All 413=141 I C 141=1932 A L J 416.

do not accept the analogy of these sale-deeds it is difficult to see what other criterion there can be for determining the value of the land. It is true that the plaintiff's servant was produced to make a statement in the trial Court, and that he said that the rate in the adjoining villages is four annas per mensem per cent, but the Court did not believe that he was telling the truth, and the only other evidence that was produced by the plaintiff was that of a mortgage deed, which is not a safe guide for the assessment of the full value of the property. We see no reason to differ from the estimate made by the trial Court which is based on evidence and for which good reasons have been given. The District Judge to whom the finding was returned was also in agreement with the Subordinate Judge.

The result therefore is that we overrule the preliminary objection and allow the plaintiff-respondent two months to make up the deficiency in court-fees. Costs in these proceedings will abide the result.

K.S. *Objection overruled.*

A. I. R. 1935 Allahabad 850

BENNET AND RACHHPAL SINGH, JJ.

Emperor v. *Dipu* and *others*

Criminal Revn. No. 740 of 1934, Decided on 7th December 1934.

(a) Criminal P. C. (1898), S. 110—Mukhias and Sarpanches are not quasi police witnesses—Their evidence must be judged from statements made—No presumption should be made against them—Witness.

Mukhias and Sarpanches are respectable persons and they are appointed to these offices because of their respectability. It is totally wrong to describe them as "quasi police witnesses." On account of the position held by these men in villages in which they reside, they are in a far better position to know about the bad characters residing in their villages. It is altogether absurd to start with a presumption against them. The proper way of judging the evidence of a witness is to consider the statement made by him and then to arrive at a conclusion whether he has given true evidence or not. No presumption should be made against him merely on the ground that he happens to be a Mukhia or a Sarpanch. [P 851 C 1]

(b) Criminal P. C. (1898), S. 110 — Proceedings under— Police officials—Evidence should not be discarded—It should be judged on merits.

The police officials very often are in a far better position to depose about the character of a man than witnesses who may be living in different villages and who may have been examined in defence by the accused. The right way of judging the evidence of police officials is to consider their statements on the merits and then to determine whether they have given true evidence or otherwise. There is no justification whatsoever for discarding the evidence of a police official simply on the ground that he belongs to the police. There may be a large number of cases in which the evidence of the police official may be more convincing and which an accused person may not be able to rebut by the production of a large number of witnesses. It is the duty of the police officials to keep under surveillance suspected persons, and in many cases they can give evidence as regards the character of an accused person, which may be found to be far more satisfactory than the evidence of witnesses who do not belong to the police department. [P 851 C 1, 2]

(c) Criminal Trial— Decision should not depend on number of witnesses party is able to produce.

The decision of a case should not depend on the number of witnesses a party is able to produce. It is not a judicial method of approaching a case. The proper and the judicial method of deciding a case is to consider the evidence produced on both sides, regardless of the number of witnesses examined and then to come to conclusion whether the prosecution or the defence has established its case. [P 851 C 2; P 852 C 1]

Govt. Advocate—for the Crown.

Debi Prasad—for Opposite Party.

Rachhpal Singh, J.—This is a revision application on behalf of the Local Government against an order of the Sessions Judge of Ghazipur allowing the appeals of the three respondents in a case under S. 110, Criminal P. C.

Proceedings under S. 110, Criminal P. C., were taken in the trial Court against Jagrup, Girdhari, Dipu, Raghunath and Harnandan. They were all bound over to be of good behaviour for a period of one year by the learned Deputy Magistrate. Against that order appeals were preferred by the above named persons in the Court of the Sessions Judge of Ghazipur. He came to the conclusion that the case was established against Harnandan and Jagrup and their appeals were dismissed. As regards Dipu, Raghunath and Girdhari, he found that the prosecuton evidence did not justify their being bound over, and he, therefore set aside order of the trial Court and discharged these three persons. The revision application has been made against the order of the learned Sessions Judge so far as it relates to Dipu, Raghunath and Girdhari. Girdhari is still absconding and so his case will be considered by this Court, when he is served with a notice of this revision application. We have only to consider the case of the other two respondents, Dipu and Raghunath. After hearing the learned counsel appearing on both sides we are clearly of opinion that the order of discharge passed by the lower appellate Court is wrong and cannot be sustained.

It appears that 59 witnesses were examined on behalf of the prosecution. Out of these 21 were police officials, 2 were Mukhias and 1 a Sarpanch. The learned Sessions Judge expressed the view that the evidence of the police officials, and of Mukhias and of Sarpanch, whom he styled as "Quasi police witnesses" should be ignored altogether as they could not be considered to be quite independent. In our opinion this is an altogether wrong view to take. Mukhias and Sarpanches are respectable persons and they are appointed to these offices because of their respectability. It is totally wrong to describe them as "quasi police witnesses." On account of the position held by these men in villages in which they reside, they are in a far better position to know about the bad characters residing in their villages. It is altogether absurd to start with a presumption against them. The proper way of judging the evidence of a witness is to consider the statement made by him and then to arrive at a conclusion whether he has given true evidence or not. No presumption should be made against him merely on the ground that he happens to be a Mukhia or a Sarpanch. The learned Sessions Judge has discarded from consideration the evidence of a large number of police officials solely on the ground that they belong to that department. This view is also utterly wrong and wholly unjustified. All that we need say is that it possesses the merit of novelty. The police officials very often are in a far better position to depose about the character of a man than witnesses who may be living in different villages and who may have been examined in defence by the accused. The right way of judging the evidence of police officials is to consider their statements on merits and then to determine whether they have given true evidence or otherwise. There is no justification whatsoever for discarding the evidence of a police official simply on the ground that he belongs to the police. There are and there may be a large number of cases in which the evidence of the police official may be more convicing and which an accused person may not be able to rebut by the production of a large number of witnesses.

It is to be borne in mind that it is the duty of the police officials to keep under surveillance suspected persons, and in many cases they can give evidence as regards the character of an accused person, which may be found to be far more satisfactory than the evidence of witnesses, who do not belong to the police department. Then it is possible that some of the police officials examined in this case might have given evidence to prove certain points against the respondents from their personal knowledge. Or they might have been eye witnesses to certain events. In such a case it would be absurd to brush aside their evidence on the ground of their belonging to the police department. We have therefore no doubt whatsoever in our mind that the learned Judge did not act rightly in discarding the evidence of the police officials on this ground. It appears to us that the learned Judge has not made an attempt to approach the case in a proper manner. Both sides had produced evidence in the case and the right course for the learned Judge was to consider the evidence of the party on the merits. If after a consideration of the evidence produced in the case the learned Judge had come to the conclusion that there were good reasons for not accepting the prosecution evidence, then he would have been perfectly entitled not to place any reliance on it. But we find that in the case before us no such attempt was made by him at all. He mentions the number of the witnesses examined by the prosecution and the defence respectively, and as he found that the number of the defence witnesses was larger than that of the prosecution witnesses so he has given finding in favour of the accused. This can hardly be said to be a judicial method of approaching a case. The decision of a case should not depend on the number of the witnesses a party is able to produce.

It is possible that in a particular case the evidence of 4 witnesses examined by the one party may be far more convincing than the evidence of the 50 witnesses whom the opposite party may produce. The proper and the judicial method of deciding a case is to consider the evidence produced on both sides regardless of the number of witnesses examined and then to come to conclusion whether the prosecution or the defence has established its case. We are of opinion that the learned Judge should have taken into consideration the evidence produced by both sides in the case and should have then given his finding as to which party's case in his opinion was true. The judgment of the learned Sessions Judge does not show that he approached the

case in the manner in which it should have been approached. When parties have produced evidence they are entitled to ask that that evidence should be considered and then a decision should be given. In the case before us the learned Judge went wrong in discarding the evidence of a large number of witnesses merely on the ground that some of them were police officials and others were "quasi police witnesses." He was also wrong in holding that because the defence was able to produce a large number of witnesses than the prosecution therefore the prosecution has not been able to make out a case. In our opinion the case was not considered by the Sessions Judge as it should have been.

We do not propose here to go into the evidence produced in the case. In our opinion the appeal has not been properly tried by the learned Sessions Judge and it is therefore necessary that we should set aside his order and send back the case for a re-hearing of the appeal. The evidence produced by both sides should be considered by the learned Sessions Judge afresh, and then he should come to a finding as to whether or not the prosecution has been able to make out a case against Dipu and Raghunath. For the above mentioned reasons we allow this application, set aside the order of the lower appellate Court so far as it relates to Dipu and Raghunath, and direct that their appeals be re-heard and then disposed of according to law.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 852

KENDALL, J.

Thakur Singh — Defendant — Applt.

v.

Kandhai—Plaintiff—Opposite Party.

Civil Revn. No. 704 of 1934, Decided on 1st May 1935.

Arbitration—Defendant not appearing before arbitrator on date fixed for final disposal — Arbitrator passing award —Court cannot pass decree based on such award without issuing notice to defendant.

Where a defendant does not appear before the arbitrator to whom the dispute has been referred for arbitration and the arbitrator makes an award, the Court cannot pass a decree on the basis of such award without issuing notice to the defendant under para. 10, Sch. 2, Civil P. C., and the failure to issue such notice is fatal to the decree. The Court has no jurisdiction to deal with the matter as if there had been no arbitration, for two reasons. In the first place the arbitration has not been superseded, and in the second place, the Court has no evidence before it on which to pass even an ex parte decree as it cannot treat the report of the arbitrator as evidence : 20 *All* 474 and 1933 *All* 313, *Rel on.* [P 853 C 1]

S. C. Das—for Applicant.

S. K. Nehru—for Opposite Party.

Order. — The circumstances which have led to this application are somewhat unusual. The plaintiff opposite party filed a suit in the Small Cause Court of Allahabad, which was transferred to the Court of the honorary Munsif. The matter was referred to arbitration on 9th November 1935. On 5th February 1934, a report was received from the arbitrator by the Court to the effect that the defendant had failed to appear on some of the dates fixed, that he had finally failed to appear on the 27th January which had been fixed for final disposal and that the arbitrator had therefore no alternative, but to recommend that the plaintiff's claim be decreed ex parte, adding that the defendant might however get the decree set aside by a proper motion if he so desired, as the recommendation made by the arbitrator was an ex parte one. No notice was issued to the defendant on the receipt of this report, and the Court ordered the matter to be put up on 15th February 1934, i. e., after ten days. In February the Court passed an order that no objection had been received and that the suit was decreed in accordance with the award. A few days later the defendant made an application to the Court to the effect that the award was an ex parte one, that the defendant had received no notice and that the decree was also ex parte. The Court apparently considered this as an objection to the award, and after several hearings disposed of it on the 31st August in the following order:

The grounds on which it is prayed that the award be set aside are not sufficient. We therefore confirm the award and pass a decree in accordance with the award.

It will be observed that the decree in accordance with the award had already been passed on 15th February 1934, and that this order of the 31st August was merely a repetition of the former one. The main ground on which the present application is based is that no notice of the filing of the award was given to the defendant as required by para. 10, Sch. 2, Civil P. C.

That such a notice is necessary is clear from the provisions of para. 10 of the Schedule, and also from the decisions in several cases, among which may be quoted those of 20 All 474 (1)

1. Chatarbuj Das v. Ganesh Ram, (1898) 20 All 474=1898 A W N 132.

and 1933 A L J 149 (2). It has been argued however that there was no award and therefore no notice was necessary. The arbitrator in forwarding the report to the Court was acting it is said, under Cl. (2), para. 7 of Sch. 2, in which it is provided that persons making default before the arbitrator shall be subject to the like disadvantage by order of the Court on the representation of the arbitrator as they would incur for the like offences in suits tried before the Court. If a party fails to appear before the Court, it is open to the Court to proceed ex parte, and it is therefore argued that the Court on the recommendation of the arbitrator proceeded ex parte and pronounced a decree, which required no notice.

No authority has been quoted which will cover the proceedings in the present case. It appears to me however that the application is bound to succeed, because what the Court did was to give a decree in accordance with the award without issuing the notice required by para. 10. When the arbitrator made his report under para. 7, the proper procedure apparently was for the Court to pass an order directing that as the defendant had defaulted in appearance, the proceedings should be ex parte, and the arbitrator should then have pronounced his award and filed it in Court, after which notice could have been issued under para. 10 and the ordinary procedure relating to arbitration would have followed. The Court had no jurisdiction to deal with the matter as if there had been no arbitration, for two reasons. In the first place, the arbitration had not been superseded, and in the second place, the Court had no evidence before it on which to base even an ex parte decree. It could not treat the report of the arbitrator as evidence. Indeed it appears to be clear from the wording of the orders passed that the Court was dealing with the report of the arbitrator as if it had been an award. This being so, the failure to issue a notice to the defendant is clearly fatal to the validity of the decree.

I therefore allow the application with costs, set aside the decree and order of the Court and direct that the suit be readmitted on its original number and disposed of according to law. The arbitration not having been superseded, I must direct that the Court shall deal with the report of the arbitrator as one made under para. 7 of Sch. 2 and pass orders on it in the light of the above remarks.

K.S. *Application allowed.*

2. Udit Singh v. Ram Lakhan Singh, 1933 All 313=145 I C 403=1933 A L J 149.

A. I. R. 1935 Allahabad 853

KENDALL, J.

Janki Misir—Appellant.

v.

Beni Singh and *others*—Respondents.

Second Appeal No. 1081 of 1933, Decided on 30th April 1935.

(a) Civil P. C. (1908), O. 23, R. 1—Order under O. 23, R. 1 affecting valuable rights acquired by persons not impleaded to such proceeding—Order is not binding on such persons.

Where an order has been passed under O. 23, R. 1 affecting the valuable right acquired by persons who have not been made parties to that proceeding, the order is not binding on those persons and has not the effect of depriving them of that valuable right. [P 854 C 2]

A suit was dismissed against all defendants and pending the appeal filed by the plaintiff, one of the defendants died and the appeal as against his representatives was allowed to abate. The appellant then applied to withdraw the suit under O. 23, R. 1 and permission was given with the result that another suit was filed:

Held: that the representatives of the deceased defendant could not be affected by the order passed under O. 23, R. 1 as they were no parties to it and that the decree passed in the original suit was binding on appellant as against them: 21 *M L J* 574, *Dist.* [P 854 C 1]

(b) Practice — Inconsistent decrees held should not be made.

Several persons were sued as trespassers on property to which the plaintiff laid claim as mortgagee. The suit was dismissed. On appeal by the plaintiff, one of the trespassers died and the appeal abated against his representatives. Suit was then withdrawn under O. 23, R.1, Civil P. C. In a subsequent suit against the representatives of the deceased and other trespassers:

Held: that the former decree had the effect of res judicata as regards the representatives of the deceased, and the necessary effect of this on the other defendants was that a decree against them could not be consistent with the decree against the representatives of the deceased and hence the whole suit should be dismissed. [P 854 C 2]

A. P. Pandey—for Appellant.

N. P. Asthana—for Respondents.

Judgment.—This is an appeal against the appellate order of the Second Additional Subordinate Judge of Jaunpur, confirmng the order of the trial Court, which had dismissed the plaintiff-appellant's suit. The facts are given sufficiently fully in the order of the lower appellate Court. The question that has been argued in second appeal is contained in the 3rd issue set forth in that judgment, namely, whether the decision of the previous suit operates as a bar against the plaintiff so far as defendants 2, 3 and 4 are concerned.

When the Subordinate Judge came to deal with this question however what he considered was whether the decision of the previous suit had the effect of barring the plaintiff's suit against all the defendants.

In the suit brought by the present appellant in 1927, for possession of this property against trespassers, the defendants were the same as in the present proceedings, with this exception, that defendant 4 in the former suit Sardar Singh, has died and is now represented by the present defendants 2 to 4, who are the respondents in the present appeal. The former suit was dismissed as against all the defendants, and the present appellant filed an appeal, but during these proceedings Sardar Singh died and the appeal was allowed to abate against his representatives. The appellant therefore filed an application to be allowed to withdraw the suit under O .23, R. 1, Civil P. C., and this permission was given with the result that the present suit was brought. The short question which I have to decide in appeal therefore is the effect of the proceedings in 1927 on the present suit. The lower appellate Court has found that the representatives of Sardar Singh could not be affected by the order passed by the Court under O. 23, R. 1 because they were no parties to that proceedings, and the result was that the decree given in 1927, against the appellant and in favour of Sardar Singh had the effect of res judicata. Having decided this point, the lower appellate Court then went on to consider the effect of this decision on the other defendants, and found that as they had all been sued as trespassers on the property to which the plaintiff-appellant laid claim as mortgagee, it would be impossible to give a decree against the defendants other than defendants 2 to 4 because such a decree would not be consistent with the decree which it was necessary to give in favour of defendants 2 to 4 allowing them to remain in possession. It therefore agreed with the trial Court in dismissing the plaintiff's suit.

Mr. Pande, for the appellants, has argued that the legal effect of the Court's order allowing the former suit to be withdrawn is that that suit must be deemed not to have been instituted. In other words, the whole of the decree has been vacated, and it cannot have any force as res judicata in favour of defendants 2 to 4. When met with the argument that the order of the Court under O. 23, R. 1 could not be held to be binding on defendants 2 to 4 who were no parties to the proceeding, he referred to a decision of the Madras High Court in 21 M L J 574 (1), in which a somewhat similar question was considered, and it was held that as the parties were not represented in the proceedings under O. 23, R. 1 and had not taken any steps to have that order set aside in revision or review, they could not now object to sue on the ground that the order granting leave was inoperative. There is however a clear distinction between the circumstances in the present case and those in the one before the Madras High Court. In the present case the contesting respondents had acquired a valuable right by the decision of the suit in their favour in the trial Court, whereas in the case before the Madras High Court the parties concerned had not acquired any right at all. I cannot therefore accept this authority for deciding that where an order has been passed under O. 23, R. 1 affecting the valuable right acquired by persons who have not been made parties to that proceeding, the order is binding on those persons and has the effect of depriving them of that valuable right.

The next argument for the appellant was that even supposing the right of defendants 2 to 4 acquired in the previous litigation could not be affected, the plaintiff should nevertheless have been allowed a decree against the rest of the defendants who were undoubtedly bound by the order under O. 23, and who were shown on the findings of fact to be trespassers on property to which the plaintiff had proved his title. Mr. Pande has not been able however to satisfy me that the decision of the lower appellate Court is wrong. A decree given in the plaintiff-appellant's favour could not possibly have the effect of giving him possession as against defendants 2 to 4, and a decree giving him possession against the rest of defendants alone could not possibly be executed. None of the defendants has any right to trespass over any share of the property. The plaintiff-appellant must either have the whole of it or none of it, and I therefore agree that a decree given against the defendants other than defendants 2 to 4 would necessarily be inconsistent with the decree which the Court is bound to give in favour of defendants 2 to 4. The

1. Peria Perumal Muthirian v. Pichan, (1911) 21 M L J 574=8 I C 268.

result is therefore that the appeal fails and is dismissed with costs.

Leave to appeal under the Letters Patent is given.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 855

GANGA NATH, J.

Tika Ram—Defendant—Appellant.

v.

Sobha Ram—Plaintiff—Respondents.

Second Appeal No. 807 of 1933, Decided on 5th April 1935, from decision of Sub-Judge, Agra, D/- 17-1-33.

(a) Tort—Seduction—Action for—Plaintiff must prove that female was in his service and that by reason of seduction he is deprived of her services—He is not entitled to damages for mere mental pain or anxiety.

In an action for seduction, the plaintiff must prove that the female seduced was in his service, actual or constructive, at the time of seduction, otherwise there is no injuria; that by reason of the act complained of or otherwise he was deprived of her services, otherwise there is no damnum, and both injuria and damnum are necessary to support this action. The plaintiff is not entitled to damages for mere mental pain or anxiety: *Grinnell* v. *Wells*, (1844) 66 *R R* 835 and *Lynch* v. *Knight*, (1861) 9 *H L C* 577, *Rel on.* [P 855 C 2]

(b) Tort—Seduction—Suit for damages is governed by Art. 22 and not by Art. 36, Limitation Act.

A suit for damages for seduction is governed by Art. 22, and not by Art. 36, Lim. Act: 5 *I C* 124, *Rel on.* [P 856 C 1]

B. Malik and *Jagdish Swarup*—for Appellant.

N. P. Asthana—for Respondent.

Judgment.—This is a defendant's appeal and arises out of a suit brought against him by the plaintiff-respondent for damages for mental worry ,anxiety and disgrace caused by the defendant's enticing away the plaintiff's wife. The plaintiff claimed Rs. 1,800 as damages for disgrace and mental pain. The defendant contended that the plaintiff had no cause of action and that the suit was time barred. The trial Court found that the defendant enticed away the plaintiff's wife and gave the plaintiff a decree for Rs. 400 with full costs. The decree was confirmed by the Subordinate Judge on appeal.

As already stated, the plaintiff has claimed damages for only mental pain and disgrace. In an action for seduction, the plaintiff must prove: (1) that the female seduced was in his service actual or constructive, at the time of seduction, otherwise there is no injuria; (2) that by reason of the act complained of or otherwise he was deprived of her services, otherwise there is no damnum, and both injuria and damnum are necessary to support this action: Mayne on Damages, Edn. 10, (vide p. 486), says:

> The action for seduction, properly so called, is an anomalous one. In form it purports to be merely an action for the consequential damage arising from the loss of service, resulting from the act complained of. Hence the action will fail unless some loss of service can be shown.

No Indian authority has been produced on this point, but the English cases are clear. In 66 R R 835 (1), it was held that an action for seduction cannot be maintained without loss of service. At p. 842, it was observed:

> The foundation of the action by a father to recover damages against the wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. It has therefore always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail: see 2 T R 166 (2).

Mr. Ramaswamy Ayyar in his law of Torts at p. 56 says with reference to an action of a husband for loss of society of his wife caused by enticement that:

> In all these cases the action lies only on proof of loss of service. The service may be actual or constructive.

As regards the damages for mental pain or anxiety, the plaintiff is not entitled to damages for mere mental pain or anxiety. In 9 H L C 577 (3), at p. 598, it was laid down:

> Mental pain or anxiety, the law cannot value and does not pretend to redress when the unlawful act complained of causes that alone, though where a material damage occurs, and is connected with it, it is impossible that a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant; the loss of service is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honour and wounded feelings of the parent.

As regards limitation, the seduction took place in October 1930. The suit was brought in March 1932. The lower Court has applied Art. 36. Art. 36

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1. Grinnell v. Wells, (1844) 66 R R 835=14 L J C P 19=7 Man & G 1033=8 Scott N R 741=2 D & L 610=8 Jur 1101.
2. Bennet v. Alcott, (1864) 2 T R 166=31 R R 667.
3. Lynch v. Knight, (1861) 9 H L C 577=8 Jur (n s) 724=5 L T 291.

does not apply. It is Art. 22 which applies. Art. 22 is for compensation for any other injury to the person for which the period is one year from the time the injury is committed. This view is supported by 5 I C 124 (4). There it was held that a suit for damages or compensation for injury caused to a person's reputation and for mental pain arising out of an assault is governed by Art. 22, Sch. 2, Limitation Act. The suit having been brought more than one year after the injury was caused is time barred. It is therefore ordered that the appeal be decreed with costs, and the decree of the lower Court be set aside and the plaintiff's suit be dismissed with costs.

Permission to file a Letters Patent appeal is granted.

K S. *Appeal allowed.*

4. Arhat Misir v. Baldeo Ahir, (1909) 5 I C 124.

A. I. R. 1935 Allahabad 856

NIAMATULLAH AND BAJPAI, JJ.

Mt. Latifunnissa—Plaintiff — Appellant.

v.

Najmuddin Shah and *others*— Defendants—Respondents.

First Appeal No. 399 of 1928, Decided on 1st May 1935, from decision of Second Sub Judge, Cawnpore, D/- 20th August 1928.

(a) Mahomedan Law – Wakf or family arrangement—No dedication in perpetuity—No provision made regarding mutawalis in future generations—Object of wakf limited to certain named individuals — Very small part of income for charity—No provision that income of property is to be spent ultimately for benefit of poor—Deed held no wakf but held valid family arrangement.

There was no dedication in perpetuity by the alleged deed of wakf. It did not make any provision as regards mutawallis in future generations. Similarly the object of the wakf was limited to certain individuals named. The charities exhausted a very small part of the income of the property and there was no provision that after the extinction of line of the wakif the income of property was to be spent for the benefit of the poor:

Held : that the deed was not a wakf, 1930 *All* 837, *Rel on.*; but that the deed was valid as a family arrangement as the parties agreed that the properties should be managed in particular manner and income disposed of in manner stated, and as the object of it was to prevent division of property into small shares and to preserve peace and harmony in family: 1922 *P C* 107, *Rel on.* [P 860 C 2]

(b) Advancement—Property belonging to husband standing in wife's name—There is no presumption of advancement—Old house belonging to wife demolished and replaced by new ones erected with funds deposited in their joint names—Inference is that husband intends to make wife owner of superstructure also.

There is no presumption of advancement where property belonging to a husband is made to stand in the name of wife, but where the husband deposits his own money in the joint names of himself and his wife with drawability by either of them and the old houses belonging to the wife are demolished and replaced by new ones erected with the aid of such funds and old materials, it is a fair inference that the husband's intention was to make the wife, who was already the owner of the sites, to be the owner of the superstructures also. [P 862 C 1]

S. N. Sen and *Mukhtar Ahmad* — for Appellant.

K. N. Katju, S. M. Husain, N. U. A. Siddiqui and *S. Majid Ali*—for Respondents.

Judgment.—This appeal arises from a decree passed by the Subordinate Judge, Cawnpore, in a suit brought by the appellant, Mt. Latifunnisa, for a declaration that a "wakfnamah," dated 24th September 1926, purporting to have been executed by her, and a deed of agreement of even date also purporting to have been executed by her, are void against her and do not affect her proprietary interests in the property detailed in Schs. 1 and 2, appended to the plaint, and for recovery of possession of a house mentioned in Sch. 3, which is identical with one of the four items of property mentioned in Sch. 1. It has been mentioned in a separate schedule in addition to its reference in Sch. 1, because the plaintiff claims possession of this house, while in respect of other property her suit is confined to a mere declaratory relief. The suit was dismissed by the trial Court which left certain issues undetermined. On the hearing of this appeal a Bench of this Court remanded the suit for a finding on a number of issues stated in an order dated 8th November 1932. The findings on those issues have since been received, and we have heard learned counsel for the parties on the whole case which is now ripe for a final decision.

The plaintiff impleaded as defendants to the suit seven persons. Defendant 1, Saiyed Najmuddin Shah, is admittedly the "sajjadanashin" of a "khanqah" at Fatehpur and the spiritual preceptor of the plaintiff. Defendant 2 is the son-in-law of defendant 1. Defendants 3 and 4 are the disciples of defendant 1. None of these defendants belong to the plaintiff's family. Defendant 6, Mt. Sughra Bibi,

is the daughter of the plaintiff. Defendant 5, Allahdiya Khan, is the husband of defendant 6. Defendant 7, Fazal Hasan Khan, is the plaintiff's son. The contest lies between the plaintiff and her daughter, defendant 6, who is hereinafter referred to as the defendant. The latter's husband has been impleaded only because he is said to have been instrumental in bringing about the alleged "wakf" and the agreement impugned by the plaintiff. Defendant 7 did not contest the suit, and is apparently at peace with his mother.

The plaintiff is the widow of one Yar Hasan Khan, who was employed in the Commissariat and died in 1925, leaving the plaintiff, his widow, and defendants 6 and 7, his daughter and son, respectively. He left a sum of over Rs. 32,000 which was realised by the plaintiff. It was divided among the three heirs of Yar Hasan Khan after payment of Rs. 11,000 dower debt due to the plaintiff, and sundry other charges. Defendant 6, the daughter, received Rs. 6,231-11-4 as her share. The daughter laid claim to a share in five houses situated in Cawnpore, the first four of which are mentioned in Sch. 1, and the fifth in Sch. 2. She alleged that all the five houses belonged to her father. The plaintiff, on the other hand, claimed them to be hers, in which her husband or his heirs had no interest. House No. 4, entered in Sch. 1 (also mentioned in Sch. 3) is claimed by the defendant as her own property under an oral gift made in her favour by her father at the time of her marriage. It is common ground that the sites of the four houses, mentioned in Sch. 1, belonged to the plaintiff, who inherited them and the houses then standing thereon from her parents. The houses originally standing on them were partly "kachcha" and partly "pucca" which were subsequently demolished, and the houses now standing on those sites were built at a considerable cost. According to the plaintiff, such cost amounted to Rupees 12,500; while according to the defendant, no less than Rs. 25,000 was spent on the new constructions. The plaintiff alleges that the money spent on the new buildings belonged to her while the defendant's case is that it was her father who constructed the existing buildings with his own funds.

This is one of the questions to be decided in this appeal. The house entered in Sch. 2 was admittedly purchased under a sale deed in the name of the plaintiff, who claims to be the owner thereof. The defendant, on the other hand, alleges that this house, like the others, belonged to her father, who purchased it under a benami sale deed in the name of the plaintiff. This is another point in dispute between the parties. The wakfnamah and the agreement, impugned by the plaintiff, are alleged by the defendant to have been executed by the plaintiff in the following circumstances:

After the distribution on 12th June 1926, of cash left by the plaintiff's husband, among his heirs, there was a dispute between the plaintiff and her daughter, defendant 6, in respect of the houses now in question. There is little doubt that it was the son-in-law, defendant 5, who was setting up a claim on behalf of his wife and, but for his activities, matters would not have come to this pass. It was agreed that all the disputes between the parties be referred to an arbitration by defendant 1 who was highly respected by both of them. Accordingly an agreement was executed on 2nd May 1926, by the plaintiff, her daughter (defendant 6), her son (defendant 7) and her son-in-law (defendant 5) referring all disputes for decision by defendant 1 as arbitrator. On 6th June 1926, the plaintiff and her daughter appeared before the arbitrator, and the plaintiff promised to produce some documents on a subsequent date. These facts are noted in Ex. C, which purports to be proceedings before the arbitrator bearing the thumb-mark of the plaintiff. Eventually defendant 1 delivered an oral award, directing that the property be distributed according to Mohamedan Law. The plaintiff thereupon executed another document on 31st July 1926, which is styled as "kabuliyat." It purports to bear the thumb-marks of the plaintiff and her daughter, defendant 6. They signify by that document their acceptance of the award. All this happened at Fatehpur, where defendant 1 resides in his "khanqah." The plaintiff, her children and her son-in-law reside at Cawnpore.

After the award was delivered, the plaintiff is said to have told her daughter and son-in-law that her husband, Yar Hasan Khan, had contemplated a wakf-alal-aulad in respect of the property and that its division was likely to be detrimental to all and that it would be better if instead of the property being partitioned she were al-

lowed to execute a deed of wakf which should ensure enjoyment thereof by all concerned. This suggestion was accepted by the daughter and her husband. Accordingly a deed of wakf was executed on 24th September 1926. The deed declared one of the houses as the exclusive property of the plaintiff and her son while another house, which is alleged to have been made a gift of to the defendant on the occasion of her marriage, was declared to be her property. These two houses are, according to the deed, unaffected by the wakf. The income of the other houses, which are made wakf, after making allowance for repairs and public charges and Rs. 30 a month as the allowance of the plaintiff, who is to remain the "mutawalli" during her lifetime, is to be divided between the son and the daughter in the proportion of 2 to 1. To be more exact, the son is to get Rs. 120 a month, while the daughter is to receive Rs. 60 a month. The total income, as given in the deed, is Rs. 225. On the same date an agreement was executed by the plaintiff, her son, daughter and son-in-law who agreed to hand over the income of the "wakf" property to defendant 1, who was to supervise the superintendence of the "wakf" by the "mutawalli" and to distribute the allowance in terms of the deed of wakf. According to the agreement, the mutawalli, was to hand over the income of the "wakf" property to defendant 1 and submit her accounts to him. There are other provisions in the agreement but in view of what has happened it is not necessary to enter into a detailed discussion of that document. An application was made to the Municipal Board for entry of the name of defendant 6 in respect of the house allotted to her by the deed. Similarly an application was made for entry of the name of defendant 7 (the son) in respect of the house reserved for him and the plaintiff. As regards the rest of the houses, entry was to be made in the registers of the Municipal Board that they were "wakf" properties and in possession of the plaintiff as "mutawalli."

The above, in brief, are the defendant's allegations. The plaintiff however denies the material part of the story narrated above. She instituted the suit which has given rise to this appeal on 12th December 1927. She alleged in her plaint that the agreement to refer the dispute to arbitration the wakf and the agreement in favour of defendant 1 were not executed by her, and that advantage was taken of her position as an illiterate "pardanashin" lady by all the defendants. She alleges to have affixed her thumb-marks to certain blank papers at the instance of defendants 5 and 6. Fraud and undue influence, alleged by her, are described in paras. 7 to 12 of her plaint. According to her story, defendants 1 and 2 identified themselves with the interests of the daughter and participated in the fraud alleged by her. She also attributes a desire to defendant 1 to have control of the entire property belonging to the plaintiff.

A written statement was filed by defendants 1 and 2, who repudiated the plaintiff's allegation so far as it charged them with fraud and unfair dealings, and consented to the agreement entrusting the superintendence of the "wakf" to defendant 1 being cancelled. They disclaimed all interest in the property or its management. Similarly, defendants 3 and 4 filed a written statement denying the plaintiff's allegation so far as it attributed any fraud to them. Defendants 5 and 6 contested the plaintiff's claim, alleging that the plaintiff had agreed to refer to arbitration the dispute which had arisen in respect of the property now in suit, that the award made by defendant 1 was accepted by her and that the deed of wakf was executed by her intelligently and voluntarily.

The trial Court set aside the agreement in view of the attitude adopted by defendant 1. In other respects the suit was dismissed. Originally the suit was tried by Mr. Gopal Chand Sharma, who held that no fraud was practised on the plaintiff, that she referred the dispute which had arisen between her and her daughter to an arbitration by defendant 1, who made an award directing that the property be divided according to Mohamedan Law, and that she subsequently executed the deed of wakf, as alleged by the defendant. The issues relating to ownership of the houses in dispute were left undecided by the Subordinate Judge, and as already stated, this Court remitted a number of issues, which were decided by another Subordinate Judge, Mr. Malik, who had in the meantime succeeded Mr. Sharma. His findings are mostly in favour of the plaintiff. It has been found on those issues that the land, on which the present buildings stand, was inherited by the plaintiff from her father,

that she built the houses now existing with funds belonging to herself, that the house entered in Sch. 2 was purchased by her and the sale-deed in her favour was not "benami" for her husband, and that the house entered in Sch. 3 was not given to defendant 6 at the time of her marriage, as alleged by her. These findings have been challenged by the defendant. The findings arrived at by Mr. Gopal Chand Sharma, so far as they are against the plaintiff, have been challenged by her. Practically the whole case has been argued and we have to record our findings on all the material questions arising in the case.

It was denied by the defendant that the plaintiff is a "pardanashin" lady and entitled to the protection which the law extends to her as regards documents executed by her. It was found before remand that the plaintiff is a "pardanashin" lady, and that the case should be approached in the light of rules applicable to documents executed by "pardanashin" ladies. There is ample evidence on the record to justify the finding that the plaintiff is a "pardanashin" lady. Nothing has been said in arguments which can persuade us to take a different view.

Mr. Gopal Chand Sharma rightly threw the onus in the first instance on the defendant to establish that the plaintiff executed the agreement of reference and the deed of wakf knowing their nature and effect on her interest, and was a free agent in doing so.

The plaintiff admits that her son-in-law and her daughter, claimed a share on the house property. She also stated that the dispute about the cash was settled, but that in respect of the "property" (implying the houses) was not amicably settled and that she claimed it to be her own while they (daughter and son-in-law) claimed it to be the property of her husband. It is probable that the parties would be disposed to refer the dispute between them to an arbitration by defendant 1 whom they and a large number of other Mohamedans of the locality regarded as a saint and who was expected to give an impartial decision on the questions at which the parties were at variance. The agreement of reference is a simple document, which provides that defendant 1, "may decide all our disputes relating to ownership and partition of the movcable and immovable properties." The main controversy between the parties was whether the immovable property belonged to Yar Hasan Khan as alleged by the daughter, or to the plaintiff herself. There is no doubt that if the agreement to refer was duly executed by the plaintiff, this question was the principal issue which called for a decision by the arbitrator. The agreement purports to have been scribed by one Waris Ali Khan and signed, inter alia, by the plaintiff's son, Fazal Hasan Khan, Waris Ali Khan was examined as a witness and stated that the plaintiff, who was in a "burqa," signed the agreement in his presence and that the document was read over to the parties, who accepted its terms. The only thing elicited in cross-examination is that though he is not a disciple of defendant 1, he has "confidence" in him (defendant). There is nothing in the evidence of this witness which need excite any suspicion. At the same time, he does not say that the document was explained, and deposed to the same having been merely read over to the plaintiff. Allahdiya, the plaintiff's son-in-law, has however stated the circumstances in which she executed the agreement. He says that there was a dispute in respect of the "tarka" of Yar Hasan and that the plaintiff agreed to refer the dispute to defendant 1 for decision. He also states that the agreement was explained to her. The stamp purports to have been purchased by the plaintiff's son, Fazal Hasan, on 1st May 1926. Fazal Hasan has not been examined as a witness in the case. The plaintiff adduced evidence to prove that Fazal Hasan is an idiot. The lower Court has not accepted this allegation; nor are we satisfied that there is any truth in this allegation. It may be that Fazal Hasan, who is described in the deed of wakf as "sidha sadha admi" (a simple man) was not considered sufficiently clever to stand cross-examination and was, for that reason, not produced; but there is no warrant for the suggestion that he is incapable of giving evidence.

One Nawab Ali, who is a zamindar paying revenue of Rs. 600, has stated that he wrote Ex. C, which he described as an application on behalf of the plaintiff but which appears to be more in the nature of proceedings before an arbitrator. He says that it was at the instance of the plaintiff that he wrote that document. He also deposes that the parties adduced oral evidence before the arbitrator and that he himself took down the evidence. According to him, the plaintiff affixed

her thumb-mark on Ex. C, which records her declaration that she would produce documents at a subsequent hearing. This witness so deposes to the oral award made by defendant 1, to the effect that the property should be divided according to the Mohamedan Law. The witness further deposes that the parties accepted the award, which was subsequently written out on a stamp paper of Rs. 5 and was laid before defendant 1 for signature; but the latter refused to sign it on the ground that "he is not a worldly man" and could not associate himself with worldly matters. Thereupon the parties requested the witness to record their acceptance of the award. Ex. D was then written by the witness and signed by the plaintiff and her daughter, both agreeing to abide by the award delivered by defendant 1. This document, according to the witness, was read over to the plaintiff. We have also the evidence of Allahdiya, the plaintiff's son-in-law, which, if believed, establishes conclusively that the plaintiff took an intelligent part in all these proceedings and knew what had happened.

Having considered the evidence bearing on the point, we find ourselves in agreement with the lower Court in holding that there was a dispute between the parties as to whether the house property should be considered to be part of Yar Hasan's assets and therefore divisible among his heirs, that the plaintiff referred this dispute to arbitration and defendant 1, who was the arbitrator, gave an award directing that the property be divided according to Mohamedan Law, which implied that it was part of the assets of Yar Hasan and did not belong to the plaintiff in her own right. In arriving at that finding we are not unmindful of the difficulty that the arbitrator, whose oral award is relied on by the defendant, has not been examined; but we accept the explanation offered on behalf of the defendant that defendant 1 has a conscientious objection to appearing in Court and it is for that reason that the defendant did not insist on his evidence. It is easily imaginable that a party in the position of the defendant would not consider it safe to enforce the attendence of a witness like defendant 1, who is supposed to be dissociated from worldly affairs and who might have refused to give evidence regardless of consequences. The plaintiff's own evidence is wholly unworthy of credit, as pointed out by the lower Court. The evidence of Allahdiya and other witnesses of the defendant is sufficiently reliable as regards the circumstances in which the plaintiff became a party to the reference and in which the award was given and accepted by all concerned. (After considering the evidence on this point the judgment proceeded). Accordingly we hold that the deed of wakf-alal-aulad was intelligently and voluntarily executed by the plaintiff.

The next question is whether the deed is valid. No question as regards its validity was raised in the Court below. In this Court, the advocate for the plaintiff impugned its validity on grounds of law, and we allowed the question to be argued. We find that the so-called wakf is not a wakf in law at all. The dedication is not in perpetuity. As regards the management, it provides that the plaintiff shall be the "mutawalli" of the property during her life. After her death her son Fazal Hasan Khan and after him one of the children would be the "mutawalli:"

> Otherwise Mt. Sughra Bibi or one of her children .... will then be the 'mutawalli;' and failing him, the manager of the 'khanqah' of Syed Najmuddin (defendant 1) shall be the mutawalli.

The deed does not make any provision as regards mutawallis in future generations. Similarly the object of the wakf is limited to certain individuals named. Two houses are declared to be exempt from wakf. As regards the income of the rest, provision is made for repairs of the house, Income-tax, Municipal taxes, expenses in respect of a mosque, "Rajbi Sharif," "Qurbani" on the occasion of Baqr Id and for expenses of Shabi Barat. The charities exhaust a very small part of the income of the property. The mutawalli is to get Rs. 30 as her allowance. Salary of a servant to the extent of Rs. 15 is allowed. The balance of Rs. 180 is to be divided between the son and the daughter in the proportion of 2 to 1. The deed proceeds to lay down that after the death of the plaintiff, Fazal Hasan would get the mutawalli's allowance and after him his "children" and thereafter "that person who will become mutawalli in my or his place shall get it." The deed winds up by the statement that it is in favour of "children." There is no provision that the allowances reserved for the son and daughter are to be distributed among their descendants generation after generation. It

is possible that this was the intention of the parties to the deed; but it has not been anywhere expressed, and we are not at liberty to read words to that effect in the deed. There is no provision that after the extinction of the line of the "wakf" the income of the property is to be spent for the benefit of the poor. An ultimate gift of this nature is essential for the validity of a wakf-alal-aulad: see 1930 All 837 (1). The "wakf" as a "wakf" is therefore void.

The document styled as a "wakf" has been proved to be part of a family arrangement, as found by us. By an agreement by the plaintiff, her son and her daughter, it was settled that the property might be dedicated in the manner laid down in the deed in supersession of the award made by defendant 1, under which each party was to receive his or her share according to Mohamedan Law. The deed bears the signatures of all interested in the property. If the word "wakf" had not been used in the document and if all of them had joined in the execution of an agreement containing exactly the same provisions as are found in the deed, there could be no doubt as to its validity as a family arrangement. The beneficiaries are living individuals or their immediate descendants. At any rate, the arrangement embodied in the deed is valid and binding on the parties to it. So far as the deed provides for payment of taxes and repairs to the house, no exception can be taken. The provision for charities amounts to a valid charge on the property. There is nothing illegal in the manager (erroneously described as "muttawalli") receiving Rs. 30 a month as remuneration. There is again nothing invalid in the provision that the manager should pay Rs. 120 a month to the son and Rs. 60 a month to the daughter, neither of whom will be entitled to actual possession or to partition of the property during his or her life-time. The only provision that remains to be considered is that in respect of the salary of a servant. This is a legitimate provision, and may be validly included in a family settlement. As to whether it will be open to the descendants of Fazal Hasan Khan and Sughra Bibi, defendants 7 and 6, to partition the property is not a question which need be decided; nor is it necessary to decide whether the issues of Fazal Hasan and Sughra Bibi who do not now exist would be bound to act in accordance with the terms of the deed. The plaintiff and her children have agreed as part of a family arrangement that the property shall be managed in a particular manner and the income thereof shall be disposed of in the manner stated in the document. There was consideration for such an agreement. The object of it was to prevent division of the property into small shares and to preserve peace and harmony in the family. This case is amply covered by the decision of their Lordships of the Privy Council in 1922 P C 107 (2). In that case also the wakf, as a wakf was invalid; but as the members of the family had agreed to accept its terms by a separate instrument, it was held that the provisions contained in the wakf deed were binding on the parties to the agreement.

In the view of the case taken by us, it is not strictly necessary to express any opinion on the findings returned by the Subordinate Judge, Mr. Malik, after remand; but as we heard arguments at length on those questions, we think it desirable to record our findings on those questions also. It is common ground that the sites of the four houses entered in the first list belonged to the plaintiff, who had inherited the houses standing thereon from her father. The evidence proves that those houses do not now exist and have been replaced by new houses since constructed. Having regard to the relations between the plaintiff and her husband, it is impossible to say that the entire amount spent on the new constructions belonged to the plaintiff or her husband. A sum of Rs. 12,000 originally belonging to Yar Hasan, was subsequently placed in the current account in the joint names of Yar Hasan and the plaintiff. The Subordinate Judge thinks that, as the plaintiff could withdraw that amount and as it was spent on the constructions, the houses should be considered to be the property of the plaintiff. This line of argument may not be correct, but we are of opinion that Yar Hasan's conduct, is more consistent with the hypothesis that his intention was to allow his money to be spent for his wife's benefit. It is true there is no presumption of advancement where property belonging to a husband is made to stand in the name of the wife, but where, as in this case,

1. Irafan Ali v. Official Receiver, Agra, 1930 All 837=130 I C 631=52 All 748.

2. Suleman Qadir v. Samiullah Khan, 1922 P C 107=69 I C 138=49 I A 153=49 Cal 820 (PC).

the husband deposits his own money in the joint names of himself and his wife with drawability by either of them and the old houses belonging to the wife are demolished and replaced by new ones erected with the aid of such funds and old materials, it is a fair inference that the husband's intention was to make the wife, who was already the owner of the sites, to be the owner of the superstructures also.

As regards the house entered in list 2 which had been purchased in the name of the plaintiff, we agree with the Subordinate Judge that the evidence is not sufficient for a finding that the sale deed was "benami." The house was purchased for a comparatively small amount, which was well within the means of Mt. Latifan.

We also agree with the Subordinate Judge in holding that the defendant failed to prove the gift of the house entered in list 2 on the occasion of her marriage. This will however make no difference, as the family arrangement embodied in the "wakf" has allotted that house to her.

The result of our findings is that the transaction embodied in the deed of wakf, dated 24th September 1926, is not valid as a wakf, but is valid as a family arrangement. The decree of the lower Court shall be modified as herein provided. In all the circumstances of the case, we direct that the parties pay their own costs in both Courts.

K.S. *Decree modified.*

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* A. I. R. 1935 Allahabad 862

SULAIMAN, C. J. AND BENNET, J.

Ahmad Ali Khan and *another*—Defendants—Appellants.

v.

Riyasat Ali Khan and *others* — Plaintiffs—Respondents.

Letters Patent Appeal No. 65 of 1934, Decided on 25th April 1935, against decree of Young, J., D/- 5th March 1934.

(a) Pensions Act (1871), Ss. 7 and 11—Pensions mentioned in Ss. 7 and 11 do not comprise all possible kinds of pensions.

There is nothing in the Pensions Act, which states that the two kinds of pension in S. 7 and the four kinds of pension in S. 11 comprise all possible kinds of pension; nor is there any reason to suppose that these six kinds do comprise all possible kinds of pension. [P 866 C 1]

(b) Pensions Act (1871), Ss. 11 and 12—Person asserting compromise to be invalid should prove that pension falls under S. 11.

Where a person challenges a compromise decree in regard to a pension, he must prove that the pension falls under S. 11 after making proper allegations. [P 866 C 2]

(c) Practice—Defects in pleadings cannot be set aside in Letters Patent appeal.

The Letters Patent appeal is not the stage of a proceeding where defects in the evidence and pleadings of a party can be set aside. [P 866 C 2]

(d) Contract Act (1872), Ss. 23 and 25—Compromise—Two considerations, one being void and other good — Compromise is valid.

Where a compromise entered into is supported by two considerations one of which is void but the other is good, the compromise is valid. [P863 C 2]

(e) Contract Act (1872), S. 37 — Family dispute—Compromise entered into and decree passed held permanently binding on family.

There was a bona fide family dispute in regard to a pension and the Collector had granted a certificate under S. 6, Pensions Act, and the civil Court lawfully had the case within its jurisdiction. Under those circumstances the parties came to a compromise of the family dispute. The compromise was embodied in the decree:

Held : that such an arrangement was intended to permanently bind the members of the family and that it would be intolerable if the members who succeeded the actual persons making the compromise were allowed to set the compromise aside on the simple ground that they were not parties to the compromise: 1927 *All* 170 (*F B*), *Rel on.* [P 863 C 2]

(f) Registration Act (1908), S. 17 (2)—Compromise in 1922 involving property not subject of case—Registration is unnecessary even in regard to that property.

Where there is a compromise filed in Court before the amendment of 1929 which involves property which is not the subject of the case in that Court, then registration is unnecessary even in regard to that property: 1919 *P C* 79, *Foll.* [P 864 C 1]

(g) Execution—Decree binding — Compromise decree—Executing Court can go into question whether compromise is valid or not.

The mere existence of a compromise and a decree passed on that compromise does not prevent an execution Court or a different Court from investigating the question whether certain terms in that compromise would not amount to a penalty which would be invalid under S. 74, Contract Act. Hence it is open to the Court to go into the question of whether the compromise in question is or is not valid. [P 864 C 2]

*** (h) Contract Act Ss. 23 and 24 — Conveyances—One party performing his part—Other party incompetent to perform portion of his part—Other part can be enforced.**

In the case of conveyances, where one party has performed the whole of his part of the contract, and it is only the opposite party which is incompetent to perform one part of it, then it is open to the civil Court to enforce the performance by the second party of that part which he is competent to perform. [P 863 C 2]

(i) Pensions Act (1871), S. 7 — Certificate granted under S. 6 — Pension does not become one mentioned in S. 7.

No doubt a certificate is not required for a suit about a pension mentioned in S. 7, but the mere fact that a certificate is granted does not make the pension in regard to which it is granted one not mentioned in S. 7. [P 866 C 1]

(j) Pensions Act (1871), S. 12—Scope.

All kinds of Government pensions do not come under S. 12. [P 866 C 1]

Wazir Hasan and *Ishaq Ahmad*— for Appellants.

P. L. Banerji and *M. A. Aziz*— for Respondents.

Sulaiman, C. J.—I concur in the order proposed. No doubt there are several classes of pensions and those falling under S. 7 are not subject to the provisions of Ss. 4 and 6, Pensions Act, (Act 23) of 1871. It is also true that the burden is on the defendants to show that the pension in dispute in this case was of the class mentioned in Ss. 11 and 12. But inasmuch as it has been assumed throughout in all the Courts that this was a political pension of the nature to which S. 12 would be applicable, I would prefer not to base my decision on the ground that this has not been established by the defendants.

In the same way I have considerable difficulty in holding that even if the withdrawal of the claim to the political pension in the former suit was in fact an invalid and void offer, the counter promise is enforceable. So far as the Indian Contract Act, is concerned, all considerations and objects of an agreement are unlawful which are of such a nature that if permitted they would defeat the provisions of any law. If therefore the object of an agreement is such that if carried out, it would be contrary to the provisions of any law, it would follow that it would defeat the provisions of that law and would therefore be unlawful. Reading S. 23 with S. 24, it would then follow that if any part of the consideration for one or more objects is unlawful, the whole agreement is void. I would therefore be inclined to consider if a part of the offer made by the plaintiffs to the former suit was such that if permitted, it would defeat the provisions of the Pensions Act, then that part of it was unlawful with the result that the whole of the offer made by the then plaintiffs would be void and therefore the compromise made by the predecessor of the defendants would be without consideration and therefore not enforceable as against the unwilling defendants. But the promise made by the defendants' predecessor to pay so much a month was not unlawful and the consideration passing from him was not void. Hence he might have either avoided the contract or enforced that part of it which was valid provided he performed the whole of his part of the contract.

The cases of conveyances stand on a different footing for two reasons: In the first place, S. 6, Sub-S. (h) of the T. P. Act, in terms does not make S. 24, Contract Act, applicable to the transfers governed by the Transfer of Property Act. In the second place where one party has performed the whole of his part of the contract, and it is only the opposite party which is incompetent to perform one part of it, then it is open to the civil Court to enforce the performance by the second party of that part which he is competent to perform. The present case is one where the plaintiffs' predecessor, assuming that the offer to withdraw the claim to the pension was invalid, was not in a position to perform a part of the compromise made by him, it might therefore be difficult to decree the plaintiff's claim when one part of the compromise made was not capable of being performed. That would amount to a substitution of a new contract by the splitting up of the offer made by the defendant's predecessor so as to uphold one part of it which might be regarded as consideration for the valid part of the compromise of the then plaintiffs and not to uphold the rest. On the other hand, as the plaintiffs' predecessor never afterwards laid any claim to the pension or the estate and the defendants are in possession of these, it would be unfair to the plaintiffs if their claim is dismissed.

I am however of the opinion that the withdrawal of the claim to political pension made in the previous suit was in no way invalid. Even as regards cases which are governed by sections 11 and 12, there is a specific provision in S. 5 that where any person has a claim relating to such pension or grant, he may prefer it to the Collector of the district who may either dispose of such claim or under S. 6 grant a certificate authorising that the case relating to such complaint should be tried by a competent Court. When such a certificate has been granted by the Collector, it seems to me that a civil suit filed in a civil Court is a perfectly legitimate action.

The civil Court is not only competent to try it, but under S. 6 of the Act is bound to take cognizance of any such claim and has to try the case and decide it. No doubt, in deciding that case the civil Court is not empowered to make any order or decree in the suit by which the liability of Government to pay any such pension or grant would be affected directly or indirectly, but the Court is authorised to adjudicate upon the rights of the parties, if any, and the decree of the Court would certainly be binding upon the parties who are before it. It therefore follows that if there had been no compromise but the suit had been tried on its merits and decided in favour of the then plaintiffs, it would not be right to say that there was any defect in the action. I agree with the learned Judge from whose judgment this appeal has been preferred that the position is the same whether the suit is decided by the Court after contest or whether a decree is passed in terms of a compromise which has been entered into between the parties. The effect of the compromise was that the then plaintiffs abandoned their claim not only to their alleged share in the political pension but also to their share in the estate of the deceased Syed Muhammad. The then plaintiffs were entitled to press their claims before the Court and ask the Court to adjudicate upon it and if the decision was in their favour, they could have gone to the Collector armed with the decree of the Court and would most probably have been able to persuade the Collector to recognise them as the pension-holders and grant the pension to them. They in consideration for what was offered by the opposite party abandoned their claim to go on with the suit and abandoned their right, if any, to the property as also the pension. I am therefore of the opinion that when the suit itself, was maintainable the abandonment of the claim was valid consideration passing from the then plaintiffs which could form good consideration for the compromise made by the defendants. I see no objection in a person not persisting in his claim for a pension and abandoning the suit which he has instituted on the strength of a certificate of the Collector.

While S. 6 deals with the maintainability of the suit relating to pensions, S. 11 is directed against a different state of affairs. Where a political pension is sought to be seized, attached or sequestrated at the instance of the creditor or in satisfaction of a decree or order of any such Court, S. 11 prohibits such action. S. 12, on the other hand, deals with private transfers and declares that all assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension mentioned in S. 11 are null and void. Obviously this deals with voluntary assignments, etc., made by a person entitled to any pension. This section does not govern decrees of Courts passed under S. 6, Pensions Act. The word "orders" in this section must mean orders made by the person entitled to any pension and is equivalent to payment orders made by such persons. The decree itself is therefore not hit by the provisions of S. 12 at all. But inasmuch as the decree is based on a private compromise, that part of the terms of the compromise which would offend against the provisions of S. 12 would be invalid even though they are embodied in the compromise decree. For instance, when the political pension under the compromise was allotted to the then defendants, an attempt to create a charge on that political pension for the purpose of securing the payment of the monthly allowance to Samiullah Khan would be null and void and of no effect. But an abandonment of the claim to have the question tried by the Court would not in itself amount to an assignment of any share in the political pension, but merely the withdrawal of the suit in lieu of the consideration offered. In my opinion such a course is not obnoxious in any way to the provisions of the Pensions Act.

I am therefore of the opinion that the offer made by Samiullah Khan to abandon his claim to the estate of the deceased, Syed Muhammad Khan, as well as to the pension, to which he might have been entitled when made in a pending suit which had been instituted after obtaining the certificate of the Collector and which was in every way cognizable by the civil Court, was not unlawful or invalid. The position would have been different if we had nothing but a registered compromise between the parties, which was never filed in any such suit.

The question of the liability of the heirs of Samiullah Khan is somewhat difficult; but as there was adequate consideration for the compromise, which was between the members of the family and was in the nature of

a family arrangement and it was intended that the allowance would be payable by the heirs out of the property left by Syed Muhammad Khan, there is no reason why when Samiullah Khan's heirs are not claiming any right to the political pension, they should not be entitled to enforce this compromise against the heirs of Aftab Ali Khan. The amount was intended to be payable out of the assets of the deceased and the compromise decree should certainly be binding on the heirs of the parties so long as the assets of Syed Muhammad Khan are available. I am unable to accept the contention that the proper interpretation of the compromise is that the sum of Rs. 50 was to be paid out of the political pension and that the words "the property left by Syed Muhammad Khan" would include the political pension as well. The contrary is clear from the later portion of the document in which a distinction is drawn between the property which had devolved from Syed Muhammad Khan and Malik Muhammad Khan and the pension which had devolved from three persons, Malik Muhammad, Syed Muhammad and Aminullah Khan. In view of the pronouncement of their Lordships of the Privy Council in the case quoted by my learned brother, the want of registration is not fatal.

Bennet, J.—This is a Letters Patent appeal by the defendants against a judgment of a learned Single Judge of this Court. The case arises as follows: One Aminullah Khan, resident in Saharanpur, had a pension of Rs. 65 p. m. from Government, and he also owned an estate. He died some time prior to 1921 leaving three sons, Syed Muhammad Khan, Malik Muhammad Khan and Muhammad Elliyas. Syed Muhammad Khan died without heirs. Muhammad Eliyas had a son, Aftab Ali Khan, and the two defendants-appellants are the sons of Aftab Ali Khan. The father of the present plaintiffs one Samiulla Khan along with one Adil Khan brought a suit No. 616 of 1921 against Aftab Ali Khan and others for a declaration that the plaintiffs were the heirs of the deceased Aminulla Khan and were entitled to a share of the pension. No property other than the pension was in dispute in that suit. The suit was contested on the ground that Samiulla Khan was not the legitimate son of Malik Muhammad Khan. Permission was obtained under S. 6, Pensions Act from the Collector for this suit to be heard by the civil Court. On 8th August 1922 the parties entered into a compromise which was filed in Court and the suit terminated by a decree in the terms of the compromise. This compromise sets out that the claim of Adil Khan to receive Rs. 24-6-0 p. m., out of the pension of Aminulla Khan of Rupees 65-2-0 p. m., should be decreed; secondly that Samiulla Khan, the plaintiff was the son of Malik Muhammad Khan, and also in accordance with this compromise Nawab Samiullah Khan and his representatives were entitled to get Rs. 50 per month, generation after generation from Nawab Aftab Ali Khan and his representatives. It was also agreed upon that the (payment of this) monthly allowance of Rs. 50 shall for ever remain a charge upon the property and the pension allowance of Nawab Aftab Ali Khan. In lieu of this Samiullah Khan relinquished his entire share in the property inherited from Nawab Sayed Muhammad Khan and Nawab Malik Muhammad Khan. In accordance with this decree payments were made of Rs. 50 p. m., to Samiulla Khan and the present suit has been brought by the heirs of Samiulla Khan for arrears of this amount. Samiulla Khan died on 25th April 1923 and Aftab Ali Khan died on 23rd December 1927. The Munsif decided the suit in favour of the plaintiffs and the defendants filed an appeal and the lower appellate Court dismissed the suit of the plaintiffs on the ground that the compromise was void under S. 12, Pensions Act.

The plaintiffs came in appeal to this Court and the learned Single Judge of this Court has held that Samiulla Khan was not a person entitled to the pension within the meaning of S. 12, Pensions Act, (Act 23 of 1871), but he was only a person who had a claim to a pension, and that the civil Court in 1921 had jurisdiction to hear and decide the suit by virtue of a certificate granted under S. 6, Pensions Act, and that having jurisdiction to determine the suit the civil Court had jurisdiction to accept a compromise made between the parties and that such a compromise would be valid. Further the learned Single Judge held that under S. 24, Contract Act, in the present case the whole of the compromise would not become invalid. The learned Single Judge therefore restored the decree of the trial Court.

In Letters Patent appeal the first point which has been argued is that S. 12, Pensions Act, renders the compromise decree invalid. Now S. 12 refers to "any pension, pay or allowance mentioned in S. 11" and S. 11 sets out:

> No pension granted or continued by Government on political considerations or on account of past services or present infirmities or as a compassionate allowance shall be liable to seizure, attachment or sequestration by any process of any Court etc.

There are four kinds of pension set out in S. 11. Learned counsel argued that these four kinds of pension must comprise all kinds of pension other than those set out in S. 7. S. 7 refers to two kinds of pension. I do not consider that this argument is correct because there is nothing in the Pensions Act, which states that the two kinds of pension in S. 7 and the four kinds of pension in S. 11 comprise all possible kinds of pension; nor is there any reason to suppose that these six kinds do comprise all possible kinds of pension. Further it was argued that because a certificate had been granted in 1921 under S. 6 therefore the pension in question could not have been one under S. 7. S. 7 states that nothing in Ss. 4 and 6 shall apply to the pensions mentioned in S. 7. No doubt a certificate is not required for a suit about a pension mentioned in S. 7, but the mere fact that a certificate is not required does not make the proposition correct that if a certificate is granted then the pension in regard to which it is granted cannot be one mentioned in S. 7. The written statement in the present suit in additional plea No. 2 set out that the deed of compromise is invalid according to law, that it is not registered nor executed on a stamp paper, that no charge can be created according to law on the pension allowance, nor is the Government pension fit to be transferred. Apparently in drafting this written statement the person who drafted it was under the impression that all kinds of Government pensions come under S. 12, Pensions Act. This however is not correct. The defendants should have made a proper pleading in their written statement that the pension was one of the four mentioned in S. 11 and it was necessary for the defendants to produce evidence to show that the particular pension in question was one which did come under S. 11, Pensions Act. The onus of proof of this matter was on the defendants as they set up S. 12 of the Act as rendering the compromise invalid. The defendants have neither made the proper allegation nor have they produced any evidence on the point. Under these circumstances I consider that the defendants have failed to establish that the pension in question was one to which S. 11 applies and that the compromise was one which would be invalid under S. 12. I am of opinion that this is not a case in which there should be any remand for a finding on the point because the defence failed to make the proper allegations in the written statement and failed to produce any evidence on the point. The Letters Patent appeal is not the stage of a proceeding where defects in the evidence and pleadings of a party can be set aside, and there are rulings of their Lordships of the Privy Council to that effect. However as many other points have been argued in this case I will assume for the rest of my judgment that this defect in the case for defence does not exist.

The next question is whether if the compromise was one which would be within the meaning of S. 12, Pensions Act, what would be the effect on the compromise. S. 12 states that the assignments, agreements, etc., enumerated by it are null and void. It therefore appears that the particular part of the compromise by which Samiulla Khan relinquished all his right to the pension would be null and void. It is to be noted that the compromise does not set out that the allowance of Rs. 50 p. m., should be paid to Samiulla out of the pension. The compromise merely provides that it should be paid as an allowance per mensem and the compromise is silent as to the source from which the payment is to be made. There is therefore nothing which could be invalid as regards S. 12 in connection with the provision for the payment of Rs. 50 p. m. The invalidity which is alleged is in regard to the relinquishment by Samiullah of his right to the pension, and this is set out in the compromise clearly and definitely. I am of the opinion that this provision that Samiulla relinquished his right to the pension may be regarded as null and void within the meaning of S. 12, provided of course on the assumption that the pension is one under S. 11. That provision is no doubt part of the consideration of the agreement. The other part of the consideration moving from Samiulla was that he gave up his right to the property which had devolved

from Syed Muhammad Khan. Two considerations therefore moved from Samiulla and of these two considerations one was null and void. Now a consideration which is null and void is distinct from a consideration which is unlawful. A consideration which is unlawful is stated by S. 23, Contract Act to be one which is forbidden by law, or is of such a nature that, if permitted, it will defeat the provisions of any law; or is fraudulent; or involves injury to the person and property of another or is regarded by the Court as immoral or opposed to public policy. Now this particular consideration is not forbidden by law, nor is it of such a nature that if permitted it would defeat the provisions of any law. The law makes this particular agreement to give up a claim to the pension null and void. There can therefore be no question of defeating the provisions of the law by recognising that that consideration is null and void. That is not defeating the provisions of the law but that is carrying out provisions of the law as the particular provision states that the particular agreement is null and void. The case there is different from a consideration which is unlawful. If there is a consideration which is unlawful then under S. 24, Contract Act, even if there are other considerations which are perfectly good the agreement will still be void because the existence of one unlawful consideration taints the whole agreement and renders the whole agreement void. What I have said in regard to consideration applies equally in regard to the object of an agreement both under S. 23 and under S. 24. Now the case of a null and void consideration has a different effect on an agreement from a case of an unlawful consideration.

Section 25, Contract Act, provides that an agreement made without consideration is void. If therefore there is a single consideration for an agreement and that consideration is void then the agreement is one without consideration and the whole agreement is void. But in the present case the compromise did not depend on the single consideration that Samiulla was to relinquish his right to the pension. There was also the consideration that Samiulla relinquished his right to the property. That consideration of relinquishment of his right to the property is a perfectly good consideration and therefore the compromise cannot be said to have been one without consideration moving from Samiulla. For these reasons I consider that even on this theory of the appellant the compromise would still be a valid compromise.

The next point on which argument is directed is a more difficult one and that is whether the compromise can bind the defendants, the sons of Aftab Ali, who was a party to the compromise. As regards this High Court there is a ruling reported in 49 All 527 (1) of a Full Bench which is binding on us which lays down in connection with the question of pre-emption as follows (p. 531):

> I am also clearly of opinion that S. 37 confers that benefit and imposes the obligation upon the representatives of the parties if the parties should die before the contingency occurs. That is, it was held by the majority of that Bench that the second paragraph of S. 37, Contract Act, would apply to a case of that nature. This paragraph lays down promises binding the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

In addition to that Full Bench ruling there are certain other considerations which apply to the present case. There was a bona fide family dispute in regard to this pension and the Collector had granted a certificate under S. 6, Pensions Act, and the civil Court lawfully had the case within its jurisdiction. Under those circumstances the parties came to a compromise of this family dispute. The compromise was embodied in the decree. It appears to me that such an arrangement is intended to permanently bind the members of the family. In the case of compromise decrees passed on family disputes it would be intolerable if the members who succeed the actual persons making the compromise were allowed to set the compromise aside on the simple ground that they were not parties to the compromise. Such settlement of family disputes are intended by the law to be of a permanent nature. Further there is the allegation in the plaint that the defendants are in possession of the property which was left by Aminulla Khan and the property which was left by Aftab Ali Khan. The defendants have not pleaded that they were not in possession of the property, nor did they raise this point in their grounds of first appeal to the lower appellate Court. I consider that the compromise will be binding on the defendants, the sons of Af-

1. Aulad Ali v. Ali Athar, 1927 All 170=100 I C 683=49 All 527 (F B).

tab Ali Khan, to the extent of the property left by Syed Muhammad Khan which is in their possession. To this extent I consider that the argument is well founded that the liability of the defendants should be limited to the assets of the property left by Syed Muhammad Khan in their hands. The decree therefore should be varied to this effect. The compromise set out that the payment of Rs. 50 p. m., to Samiulla should be made generation after generation so long as the property left by Syed Muhammad Khan remains in the possession of Aftab Ali Khan or in the possession of his representatives. The suit has not been brought to enforce a charge on that property, but nevertheless I consider that there is a liability on the defendants to the extent of the property in their hands.

Some further question was argued in regard to the question of registration of the compromise. At the time when the compromise was drawn up in 1922 the Registration Act was slightly different from what it is at present and in S. 17 (2) it provided that nothing in Cls. (b) and (c), Sub-S. (1) applies to any decree or order of a Court. That provision of law was interpreted by their Lordships of the Privy Council in the year 1919 in 47 Cal. 485 (2), (at p. 495), and their Lordships stated that where there was a compromise filed in Court which involved property which was not the subject of the case in that Court then registration was unnecessary even in regard to that property. This is shown in the ruling of their Lordships at pp. 496 to 498. Subsequently by Act 21 of 1929 this S. 17 (2), Registration Act, has been amended and it now excepts a compromise decree passed in regard to property which is not the subject of the suit. But the compromise with which we are dealing was of 8th August 1922, before this section 17 (2) of the Act had been amended. Clearly therefore registration was not necessary for the compromise even so far as it affected the property of Syed Muhammad Khan which was not the property in dispute in that case. Various rulings have been shown by learned counsel for the appellant in his very able address in which he has pointed out that the mere existence of a compromise and a decree passed on that compromise does not prevent an execution Court or a different Court from investigating the question whether certain terms in that compromise would not amount to a penalty which would be invalid under S. 74, Contract Act. I consider therefore that it is open to us to go into the question of whether the compromise in question would or would not be valid. But as I have stated above learned counsel for the appellants has failed to establish that the compromise was one which is invalid. For these reasons I consider that this appeal should fail except to the extent that the decree to be granted to the plaintiffs should be against the defendants out of the assets of Syed Muhammad Khan in their hands.

K.S. *Appeal partly allowed.*

2. Hemanta Kumari Debi v. Midnapur Zamindari Co., 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485 (P C).

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* A. I. R. 1935 Allahabad 868

KENDALL AND IQBAL AHMAD, JJ.

Aijaz Ahmad—Defendant—Appellant.

v.

Nazirul Hasan and *another*—Plaintiff and Defendant—Respondents.

First Appeal No. 370 of 1929, Decided on 29th April 1935, from decision of First Addl. Sub-Judge, Jaunpur, D/- 8th August 1928.

*** (a) Execution—Sale of property held by Collector in execution of decree transferred to him by civil Court—Case retransmitted to civil Court—Collector has jurisdiction to set aside sale if he is satisfied that by fraud of decree-holder, judgment-debtor has been kept ignorant of execution and decree-holder has by such fraud purchased property for much less than its real value—Propriety of his order cannot be called in question in civil Court.**

A Collector has jurisdiction to set aside the sale of immovable property held in execution of a decree transferred to him by the civil Court in accordance with the provisions of S. 68, Civil P. C., after the sale has been confirmed by him and the record of the execution case has been retransmitted to the civil Court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings culminating in the sale of the property and of the confirmation of sale, when as a consequence of his fraud the decree-holder succeeded in purchasing the property of the judgment-debtor for much less than its real value; and the propriety of his order cannot be called into question in civil Court: 1933 *All* 783, *Rel on*; 1926 *All* 575, *Diss from*.

[P 839 C 1; P 872 C 2]

(b) Civil P. C. (1908), S. 68—Collector has powers similar to those of civil Court—Orders passed by him are judicial orders.

By Rr. 996, 997 and 998 of the Manual of Orders in Revenue Department, Vol. 1 of U. P. Government, the Collector is given power to set aside sale on grounds similar to those provided

for by O. 21, Rr. 89, 90 and 92, or to confirm it. The order of Collector confirming or setting aside a sale, therefore, stands on an identical footing with similar orders passed by the civil Courts in execution proceedings, and as the orders passed by civil Courts are judicial orders, the orders passed by the Collector must necessarily be judicial orders. [P 871 C 1]

* **(c) Practice—Inherent powers—Officer acting judicially has inherent power to correct his orders if he is satisfied that it is necessary for ends of justice—Collector acting under S. 68, Civil P. C., has inherent power to cancel his order on valid grounds—Such inherent power does not depend on continuance of proceedings in course of which order is made.**

A Court has inherent jurisdiction to recall and cancel its invalid orders, and to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. On principle there is no difference between an order passed by a Court and an order passed by an officer acting judicially. The orders passed by both are judicial orders, and if a Court has inherent power to correct its judicial orders, there seems no justification for holding that an officer acting judicially has no similar powers. Hence even though the Collector when executing a decree transferred to him under S. 68, Civil P. C., is not a "Court" that fact by itself cannot divest him of the power to correct or to cancel his judicial orders, provided valid grounds exist for doing so. And the inherent power vested in a Court or in a judicial officer to set right judicial orders previously passed does not depend on the continuance of the proceedings in the course of which the order was passed, but can be exercised even if the proceedings have terminated: 1933 *All* 783 (*FB*), *Rel on.*

[P 871 C 1, 2; P 872 C 1]

S. N. Sen and *Shiva Prasad Sinha*—for Appellant.

P. L. Banerji and *A. M. Khwaja*—for Respondents.

Iqbal Ahmad, J.—The question of law that arises in the present appeal is whether a Collector has jurisdiction to set aside the sale of immovable property held in execution of a decree transferred to him by the Civil Court in accordance with the provisions of S. 68, Civil P. C., after the sale has been confirmed by him and the record of the execution case has been re-transmitted to the Civil Court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings culminating in the sale of the property and of the confirmation of sale, when as a consequence of his fraud the decree-holder succeeded in purchasing the property of the judgment-debtor for much less than its real value.

The plaintiff-respondent held a decree for costs for a sum of Rs. 1,585 against Mohammad Munawar, the predecessor in interest of the defendants. The plaintiff applied for execution of the decree by attachment and sale of 1 anna 2 pies share out of 4 annas 4-2/7 pies in village Sarai Kheta belonging to the judgment-debtor. The Civil Court transferred the decree for execution to the Collector. A proclamation of sale was issued by the Collector showing an encumbrance of Rs. 30,000 on the 4 annas 4-2/7 pies share. The 1 anna 2 pies share that was advertised for sale was actually sold by the Collector on 22nd September 1922 and was purchased by the decree-holder for a sum of Rs. 1,000 and the sale was confirmed by the Collector on 26th October 1922. The record of the execution case was thereafter sent back by the Collector to the Civil Court in May 1923. The decree-holder obtained the sale-certificate on 20th August 1925, and formal delivery of possession was made over to him on 14th October 1925.

Within a month of the date of delivery of possession, viz., on 12th November 1925, Mohammad Munawar, the judgment-debtor, filed an application before the Collector for setting aside the sale. The application was based mainly on the allegation that the decree-holder by the exercise of fraud kept the judgment-debtor utterly uninformed of the execution proceedings and thus suceeded in purchasing property of considerable value at a very low price. It was stated in the application that the decree-holder intentionally did not allow notice of the execution proceedings to be served on the judgment-debtor, and took steps to prevent the judgment-debtor from getting information of the proclamation of sale or of the fact that the property was ordered to be sold. It was further alleged that no proclamation of sale was made by beat of drum as required by the rules and that, in consequence of the fraudulent proceedings of the decree-holder, no intending purchasers except the decree-holder were present on the date fixed for sale and thus the decree-holder succeeded in purchasing property of the value of Rs. 21,000 for a sum of Rs. 1,000 only. The judgment-debtor also asserted that the decree-holder, to conceal his fraudulent proceedings and to keep the judgment-debtor ignorant of the fact of the auction-sale, intentionally did not obtain the sale certificate for about three years after the date of the sale and, with the same object in view, omitted to

take out execution for the remaining decretal amount, viz., the sum of Rs. 585 and allowed the same to become time barred.

The application was filed long after the expiry of 30 days from the date of the sale, but the judgment-debtor claimed the benefit of the provisions of S. 18, Limitation Act, on the ground that he was, by the fraud of the decree-holder, kept out from the knowledge of the fact of the sale till 14th October 1925 the date on which possession was delivered to the decree-holder. The judgment-debtor accordingly maintained that the period of limitation should be computed from the date on which the fraud of the decree-holder came to his knowledge, viz., from 14th October 1925, and as the application was made within 30 days of that date, it was within time.

The application was opposed by the decree-holder and the Collector called for a report from the Tahsildar. The report of the Tahsildar was in favour of the judgment-debtor. He reported that the decree-holder, who was the lambardar of the village "abused his position by practising fraud on the drummer and the witnesses" who attested the sale-proclamation, with the result that no purchaser except the decree-holder was present at the time of the auction-sale and that the decree-holder succeeded in getting his bid of Rs. 1,000 accepted by showing an encumbrance of Rs. 33,000 which "was also a trick played by" him. He held that the value of the property was much more than Rs. 1,000, and attributed the omission of the decree-holder to obtain the sale certificate for a period of about three years and to execute the decree for the sum of Rs. 585 to his anxiety to keep the judgment-debtor ignorant of the fact of the sale. He accordingly recommended that the sale be set aside. The Collector agreed with the opinion expressed by the tahsildar and passed an order setting aside the sale on 4th January 1926.

The suit giving rise to the present appeal was then brought by the decree-holder auction-purchaser, for a declaration that he was the owner in possession of the 1 anna 2 pies share and that the order of the Collector setting aside the sale was without jurisdiction. In the alternative, the plaintiff prayed for a decree for possession of the 1 anna 2 pies share. Mohammad Munawar resisted the suit on the same allegations on which the application for setting aside the sale was based. Mohammad Munawar died during the pendency of the suit in the Court below, and his legal representatives were brought upon the record as defendants to the suit.

At the trial the plaintiff wanted to adduce evidence to prove that the proclamation of sale was made by beat of drum, and that the judgment-debtor had full knowledge of the execution proceedings and of the sale of the property. But the counsel for the defendant judgment-debtor objected to the reception of the evidence on the ground, that if the Collector had jurisdiction to set aside the sale, it was not open to the Civil Court to go into the question whether or not the Collector was right in holding that the sale was vitiated by fraud that was perpetrated by the decree-holder. The Court below accepted the contention of the defendant's counsel and held that the only question that called for determination in the case was whether or not the Collector had jurisdiction to set aside the sale after he had confirmed the same. It accordingly proceeded to hear arguments on the point, and held that the Collector had no jurisdiction either to set aside the sale, or to review the order confirming the sale, after the sale had been confirmed and the record of the execution case was re-transmitted to the Civil Court. It observed that after the confirmation of the sale only the Civil Court had jurisdiction to set aside the sale on the ground of fraud, and accordingly, the order passed by the Collector on 4th January 1926, setting aside the sale was without jurisdiction. It therefore passed a decree in the plaintiff's favour for possession of the share in dispute. In support of its view the Court below placed reliance on the decision of this Court in 24 A L J 687 (1). It was held in that case that after a sale has been confirmed by the Collector and the decree has been re-transmitted to the Civil Court, the Collector has no jurisdiction to set aside the sale, though he is competent to

make any correction in the sale-certificate to make it conform with the proclamation of sale as a consequential or incidental exercise of the authority vested in him to grant a certificate of sale after the sale is confirmed.

One of the legal representatives of Mohammad Munawar has come up in appeal to this Court, and it is argued on his behalf that the view of law taken by the Court below is erroneous.

1. Nand Kishore v. Badan Singh, 1926 All 575= 95 I C 578=48 All 568=24 A L J 687.

In our judgment this contention is well-founded and ought to prevail.

That the orders passed by a Collector confirming or setting aside a sale held by him in execution of a decree transferred to him in accordance with the provisions of S. 68, Civil P. C., are judicial orders admits of no doubt. The Local Government has, in exercise of the powers vested in it by S. 70 (1), Civil P. C., made rules conferring upon the Collector the power to set aside a sale on grounds similar to those provided for by O. 21, Rr. 89 and 90, Civil P. C., (vide Rr. 996 and 997 of Manual of Orders of the Government of the United Provinces in the Revenue Department, Vol. 1), similarly R. 998 framed by the Local Government confers on the Collector the power to confirm or to pass an order setting aside the sale on grounds similar to those provided for by O. 21, R. 92, Civil P. C. The orders passed by the Collector or his gazetted subordinates are further made appealable by the rules to higher revenue authorities. It cannot therefore be disputed that the Collector has powers similar to the powers conferred on the Civil Courts by the Civil Procedure Code to confirm or to set aside a sale. The order of the Collector confirming or setting aside a sale therefore stands on an identical footing with similar orders passed by the Civil Courts in execution proceedings, and as the orders passed by Civil Courts are judicial orders the orders passed by the Collector must necessarily be judicial orders. Further it is provided by the Code itself that in executing a decree transferred to the Collector under Section 68, the Collector and his subordinate shall be deemed to be acting judically (vide S. 71, Civil P. C.). It is therefore manifest that an order passed by a Collector either confirming or setting aside a sale is a judicial order, and the question that arises for consideration in the present appeal is whether or not the Collector has inherent power to recall and cancel his order confirming or setting aside a sale if he is satisfied that it is necessary to do so for the ends of justice or to prevent abuse of the process to which resort must be had by him in executing the decree transferred to him under S. 68, Civil P. C.

It is well settled that a Court has inherent jurisdiction to recall and cancel its invalid orders, and to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. On principle there is no difference between an order passed by a Court and an order passed by an officer acting judicially. The orders passed by both are judicial orders, and if a Court has inherent power to correct its judicial orders there seems no justification for holding that an officer acting judicially has not similar powers. If a Court has power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, an officer acting judicially must on principle have similar powers. It may be that the Collector when executing a decree transferred to him under S. 68, Civil P. C., is not a "Court", but that fact by itself cannot divest him of the power to correct or to cancel his judicial orders provided valid grounds exist for doing so.

It is true that neither a Court nor an officer acting judicially has power to dispense with the provisions of any legislative enactment or to do that which is prohibited by any rule of law, but there is no rule of law that debars a Collector from recalling his order confirming a sale if he is satisfied that the order ought to be recalled in order to secure the ends of justice. R. 998 framed by the Local Government prohibits the institution of a suit for challenging an order confirming or setting aside a sale, but that rule is restricted in its scope to the grounds mentioned in Rr. 996 and 997 for setting aside a sale, and has no application to cases in which the order confirming the sale has been secured by the auction-purchaser by the exercise of fraud. Further, R. 998 prohibits the institution of a suit and not the exercise of the inherent power possessed by an officer acting judicially to correct his judicial orders. Fraud vitiates all proceedings including judicial orders and if the Collector is satisfied that the decree-holder perpetrated fraud not only in publishing or conducting the sale, but also in keeping the judgment-debtor ignorant of the fact of the confirmation of the sale, he has inherent power to set aside the sale with a view to prevent an abuse of the proceedings held by him.

But it is argued that the Collector becomes functus officio after re-transmitting the decree to the Civil Court and thereafter has no jurisdiction to set aside the sale and, in support of this contention, reliance is placed on the decision in 24 A L J 687 (1). We are unable to agree with this contention. The re-transmission of the de-

cree to the Civil Court no doubt puts an end to the jurisdiction of the Collector to take further proceedings in execution of the decree, but it cannot divest him of the inherent jurisdiction possessed by him to correct his judicial orders or to review the same. The inherent power vested in a Court or in a judicial officer to set right judicial orders previously passed does not depend on the continuance of the proceedings in the course of which the order was passed, but can be exercised even if the proceedings have terminated. This was the view taken by a Full Bench of this Court in 1933 A L J 1032 (2). In that case a decree was transferred for execution by the Subordinate Judge of Cawnpore to a Civil Court in Allahabad. An application for execution was made in the Allahabad Court, to which the judgment-debtor objected on the ground that the decree had been adjusted out of Court under a private arrangement. On the date fixed for the hearing of the objection the decree-holder was absent and his pleader stated that he had no instructions. The Allahabad Court then heard the objection and allowed it ex parte. The execution case was then struck off and a certificate was sent to the Cawnpore Court stating that the decree had been fully satisfied and that the case had been disposed of. Thereafter the decree-holder made an application in the Allahabad Court for the setting aside of the ex parte order on the ground that he had been prevented by sufficient cause from not appearing on the date of hearing. The Court entertained the application and set aside the previous ex parte order allowing the objection and dismissing the application for execution and restored the execution case to the file of pending cases. The Full Bench held that the Allahabad Court had jurisdiction to pass the order that it did and observed that:

The decree-holder applied invoking inherent jurisdiction of the Court to set aside an ex parte order to meet the ends of justice. The proper Court to entertain such an application was obviously the very Court which had passed the order which was sought to be set aside. The inherent jurisdiction vested in that Court, and not in the Cawnpore Court which could not properly consider the propriety of the previous order. If a question arose for a review of judgment or for setting aside an ex parte order, that jurisdiction could be properly exercised by the Court which passed the previous order. This is not a case of a further execution of the decree, which cannot be ordered after the satisfaction had been recorded and certificate sent to the original Court, but a question as to whether a previous proceeding should or should not be re-opened.

These observations make it abundantly clear that the inherent jurisdiction possessed by a Court to which a decree is sent for execution does not terminate with the conclusion of the execution proceedings in that Court. It therefore follows that the Collector is not divested of the inherent jurisdiction possessed by him simply because of the termination of the execution proceedings and the re-transmission of the decree to the Civil Court. In 24 A L J 687 (1), the order of the Collector setting aside the sale was sought to be supported in this Court on the ground that the Collector could in exercise of the power of review vested in him set aside a sale. But this Court overuled this contention on the ground that there was nothing in the order of the Collector in that case to suggest that he was exercising the power of review. In the case before us we however find that in the application that was made by Mohammad Munawar for setting aside the sale he requested the Collector to review his order confirming the sale. Apart from this in our judgment the decision in 24 A L J 687(1) cannot be reconciled with the Full Bench decision of this Court noted above.

For the reasons given we hold that the Collector had jurisdiction to set aside the sale and the propriety of his order could not be called into question in the Civil Court. We accordingly allow this appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs here and below.

K.S. *Appeal allowed.*

2. Muhammad Hanif v. Ali Raza, 1933 All 783=145 I C 995=55 All 891=1933 A L J 1032 (FB).

A. I. R. 1935 Allahabad 872

KENDALL, J.

Mahabir—Defendant—Applicant.

v.

Anjuman Wazifatul Muslimin—Plaintiff and another, Defendant — Opposite Parties.

Civil Revn. No. 28 of 1935, Decided on 3rd May 1935, against order of Small Cause Court Judge, Allahabad, D/- 17th September 1934.

(a) Association — Unregistered association cannot sue nor be sued unless all members are impleaded.

An unregistered association can neither sue nor be sued, unless all the members of the association are impleaded: 21 *All* 346; 20 *All* 167; 20 *All* 497 and 1925 *All* 337, *Rel. on.* [P 873 C 1]

(b) Gift—Unregistered association — Property to be handed over to named person for use of such association—Gift is valid.

Where under a gift to an unregistered association, the property is to be handed over to a person for the use of the association, the gift is a valid one: 1927 *All* 789, *Rel. on.* and 1917 *All* 94, *Dist.* [P 873 C 2]

Sri Narain Sahai—for Applicant.

P. L. Banerji—for Opposite Parties.

Order.—The facts out of which this application for revision arises are stated in the judgment of the trial Court. The correctness of the decision is assailed on more than one ground. The first is that the Anjuman Wazifatul Muslimin is an unregistered association which could neither sue nor be sued, unless all the members of the association were impleaded. That this is so is clear from a number of decisions of this Court among which may be mentioned the following: 21 All 346 (1), 20 All 167 (2), 20 All 497 (3) and 23 A L J 37 (4). At this stage however it appears that the plaintiff is not the Anjuman Wazifatul. Mr. Aziz, secretary of the Anjuman, applied for leave to sue in a representative capacity, and the Court after the usual proceedings under O. 1, R. 8 gave him permission to sue, so that the real plaintiff is Mr. Aziz suing in a representative capacity for the members of the Anjuman. The trial Court in discussing this question made use of the expression "an unregistered society like the present plaintiff can sue", but this is clearly wrong, as the decision quoted above shows.

The trial Court has decided that the gift was in favour of Mr. M. A. Aziz as secretary of the association, but it has been contended on behalf of the opposite party here that the gift was really made to Mr. Aziz. The deed of transfer is to the following effect:

I desire that I may spend the money in the name of God. Therefore I have decided to transfer the rights in the said promissory note to the Anjuman for the purpose of scholarships. Therefore I have executed this document in favour of Mr. Aziz in his capacity as secretary, and gifted the promissory note in favour of the said gentleman, and he has accepted the gift.

If the gift had been made to Mr. Aziz in his personal capacity he could have sued on the basis of the promissory note and there would have been no difficulty. But it is maintained that this document had the effect of transferring the promissory note, not to Mr. Aziz in his personal capacity, but to the Anjuman. This difficulty will be met in any case if Mr. Aziz is allowed to sue as the representative of the Anjuman, as has been done. Finally it has been argued that assuming the gift to be made to the Anjuman, that association not being a registered association is not capable of being the recipient of a gift. There is some authority for this proposition in 14 A L J 1038 (5). The circumstances there appear to have been quite different. The finding of the Court was that the Anjuman, the unregistered body in whose favour the gift was said to have been made, had no definite existence until it was registered subsequently to the gift. There was therefore nobody "who were capable of having the property transferred by the deed of 1908." The deed purported merely to transfer the property to the Anjuman. In the present case there does not appear to be anything indefinite about the identity of the body, and there was certainly nothing indefinite in the wishes of the transferor. The property was to be handed over to Mr. Aziz for the use of the Anjuman. In 103 I C 45 (6), a Bench of this Court held that although an unregistered society cannot sue or be sued unless all the members are impleaded, there never has been a rule that such an unregistered society cannot hold property. It is not a fact that they have no legal existence at all, though for purposes of proceedings in Court such a society is not a juridical person.

The final result is that I do not see any need for interfering with the decision of the trial Court, which is entirely equitable and which does not appear to me to be contrary to law. The application is dismissed with costs.

K.S. *Application dismissed.*

1. Ganesha Singh v. Mundi Forest Co., (1899) 21 All 346=1899 A W N 123.
2. Panchaiti Akhara v. Gauri Kuar, (1898) 20 All 167=1898 A W N 7.
3. N. W. P. Club v. Sadullah, (1898) 20 All 497.
4. Ram Sarup v. The Arya Samaj, Dharampur, 1925 All 337=86 I C 255=47 All 342=23 A L J 37.
5. Mathura Kuer v. Dharam Samaj, 1917 All 94=38 I C 183=14 A L J 1038.
6. Bhagwan Das Singh v. Pinjra Pole Pashu Anathalaya, 1927 All 789=103 I C 45.

A. I. R. 1935 Allahabad 873

KENDALL, J.

Syed Khurshed Ali—Applicant.

v.

Ghulam Mustafa—Opposite Party.

Civil Revn. No. 686 of 1934, Decided on 29th April 1935, against decree of Munsif, Farrukhabad, D/- 22nd October 1934.

(a) Civil P. C. (1908), Ss. 144 and 148—Order of High Court ordering removal of materials within certain time—Application by judgment-debtor to Munsif's Court to obtain possession of land and building—Order that possession should not be given to him but that the building should be demolished by Court Amin at expense of judgment-debtor and further that period taken by Court in deciding judgment-debtor's application should be excluded from period fixed by High Court for removal of materials—Order held not one under S. 148 but one under S. 144.

The High Court allowed the judgment-debtor to remove the materials of the house within three months. In the meanwhile the decree-holder had obtained possession of the land and the building. The judgment-debtor made an application to the Munsif for possession of the land by demolition of the building, and the Munsif interpreting it as being an application for possession decided that possession should not be delivered to the judgment-debtor, but he directed that the house should be demolished by the amin under the orders of the Court at the expense of the judgment-debtor. He also remarked that the period taken by the Court in deciding the objection which the decree-holder had made to the judgment-debtor's application should be excluded from the three months allowed to the judgment-debtor for the removal of the materials :

Held : that it was not an order passed under S. 148 but one under S. 144. [P 875 C 1]

(b) Civil P. C. (1908), Ss. 144 and 2—Order under S. 144 is decree.

An order passed under S. 144 is a decree within the meaning of S. 2 and as a decree it is subject to appeal. [P 875 C 1]

(c) Revision — Appealable order — High Court cannot interfere.

The High Court under S. 115, Civil P. C., has no jurisdiction to interfere in revision with an order which is subject to appeal. [P 875 C 1]

M. Waliullah—for Applicant.

M. A. Aziz and *Shambhu Prasad*—for Opposite Party.

Order.—This application has arisen from a somewhat complicated set of circumstances. The present applicant filed a suit for possession of land by the demolition of a house and obtained a decree which was upheld in the lower appellate Court and the High Court on 28th July 1931. The substance of the decree was that the opposite party would be entitled to remove the materials of the house within three months from the date of the decree, and if he failed to do so, the plaintiff was to be entitled either to remove the materials with the help of the Court or to obtain possession of the land with the materials. The opposite party was permitted to file an appeal under the Letters Patent which was dismissed on 4th August 1933, but omitted to pray for an extension of the time allowed to him by the decree of 28th March 1931, for the removal of the materials. Later on he made an application in review for extension of time, explaining that the omission had been by oversight and on 16th August 1934, the Letters Patent Bench granted three months extension of time with effect from the date of this order of 16th August 1934. In other words, the Letters Patent Bench modified its original order and allowed the opposite party to remove the materials of the house within three months of 16th August 1934. In the meanwhile however the decree-holder, the present applicant, had obtained possession of the land and the building. On 3rd September 1934, the opposite party made an application to the Munsif. It was worded as one for possession of the land by demolition of the building, and the Munsif apparently interpreted it as being an application for possession. He decided that possession should not be delivered to the judgment-debtor, but he directed that the house should be demolished by the amin under the orders of the Court at the expense of the judgment-debtor, and he also remarked that the period taken by the Court in deciding the objection which the decree-holder had made to this application, that is to say, the period from 3rd September 1934 to 22nd October 1934, should be excluded from the three months allowed to the judgment-debtor for the removal of the materials.

It is that order which has caused the difficulty. According to the applicant, the Munsif's order is without jurisdiction because he has varied the terms of the decree of the Letters Patent Bench by allowing an extension of time. The authority of the following cases has been quoted for holding that S. 148 Civil P. C., gives the Court no power to vary the terms of a decree: 35 All 582 (1), 40 All 579 (2), 42 All 639 (3) and 146 I C 171 (4). It is not however necessary for me to determine this question because it appears to me that the preliminary objection taken on behalf of the opposite party is bound to succeed.

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1. Suranjan Singh v. Ram Babal Lal, (1913) 35 All 582=21 I C 585.
2. Sajjadi Begam v. Dilawar Husain, 1918 All 98 =47 I C 4=40 All 579.
3. Kandhaiya Singh v. Mt. Kundan, 1920 All 173=57 I C 16=42 All 639.
4. Abdul Rahman v. Banke Behari Lal, 1934 Oudh 17=146 I C 171=9 Luck 215.

The order passed by the Munsif is not an order merely extending time to the judgment-debtor for the purpose of removing the materials. The Court did actually refuse the judgment-debtor's application on the ground that the judgment-debtor was not entitled to obtain possession of the land which had already passed to the decree-holder. The Court therefore passed an order, which was not merely an order extending time, but which directed a course to be pursued which had not been contemplated in the decree, namely, that the materials should be removed by the Court at the expense of the judgment-debtor. It will be seen that this was not an order passed under S. 148, Civil P. C. The decree had fixed a period within which the judgment-debtor was to be allowed to remove the materials, and the order does not extend the time given to the judgment-debtor for removing the materials. It must be held that the order is one passed under S. 144, Civil P. C. As such it may have been passed without jurisdiction, but the point is that as it is an order of this description, it amounts to a decree within the meaning of S. 2, Civil P. C., and as a decree it is subject to an appeal. The High Court under S. 115, Civil P. C., has no jurisdiction to interfere in revision with an order which is subject to appeal, and for this reason the preliminary objection is accepted and the application is dismissed with costs.

K.S. *Application dismissed.*

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* * A. . R. 1935 Allahabad 875

THOM AND IQBAL AHMAD, JJ.

Ram Narain Sahu and *another* — Plaintiffs—Appellants.

v.

Mt. Makhna — Defendant — Respondent.

First Appeal No. 355 of 1930, Decided on 2nd April 1935, from decision of Addl. Sub-Judge, Benares, D/- 27th May 1930.

(a) Hindu Law—Joint family—Every family is presumed to be joint—If one member separates, presumption is that others also have ceased to be joint—They can continue to be joint or reunite—But this can be only by virtue of express or implied agreement—But there is no presumption that there is separation between one co-parcener and his descendants.

Every family governed by the Mitakshara school of law is presumed to be joint unless the contrary is proved, but if one member of the family separates from the others, this presumption is destroyed and there is no presumption that the separation was partial and was confined only to the member separating himself and that the remaining members of the family remained united. It is however open to the remaining members to continue to remain united or to reunite, but this can be only by virtue of an express or implied agreement between them and such an agreement, if pleaded, must be proved like any other fact. But in the absence of proof of such an agreement the presumption is that on separation of one co-parcener the remaining co-parceners ceased to be joint. There is however in such a case no presumption that there was a separation between one co-parcener and his descendants: *Case law discussed.* [P 879 C 1]

(b) Hindu Law—Joint family—Separation of one member — Agreement to continue to remain joint and agreement to reunite—Distinction pointed out—After partition decree, there can be only agreement to reunite.

There is distinction between an agreement to continue to remain joint and an agreement to re-unite. The former predicates the continuance of jointness throughout, while the latter can only come into existence after there has been a partition between the co-parceners agreeing to re-unite. If by a partition decree the share of each co-parcener is separated, there can be no question of agreement to remain joint as jointness is put an end to by the decree, and in such case it is only by an agreement to re-unite that some of the co-parceners can again become members of a joint Hindu family. [P 880 C 1]

(c) Hindu Law—Re-union—Agreement to remain joint or reunite can only be inferred by long course of conduct exhibiting intention not to separate.

An agreement to remain joint or to re-unite can only be inferred by long course of conduct clearly exhibiting an intention not to become separate. [P 880 C 2]

(d) Hindu Law—Partition — Presumption of jointness can be displaced by slight evidence showing severance of status—Agreement among all adult members to separate or definite and unequivocal indication of intention to separate by one adult member is sufficient—Intention to separate may be expressed in several ways — Serving notice on other co-parceners or filing suit for partition—Severance is from date of notice or date of suit.

The presumption of jointness, that holds good in the case of a family governed by the Mitakshara School of law, can be displaced by slight evidence pointing to the conclusion that the severance of the status of jointness was effected, either by agreement amongst all the adult members of the family or by a definite and unequivocal indication of his intention by even one adult member of the family to separate himself from family and enjoy his share in severalty. In the latter case it is open to the member indicating his intention to separate to put an end to jointness at his sweet will, even if the other members of the family do not agree to separation. Separation means the severance of the status of jointness and it is therefore a matter of individual volition. Whether there has been a clear, definite and unambiguous indication of an intention to separate by a member of a joint

family is a question of fact, and the answer to that question must depend on the facts and circumstances of each case. The intention to separate may be expressed in different ways either by explicit declaration or by conduct. One of the recognised modes in which such an intention may be expressed is either by serving a notice on the other co-parceners or by instituting a suit for partition and in such cases the severance of the joint status is presumed from the date of the notice or from the date of the suit : *Case law referred.* [P 881 C 1]

**** (e) Hindu Law—Partition—Intention to separate—Member who is minor or of unsound mind can express intention through guardian provided Court is of opinion that it is for benefit of such person — If such finding is recorded by Court, separation is complete and is not dependent on fact that share of such person is not actually separated by metes and bounds.**

A member of a joint family who is a minor or of unsound mind is incapable of giving expression to an effective intention to separate, but such intention can be expressed by his guardian and has the legal effect of bringing about disruption of the joint family, provided the Court is of the opinion that it is to the benefit of the minor or the person of unsound mind to separate. Once the Court has recorded a finding to that effect the separation follows as a matter of law and is not dependent on the fact of the share of the minor or of the person of unsound mind being actually separated by metes and bounds.

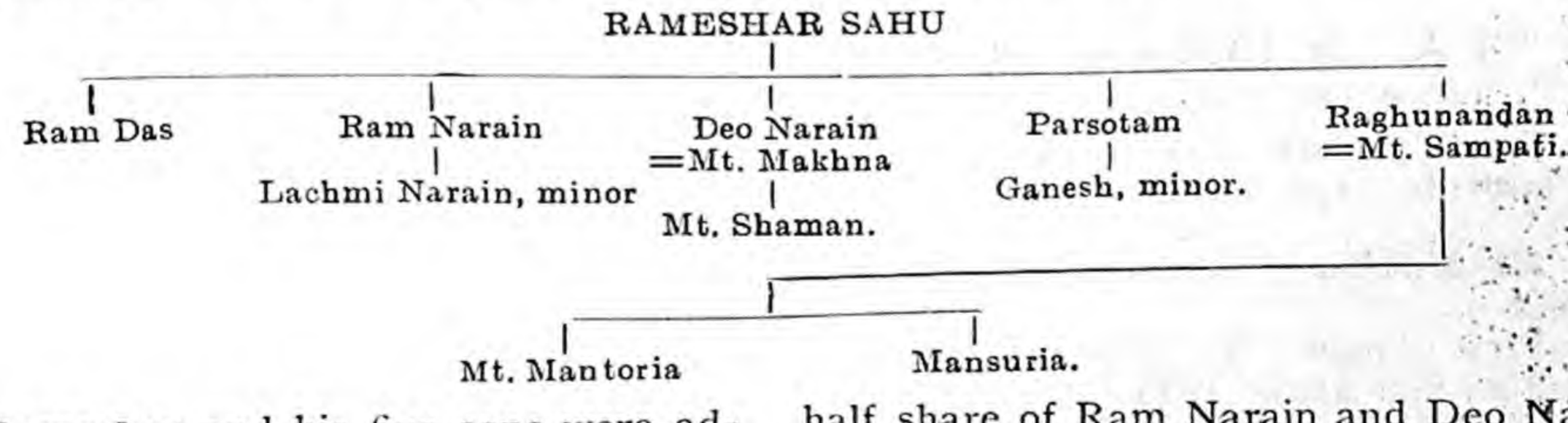
[P 882 C 1]

B. E. O'Conor, P. L. Banerji, Ram Nama Prasad and *Miss S. K. Nehru*—for Appellants.

Tej Bahadur Sapru, K. N. Katju and *N. Varma*—for Respondent.

Judgment.—This is a plaintiffs' appeal and arises out of a suit brought by Ram Narain and his son Lachhmi Narain for a declaration that they are the owners in possession of the property specified at the foot of the plaint and that Mt. Makhna, defendant-respondent, who is the widow of Deo Narain, the own brother of Ram Narain, had no right or title to the same.

The cardinal question for decision in the case was whether Deo Narain was joint with or separate from his brother Ram Narain on the date of his death in the year 1927. If Deo Narain died as a separated Hindu, as held by the Court below, Mt. Makhna became entitled to the properties owned by him by right of inheritance and the plaintiffs had no right to the same. There were some disputed questions of fact in the Court below, but the findings of the Court below on those points have not been assailed, and the whole controversy in this appeal has hovered over the question as to what was the legal effect on the status of Ram Narain and Deo Narain of a partition suit filed by two other brothers of Ram Narain against Ram Narain and Deo Narain in the year 1923, and of an application for partition of Deo Narain's share filed by Mt. Makhna during the pendency of that partition suit. The following pedigree shows the relationship of the parties to the partition suit and is explanatory of the facts hereinafter mentioned:



Rameshar and his five sons were admittedly members of a joint Hindu family governed by the Mitakshara school of Hindu law. The family was in affluent circumstances and owned moveable and immovable properties of considerable value. Both Rameshar and Raghunandan died while the family was joint and the remaining four sons of Rameshar became owners of the entire family property by right of survivorship. In the year 1923, Ram Das and Parsotam filed a suit for partition and separate possession of their one-half share in immovable properties from the half share of Ram Narain and Deo Narain who were impleaded as defendants to the suit. Mt. Sampati, the widow, and Mantoria and Mansuria, the daughters of Raghunandan, were also arrayed as defendants on the allegation that they were entitled to maintenance and to the marriage expenses of the two daughters from the family property, but we are not concerned with them in the present appeal. Deo Narain was of unsound mind and the plaintiffs proposed that Ram Narain should be appointed his guardian for the suit. Ram Narain refused to act as such on the

ground that his interests were adverse to those of Deo Narain and then Mt. Makhna was appointed guardian ad litem of Deo Narain and acted as such throughout that litigation. In their plaint the plaintiffs of the partition suit alleged that they (plaintiffs) had separated from Ram Narain and Deo Narain in food and residence in or about the year 1920, and that the household properties and cash were divided at that time, and prayed for the partition of only immovable properties. The suit was contested both by Ram Narain and Deo Narain. They admitted that the plaintiffs had separated in mess and residence and did not object to partition of the family properties, but denied that any partition of the household articles and cash took place as alleged by the plaintiffs and contended that Parsotam, one of the plaintiffs, was in the charge of the money lending business, etc., and, as such, the plaintiffs were liable to render accounts of the family ornaments and assets of the shop and the outstandings, etc., from the date they separated in mess and residence, viz., from the year 1920. The Court accepted the contention of the defendants and ordered the plaintiffs to give an account of the movables, cash and the income and expenses for three years before the date of the partition suit. The plaintiffs however did not render accounts and the defendants were then ordered to file an account of the household properties, cash and outstanding debts in possession of the plaintiffs. The Court accepted the account submitted by the defendants and held that they (the defendants) were entitled to a sum of Rs. 98,000 odd from the plaintiffs and passed a preliminary decree on 23rd April 1924, in the following terms:

> It is decreed and ordered that the accounts of the defendants are correct. The objection of the plaintiffs be disallowed. The Amin do partition the immovable properties specified in the plaint. He do divide them into two shares and report by 14th May 1924 as to what share can be given to the plaintiffs.

A Commissioner was appointed by the Court to prepare two lots of the house properties, but before the lots were prepared, Mt. Makhna, as guardian of Deo Narain, presented a petition on 3rd May 1924, praying that Deo Narain's share in the family property be also separated. She alleged in the petition that Deo Narain's share was admittedly 1-4th and that there was "an apprehension of loss in future if the said share is allowed to remain joint" (the application is printed at p. 117 of the record). The plaintiffs objected to the partition of Deo Narain's share on the ground that Deo Narain was living jointly with Ram Narain and alleged that Mt. Makhna had presented the petition in collusion with Suraj Prasad who was a pairokar on behalf of the defendants. Ram Narain also opposed the application mainly on the ground that, as the preliminary decree did not direct the partition of the shares of defendants inter se, the Court had no jurisdiction to partition and separate Deo Narain's share from his share. He alleged that as Deo Narain was insane it was essential for safeguarding his rights that his share should be kept joint with his share, and maintained that Mt. Makhna as guardian ad litem of Deo Narain was not entitled to apply for partition of Deo Narain's share (vide p. 121 of the record). Mt. Makhna filed a replication on 12th July 1924 (p. 123 of the record). She alleged that Ram Narain opposed her petition dated 3rd May 1924 out of dishonest motives and with a view to misappropriate the profits of Deo Narain's share and contended that the right of a defendant to a partition suit to have his share also partitioned subsists till the date of the passing of the final decree. She asserted that as the guardian of Deo Narain she was fully competent to apply for the partition of Deo Narain's share. The Court by its order dated 16th August 1924 (p. 129 of the record) overruled the objections filed by the plaintiffs and Ram Narain and granted the petition for the partition of Deo Narain's share. It held that it is the right of every defendant in a partition suit to have his own share partitioned and given to him and as such Mt. Makhna was entitled to apply for partition of Deo Narain's share, though the preliminary decree did not direct the partition of his share. It observed that it was to the interest of Deo Narain that his share should be partitioned, and, accordingly, ordered that Deo Narain's 1-4th share in the family properties be also partitioned, and a final decree was drawn up in accordance with the order.

Ram Narain and Lachhmi Narain filed an appeal in this Court against the final decree passed by the Subordinate Judge. Deo Narain died during the pendency of the appeal and, on an application being made by the appellants, Mt. Makhna, the widow of Deo Narain, and Mt. Shaman, his daughter, were brought upon the record in the

array of the respondents as the legal representatives of Deo Narain. This Court held that, as the preliminary decree dated 23rd April 1924, had not been appealed against and had become final, the Subordinate Judge had not the jurisdiction or the legal competency to go behind that decree and to direct the partition of the share of Deo Narain from that of Ram Narain and, accordingly, modified the final decree and directed that "the shares of Ram Narain, Lachhmi Narain and Mt. Makhna as the representatives of Deo Narain be held in common" (the judgment of this Court is printed at p. 185 of the record).

After the decision of this Court Makhna applied for the entry of her name in the revenue papers in place of the name of Deo Narain and her application was granted by the Revenue Court on 1st September 1928. The suit giving rise to the present appeal was then filed by Ram Narain and Lachhmi Narain on the allegation that Deo Narain was joint with them on the date of his death and they succeeded by right of survivorship to the entire property that was allotted by the final decree to Ram Narain and Deo Narain and that Mt. Makhna had no right to the same. The plaintiffs alleged that nothwithstanding the decree in the partition suit they and Deo Narain continued to live as members of a joint Hindu family and that the application dated 3rd May 1924, had no effect whatever on the jointness between them as that application was ultimately dismissed by this Court.

Mt. Makhna contested the suit. She contended firstly that the institution of the partition suit by two of the sons of Rameshar had the effect of causing a disruption of the entire joint family and that Deo Narain must be deemed to have become separate from all his brothers from the date of the institution of that suit; and secondly, that as the application dated 3rd May 1924, was filed by her with the consent and permission of Deo Narain and was granted by the trial Court and the share of Deo Narain was separated, Deo Narain was the exclusive owner of the share allotted to him and she succeeded to the same by right of inheritance. She denied the allegation of the plaintiffs that Deo Narain was of unsound mind, but the Court below decided the point against her, and the finding on that point has not been assailed on her behalf in the present appeal. The plaintiffs alleged that Ram Das and Parsotam Das had separated in mess and residence from Ram Narain and Deo Narain about the year 1920 and that Ram Narain and Deo Narain continued to live jointly till the latter died in the year 1927. The case of Mt. Makhna, on the other hand, was that all the four brothers separated with each other in mess and residence in 1920 and that Deo Narain continued to live as a separated Hindu till his death in the year 1927. This point has also been decided against Mt. Makhna and no exception has been taken to the finding of the Court below on the point.

On the main question in the case the Court below held that the effect of the separation of Ram Das and Parsotam Das was to put an end to the presumption of jointness, and, as such, the burden of proving that Ram Narain and Deo Narain continued to be joint was on the plaintiff-appellants and this burden had not been discharged. In this connexion the Court below emphasized the fact that the Subordinate Judge, who allowed the application dated 3rd May 1924, had held that the partition of Deo Narain's share was to his benefit and that this finding of the Subordinate Judge was approved on appeal by this Court, though this Court annulled the partition of Deo Narain's share effected under the orders of the Subordinate Judge on account of the technical difficulty that the partition of his share was not ordered by the preliminary decree. It observed that though the proposition, that a definite and unequivocal indication of his intention by a member of a joint Hindu family to separate himself from the other members of the family and to enjoy his share in severalty causes the severance of the status of jointness, has no application to the case of a minor or a lunatic, and therefore the application dated 3rd May 1924, filed by Mt. Makhna could not by itself cause the separation of Deo Narain, but held that as that application had the approval of the trial Court, it was sufficient to put an end to the joint status and that Deo Narain became separate from Ram Narain from the date that the application was allowed by the trial Court. The Judge further noticed various facts in the course of his judgment that in his opinion demonstrated that there was not only a formal severance, but a severance in fact between Deo Narain and Ram Narain, and, as a result of his findings, held that Deo Narain was a separated

Hindu on the date of his death and accordingly dismissed the suit. The plaintiffs have come up in appeal to this Court and it is argued on their behalf that the conclusion arrived at by the Subordinate Judge is erroneous and runs counter to the law on the subject as interpreted by judicial decisions. It is admitted on all hands that the decree in the partition suit effected the separation of Ram Das and Parsotam from the joint family and the main question for consideration in the appeal is whether it left Ram Narain and Deo Narain united inter se. The plaintiffs contend that, as in consequence of the decision of this Court the share of Deo Narain was not separated from the share of Ram Narain, they must be presumed to have remained joint, and the separation of their two brothers had not the effect of causing a severance of their joint status. On the other hand, it is urged on behalf of the defendant-respondent that the separation of Ram Das and Parsotam caused a disruption of the entire family and each member of the family must be deemed to have become separate from the others.

The general principle is that every family governed by the Mitakshara school of law is presumed to be joint unless the contrary is proved, but if one member of the family separates from the others ,this presumption is destroyed and there is no presumption that the separation was partial and was confined only to the member separating himself and that the remaining members of the family remained united. It is however open to the remaining members to continue to remain united or to reunite, but this can be only by virtue of an express or implied agreement between them and, such an agreement, if pleaded, must be proved like any other fact. But in the absence of proof of such an agreement the presumption is that on the separation of one co-parcener the remaining co-parceners ceased to be joint. There is however in such a case no presumption that there was a separation between one co-parcener and his descendants.

The leading case on the subject is the decision of their Lordships of the Privy Council in 30 Cal 725 (1). It was held in that case that when one co-parcener separates from the others, there is no presumption that the remaining co-parceners remained united, and where it is necessary, in order to ascertain the share of the outgoing co-parcener, to fix the shares which the others are, or would be entitled to, the separation of one may be said to be the virtual separation of all. And an agreement amongst the remaining co-parceners to remain united or to reunite must be proved like any other fact. To the same effect is the decision of their Lordships in 1923 P C 136 (2). The question was again considered and decided by their Lordships in 1925 P C 49 (3), and great reliance has been placed on behalf of the appellants on this decision. It was observed by their Lordships in that case that it is open to the co-parceners in a joint family to separate by agreement amongst themselves:

> But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the co-parceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is, on separation, entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous co-parceners had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to re-unite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence and when it happens it must be strictly proved as any other disputed fact is proved.

Their Lordships further held that:

> In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his co-parceners or was a separation of all the brothers of the joint family from each other.

It is contended on behalf of the appellants that this decision is an authority for the proposition that on the separation of one member of the family the remaining members may without "special agreement" continue to live as members of a joint family and it is

1. Balabux v. Rukhmabai, (1903) 30 Cal 725=30 I A 130=8 Sar 470 (P C).

2. Jatti v. Banwari Lal, 1923 P C 136=74 I C 462=4 Lah 350=50 I A 192 (P C).

3. Palani Ammal v. Muthuvenkatachala Moniagar, 1925 P C 49=87 I C 333=52 I A 83=48 Mad 254 (P C).

urged that, as by the final decree in the partition suit the shares of Ram Narain and Deo Narain were not partitioned and were kept in one lot, Ram Narain and Deo Narain must be presumed to have continued to remain joint. It cannot be disputed that it is open to the non-separating members to remain joint without an express agreement to that effect, and that their intention to remain joint or to re-unite may be inferred from the way in which their family business was carried on or from other conduct indicating an intention to remain united, notwithstanding the separation of some of the co-parceners. In other words, where proof of an express agreement to remain joint or to re-unite is wanting. such an agreement may be implied from the conduct of the non-separating co-parceners, if the conduct points to the conclusion that, notwithstanding the separation of the outgoing co-parcener they intended to remain joint. But in the absence of proof of an express or an implied agreement to that effect, the presumption is that each co-parcener separated from the other. The observation of their Lordships that the decree in a partition suit is the evidence to show whether only the plaintiff in the suit separated from his co-parceners or there was a separation of all the members of the joint family from each other does not militate against the propositions noted above. If by the decree the share of each co-parcener is partitioned, the decree furnishes cogent evidence of separation of all the members from each other, and, in such case, a heavy burden lies on the person who pleads an agreement among some of the co-parceners to re-unite. It is to be observed that there is distinction between an agreement to continue to remain joint and an agreement to re-unite. The former predicates the continuance of jointness throughout, while the latter can only come into existence after there has been a partition between the co-parceners agreeing to re-unite. If by a partition decree the share of each co-parcener is separated, there can be no question of an agreement to remain joint as jointness is put an end to by the decree and in such case it is only by an agreement to re-unite that some of the co-parceners can again become members of a joint Hindu family.

It is true that in consequence of the decision of this Court the share of Deo Narain was not separated from the share of Ram Narain by the final decree and the shares of both remained in one lot. Nevertheless the partition of the shares of Ram Das and Raghunandan put an end to the presumption of jointness between Ram Narain and Deo Narain and the plaintiffs can only succeed in the present litigation either on proof of the fact that Ram Narain and Deo Narain continued to live joint or re-united with each other, and this can only be done by proving either an express or an implied agreement between them to that effect. The plaintiffs however are here faced with an insurmountable difficulty. Deo Narain was of unsound mind and was therefore incapable of entering into an express agreement to re-unite or to continue to remain joint with Ram Narain, and, as he died before the final decision of the partition suit, there can be no question of an agreement to that effect being implied by his conduct. An agreement to remain joint or to re-unite can only be inferred by long course of conduct clearly exhibiting an intention not to become separate, and in the case before us, there was no time to indicate such an intention as Deo Narain died before the termination of the partition suit.

That the decision in 1925 P C 49 (3), does not in any way introduce a change in the law as laid down in 30 Cal 725 (1), is manifest from subsequent pronouncements of their Lordships of the Privy Council. In 1925 P C 93 (4), it was held by their Lordships that when it is proved that there was separation of a joint Hindu family, it is for those who allege a reunion to prove it like any other fact, and the facts that after the separation certain members of the family lived in one and the same house, carried on business as partners and jointly paid Government revenue, are not sufficient to prove reunion. To the same effect are the decisions in 1931 P C 154 (5) and 1934 P C 138 (6). It was held in these cases that after one member of a joint family has separated, there is no presumption that the other members remained joint, and whether they have done so is a question of fact which must be proved like any other fact.

For the reasons given we hold that the plaintiffs in the present case did not discharge the burden that un-

4. Jag Prasad Rai v. Singari, 1925 P C 93=86 I C 122 (P C).
5. Bal Krishna v. Ram Krishna, 1931 P C 154=132 I C 733=58 I A 220=53 All 300 (P C).
6. Babu v. Official Assignee, Madras, 1934 P C 138=150 I C 1=61 I A 257=57 Mad 931 (PC).

doubtedly lay on them, and, that the finding of the Court below that neither an express nor an implied agreement between the plaintiffs and Deo Narain to remain joint or to re-unite was proved, is correct.

Apart from this, in our judgment the application dated 3rd May 1924, filed by Makhna, was in the circumstances of the present case, sufficient to bring about separation between Ram Narain and Deo Narain, even if they be presumed to have continued to be joint till the date on which the application was filed. It is settled law that the presumption of jointness, that holds good in the case of a family governed by the Mitakshara school of law, can be displaced by slight evidence pointing to the conclusion that the severance of the status of jointness was effected, either by an agreement amongst all the adult members of the family, or by a definite and unequivocal indication of his intention by even one adult member of the family to separate himself from the family and enjoy his share in severalty. In the latter case it is open to the member indicating his intention to separate to put an end to jointness at his sweet will, even if the other members of the family do not agree to separation. Separation means the severance of the status of jointness and it is therefore a matter of individual volition. Whether there has been a clear, definite and unambiguous indication of an intention to separate by a member of a joint family is a question of fact, and the answer to that question must depend on the facts and circumstances of each case. The intention to separate may be expressed in different ways either by explicit declaration or by conduct. One of the recognized modes in which such an intention may be expressed is either by serving a notice on the other co-parceners or by instituting a suit for partition, and in such cases the severance of the joint status is presumed from the date of the notice or from the date of the suit, vide 35 All 80 (7), 1916 P C 104 (8), 1920 All 116 (9), 1922 P C 201 (10) and 1931 P C 154 (5). This is the general law, but it is not applicable in the case of persons who are under a legal disability for the simple reason that such persons are incompetent to give expression to an intention to separate. It was held by a Full Bench of this Court in 1920 All 116 (9), that the institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of a similar suit by an adult member of the family, that is to say, the mere institution of the suit on behalf of a minor member does not effect a separation of the family, but separation only takes place when the suit is decreed. It was observed in that case that it would "open up great dangers" to hold that it is open to a next friend or a guardian of a minor to bring about an immediate alteration of the status in a family, that might otherwise be quite united, simply by the institution of a suit on behalf of the minor for partition:

> Because a minor cannot demand as of right a separation; it is only granted in the discretion of the Court when, in the circumstances, the action appears to be for the benefit of the minor.

A person of unsound mind in this respect stands on the same footing as a minor, and it may therefore be assumed that the mere presentation of the petition dated 3rd May 1924, had not the effect of bringing about separation between Ram Narain and Deo Narain, if they were joint up to that date. But as observed above, the Court held that, as the separation of Deo Narain's share was to his benefit, the application ought to be allowed, and accordingly ordered the partition of Deo Narain's share as well. A separate lot for Deo Narain was prepared and was incorporated in the final decree passed by the trial Court. This Court no doubt allowed the appeal filed by Ram Narain and Lachhmi Narain against the final decree, but there is nothing in the judgment of this Court to indicate that it held that Ram Narain and Deo Narain were joint with each other. On the other hand the Bench that decided the appeal observed that

> The fact of varying the decree of the Court below will not in any way prejudice the right of Mt. Makhna to institute a suit for partition of the share of Deo Narain from that of Ram Narain in the family property.

The only ground on which the appeal was allowed was that there was no direction contained in the preliminary decree for the separation of Deo Narain's share, but the finding of the Subordinate Judge that Mt. Makhna

7. Suraj Narain v. Iqbal Narain, (1913) 35 All 80=18 I C 30=40 I A 40 (P C).
8. Girja Bai v. Sadashiv Dhundiraj, 1916 P C 104=37 I C 321 = 43 I A 151 = 43 Cal 1031 (P C).
9. Lalta Prasad v. Sri Mahadeoji Birajman Temple, 1920 All 116=58 I C 667=42 All 461 (F B).
10. Ramlinga Annavi v. Narayana Annavi, 1922 P C 201=68 I C 451=49 I A 168=45 Mad 489 (P C).

was justified in making an application for the separation of the share of Deo Narain was accepted by this Court, and the learned Judges observed that

We are of opinion that there was considerable justification on the part of Mt. Makhna in applying to the Court below for the partition of the share of Deo Narain with a view to safeguard his interests.

The following quotation from the judgment further demonstrates that this Court was of the opinion that Deo Narain was not joint with Ram Narain. The learned Judges observed that:

We leave Ram Narain and Mt. Makhna to have their rights adjusted by means of a separate suit, if they so choose. In the meantime we are of opinion that the portion of the property which has not been allotted to the plaintiffs should be considered for the purpose of the present suit to be the property held in common.

The fact therefore remains that the guardian ad litem of Deo Narain did clearly express an intention by means of an application to have the share of Deo Narain separated from the share of Ram Narain and the application had the approval both of the Court below and of this Court, and in our judgment this had the legal effect of bringing about separation between Ram Narain and Deo Narain, even if they were joint up to the time that the petition was filed in Court. A member of a joint family who is a minor or of unsound mind is incapable of giving expression to an effective intention to separate, but such intention can be expressed by his guardian and has the legal effect of bringing about disruption of the joint family, provided the Court is of the opinion that it is to the benefit of the minor or the person of unsound mind to separate. Once the Court has recorded a finding to that effect the separation follows as a matter of law and is not dependent on the fact of the share of the minor or of the person of unsound mind being actually separated by metes and bounds. We therefore hold that the petition dated 3rd May 1924, did also bring about separation between Ram Narain and Deo Narain.

For the reasons given above, we hold that the Court below was right in dismissing the suit and we dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 882

KENDALL, J.

Sarju and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 5 of 1935, Decided on 12th March 1935, from order of Sess. Judge, Cawnpore, D/- 26th October 1934.

Criminal Trial — Confession—Magistrate has to see whether it is relevant or not—If it is not relevant, it cannot be used as against other accused even though true facts are mentioned.

The question the Magistrate has to consider is, in the first place, whether the confession is relevant or not. If it is not relevant it does not matter how many true facts are mentioned in it, and it cannot be used against the other persons accused in the case. [P 883 C 1, 2]

Saila Nath Mukerji—for Appellants.

Government Pleader—for the Crown.

Judgment.—The appellants, Sarju and Maiku, were convicted by the Sessions Judge of Cawnpore with three other persons of an offence under section 395, Penal Code, and sentenced to seven years rigorous imprisonment. They have appealed against their convictions and sentences, and Sarju has been represented in this Court by Mr. Saila Nath Mukerji. The dacoity took place on the night between 4th and 5th June 1934, at the house of one Pitan Lodh of village Rastpur in the District of Cawnpore. Pitan himself and his two sons were not at home on the night in question, and the house was only occupied by womenfolk and some children as well as by one Kunwarwa, son of Pitan's nephew, aged 20. The Sessions Judge was thoroughly satisfied by the evidence that a dacoity did take place at Pitan's house on the night in question, though it was not of a very serious nature, the only property taken being the jewels which were on the persons of the women, nobody being injured. It did not last a very long time because information was taken to the mukhya, Sardar Prasad, and he came to the spot with a relieving force, before whose arrival the dacoits, who are said to have been eight in number, had dispersed. According to the evidence for the prosecution, one of the dacoits, Bajrang Brahman, was not only a resident of Rastpur but was actually the family priest of Pitan, and he and another of the dacoits, Ram Lal Ahir, were recognised by Mt. Kallo, daughter of Pitan, on the night in question. When Pitan returned on the afternoon after

the dacoity the names of these two were given to the Police, and Bajrang was arrested at once. Bajrang made a confession which was recorded by a Magistrate on 9th June, but which he retracted in the Sessions Court.

The evidence against Bajrang and Ram Lal, who were known beforehand, who were recognised on the spot and were named to the Police, is of a different quality from that against Sarju, the present appellant, and Maiku, who has appealed from jail. I am only now concerned with the cases of the last two. Apart from the retracted confession of Bajrang, the evidence against them consists only of the statement of one identifying witness, Mt. Kallo.

It has been pointed out that Bajrang was arrested on 5th June, and he remained in Police custody until 9th June, when his confession was recorded by the Magistrate, and also after that date. The Judge has remarked: "The confession is not in itself of very much value," and he goes on to point out that Bajrang was kept in Police custody up to the moment that he was sent to a Magistrate and was then remanded to Police custody and remained there apparently till the case was committed to the Sessions. He gives reasons for holding that this procedure was entirely wrong and that the circumstances strongly suggest that Bajrang received an inducement from the Police, namely, that he would be made a prosecution witness. The Judge had held that, although the circumstances suggest that there was an inducement, it does not necessarily follow that the confession was false. No doubt part of the confession is true, but what the Judge had to consider was whether the confession could be used as evidence if it was caused by some inducement. Under S. 24, Evidence Act, a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. The question to consider therefore was, in the first place, whether the confession was relevant or not. If it was not relevant it did not matter how many true facts were mentioned in it, it could not be used against the other persons accused in the case.

The Judge however has used it, although he says, "very little reliance can be placed upon it." If however the confession is discarded altogether in considering the case against Sarju, and Maiku, the only thing that remains is the evidence of Mt. Kallo who identified them in jail. In the identification proceedings 20 under-trial prisoners were put up from among whom five were to be identified by the witnesses in the present case. Mt. Kallo identified three correctly and made two mistakes, that is to say, she was not a good witness but a fair one, and what is to be considered is whether her evidence is sufficient alone to convict the appellants. The Judge has discussed her evidence at considerable length and with great care. He believed her to be a very stupid witness and she certainly made some mistakes which are difficult of explanation. For instance, in cross-examination she stated that she had seen both Sarju and Maiku before the dacoity while visiting Bajrang in the village. If this is a fact it is certainly curious that there was no mention of their names when the report was made to the Police, and Bajrang and Ram Lal were named, that is, it was not suggested that there were other dacoits who had been identified and who could be recognised if they were produced. The Judge remarks that she may not have realised until after she had seen them in jail that she had actually seen them before. But it seems to me to be very doubtful whether he would have convicted Maiku and Sarju on the evidence of Mt. Kallo alone, if he had also not made use of the confession of Bajrang. In these circumstances I think I am bound to give the benefit of the doubt to these two appellants. I therefore allow their appeals, set aside the order of conviction and sentences, and direct that they be acquitted and released.

K.S. *Order set aside.*

A. I. R. 1935 Allahabad 883

ALLSOP, J.

Ram Gir—Applicant.

v.

Ravisaran Singh and *others*—Opposite Parties.

Criminal Revn. No. 200 of 1935, Decided on 17th April 1935, from order of Dist. Magistrate, Benares.

(a) Criminal Trial—Revision — Technical irregularities are not grounds for interference.

Technical irregularities in procedure are not sufficient grounds for interference in revision. [P 884 C 1]

(b) Criminal Trial — Object of criminal Courts is to punish crime and not primarily to do justice between parties.

It is not the object of the Criminal Courts primarily to do justice between a complainant and an accused person. Their primary object is to punish crime in the interests of the State. If a complainant is considering his own private grievances he can seek redress by way of damages in a civil Court. [P 884 C 2]

A. Sanyal—for Applicant.

C. Ross Alston and *Ambika Prasad Dube*—for Opposite Parties.

Order.—This is an application in revision. The Joint Magistrate of Benares, dismissed under S. 203, Criminal P. C., two complaints which were made by the applicant. The applicant is a goshain who has an interest in a temple in the village of Kaithi. There has been a dispute between the goshains and the zemindars of that village over their rights in this temple. I am told that the Subordinate Judge has decided that the parties both have rights but his decision is the subject of an appeal in this Court. The complaints were that the zemindars had forcibly removed the applicant's lock from a room in the temple and had removed certain articles which were used for the purposes of the temple and when the applicant interfered that he was beaten and insulted by having his beard pulled.

The Joint Magistrate made local enquiries and came to the conclusion that the story was not true. It was obviously in any case a matter which seems to have been more or less of a civil nature. The complaint makes it clear that it was not the violence used against the applicant which was emphasised at that time. The complaint is that the Magistrate did not take the applicant's evidence and also the technical point that he did not personally examine the applicant and record his statement when the complaints were presented. I am not satisfied that in substance there was no proper enquiry into the complaints made and I am not prepared to interfere in revision merely because there have been technical irregularities in procedure. I do not say that such irregularities did occur, but if they did occur, they are no sufficient grounds for interference. It has been stressed that the complainant has not received justice. It is not the object of the Criminal Courts primarily to do justice between a complainant and an accused person. Their primary object is to punish crime in the interests of the State. If a complainant is considering his own private grievances he can seek redress by way of damages in a Civil Court. I see no reason to interfere, and I dismiss this application.

K.S. *Application dismissed.*

A. I. R. 1935 Allahabad 884

KENDALL, J.

Kailash Pati Sahai — Defendant — Appellant.

v.

Jagarnath Rai—Plaintiff and others, Defendants—Respondents.

Second Appeal No. 280 of 1933, Decided on 13th March 1935, from decision of 2nd Addl. Sub-Judge, Ballia, D/- 14th November 1932.

Benami—Direct evidence for its proof is not necessary—Evidence of intention is relevant—Finding of benami based on some evidence cannot be upset in second appeal.

It is not necessary to produce direct evidence to prove a transaction as benami; evidence of intention is relevant, and a finding in favour of benami transaction, if based on some evidence, cannot be interfered with in second appeal. [P 886 C 1]

K. Verma—for Appellant.

Janaki Prasad—for Respondents.

Judgment.—This is an appeal by one of the defendants in a suit for a declaration that was dismissed by the trial Court, but decreed by the lower appellate Court. There is a great deal of confusion both of law and fact in the judgment of the Second Additional Subordinate Judge of Ballia, Mr. Sri Nath, and it is necessary therefore to state at some length the circumstances from which the suit arose.

Sheo Govind, one of the defendant respondents, was a member of a joint family consisting of himself and his step-brothers, Shambu Nath and Sheo Kumar, who were also joined in the suit as defendants. In execution of a money decree against Sheo Govind certain property was attached and sold at auction, and it was purchased in the name of Mt. Rameshwari Devi, sister of the present defendant-appellant, for a sum of Rs. 1,800. The purchaser got a sale certificate and formal possession, and obtained mutation of names. The validity of this auction-sale was called in question in a partition suit between Sheo Govind and his step-brothers, and Mt. Rameshwari Devi was made a

party to those proceedings. The matter was referred to arbitration, and the arbitrators held that the sale in favour of Mt. Rameshwari Devi was a good sale, but that as the parties had agreed that Mt. Rameshwari Devi would return the property to Sheo Govind and his step-brothers on receipt of the purchase money, namely. Rs. 1,200, from Shambu Nath and Sheo Kumar and Rs. 600 from Sheo Govind, a covenant was embodied in the decree that she would do so if they made payment in the month of Jeth in any year. The plaintiff-respondent in the present suit obtained a money decree against Sheo Govind in 1929, and applied in execution for attachment and sale of the disputed property on the ground that it belonged to Sheo Govind. This property, as I have already explained, was recorded in the name of Mt. Rameshwari Devi; but she had died in the meanwhile and it was her brother, the present appellant, who made an objection under O. 21, R. 58, Civil P. C., as her heir, on the ground that the property was his. This objection was allowed and the plaintiff therefore filed the present suit.

The suit was based on the allegations that the auction-sale of 1924 was fictitious and that it was never enforced, so that the 1/3rd share of Sheo Govind was liable to attachment and sale in execution of the plaintiff's decree. In the alternative, it was pleaded that if the sale were held to be valid, there was nevertheless a charge in favour of Sheo Govind in respect of 1/3rd of the property, which had been created by the decree in the partition suit, and as a consequence it was prayed that that share should be attached and sold in execution of the decree. Apparently the plaintiff's meaning was that Sheo Govind's right of reconveyance could be attached and sold, and that a declaration to this effect ought to be decreed.

The lower appellate Court has come to a finding that the auction-sale of 1924 was benami and that Sheo Govind was the real purchaser, the present appellant's sister being only a benamidar. In the last paragraph however the lower appellate Court has discussed the partition proceeding and remarked that the sale was "fictitious and benami", but that Sheo Govind had a right of reconveyance under the partition decree subject to payment of Rs. 600, and that this right of reconveyance was attachable and saleable. It appears therefore that the learned Additional Subordinate Judge mixed up three things. If the sale was fictitious, as he found it to be, there was no sale at all, and it could not have been a benami transaction, because such a transaction, does mean a transfer of property, though not to the nominal transferee. If the sale was benami as he also found it to be, the purchaser was the person who provided the sale consideration, and this according to the lower appellate Court, was Sheo Govind. But this is evidently a mistake because it is quite clear both from the pleadings and the evidence that if the transaction was benami, the real purchaser was the joint family of which Sheo Govind was the manager. If on the other hand, the sale was neither fictitious nor benami, but a genuine transaction, and a right of reconveyance to Sheo Govind and his two step-brothers was created by the partition decree of 1925, then that right of conveyance so far as Sheo Govind was concerned might be attached and sold in execution of the plaintiff's decree. But this finding is altogether inconsistent with the finding that the sale was a benami one, and that the purchasers were really Sheo Govind and his step-brothers, because in that case of course there could be no question of a reconveyance to them.

The lower appellate Court has however not come to a definite finding that the auction-sale of 1924 was a genuine one. The remarks about the reconveyance were made in the course of a discussion about the partition decree, and if the definite finding that the sale was benami is to be upheld, all this part of the judgment is obiter besides being unintelligible. The statement in the judgment that the sale was fictitious, again, appears to be due to a misunderstanding of the meaning of the word "fictitious." The decision that the sale was benami appears to be on the face of it one of fact; but it has been argued by Mr. Kamlakant Verma, to whom I have been much indebted for his clear exposition of the difficulties in the case, that it is a finding that is not supported by any evidence. There was a witness Kanhaiya Lal who came forward to prove that the property was purchased by Sheo Govind out of money received from the Maharaja of Dumraon. This witness however has been disbelieved by the trial Court, and it does not appear that the Additional Subordinate Judge believed him either, because he remarks:

It is beyond the means of appellant (i. e. the plaintiff) to give definite and direct evidence as to from where respondent 2 (Sheo Govind) got the money. The letter, auction sale and dakhal dehani suggest that the real purchaser is respondent 2 (Sheo Govind).

He then goes on to point out that the husband of Rameshwari Devi had not been able to prove that his wife had money with which the sale consideration could have been paid, and this has led to the suggestion that the Court had misdirected itself in believing that the burden of proof was on the defendants, i. e., those upholding Mt. Rameshwari Devi's title. It certainly appears that the Court did not rely on Kanhaiya Lal's evidence, which was definite and direct, though it may not have been true. What the Court has relied on are the letter, the auction-sale and the dakhal dehani. If these provide evidence on which the Court could base a finding of fact, I am clearly of opinion that the finding cannot be disturbed in second appeal. The letter is one written by Sheo Govind in 1923 to Kanhaiya Lal showing that his property had been put up to sale and that he was anxious to purchase the property in the name of another person so that the creditors might not proceed against it. The Additional Subordinate Judge has held that this clearly shows the intention of Sheo Govind to bring about a benami transaction, and draws from it the inference that if he did subsequently make a transfer of the property, the transfer was a benami one. The other piece of evidence is that after the auction-sale formal possession of the property was given to one Ram Govind Lal who had some connexion with Sheo Govind. This last piece of evidence is not very definite, but the letter does appear to show clearly that a benami transaction was intended by Sheo Govind. It has been argued by Mr. Verma that although this may be so, it does not follow that such a transfer was actually made. But I have not been shown any authority for holding that evidence to prove that a transaction was benami must necessarily be direct evidence. It appears to me that the evidence of intention was relevant, and it follows from this that the finding in favour of the benami transaction was based on some evidence and is binding on me.

I have already said that the Judge remarked that respondent 2, i. e., Sheo Govind, was the real purchaser. He may have actually deposited the money, but the case for the plaintiff was—and the partition proceedings bear this out—that the money was joint family money and that Sheo Govind's personal share was only 1/3rd of it. It follows from this that Sheo Govind was the real purchaser at the auction-sale to the extent of 1/3rd, and that the plaintiff-respondent is entitled to a decree for a declaration that Sheo Govind's 1/3rd share in the property named in the plaint can be attached and sold in execution of his decree. It is by no means clear that this is the conclusion at which the lower appellate Court had arrived ,and it would be difficult to say that the appeal was not to some extent justified. But the respondents are not responsible for this and cannot be made to suffer for it, and I therefore direct that the appeal be dismissed with costs.

(Permission for Letters Patent appeal was refused).

R.W./R.K. *Appeal dismissed.*

A. I. R. 1935 Allahabad 886

SULAIMAN, C. J. AND GANGA NATH, J.

(*Firm*) *Makhan Lal Lachmi Narain* —Defendants—Appellants.

v.

(*Firm*) *Abhai Ram Chunni Lal* — Plaintiff —Respondent.

First Appeal No. 168 of 1933, Decided on 17th April 1935, from order of Sub-Judge, Jaunpur, D/- 24th August 1933.

Civil P. C. (1908), Sch. 2, Paras. 17 and 19 —Agreement of reference to arbitration— Nothing in writing produced—It cannot be ordered to be filed under para 17.

Para. 17 contemplates that the agreement should be in writing and should be before the Court, so that it may be ordered to be filed in order that an arbitrator may be appointed in accordance with its provisions and he may be called upon to act upon the agreement. It is not necessary that the document should be in the form of a written contract signed by the parties so as to be an instrument or document ; but it is certainly necessary that there should be some writing which should embody the whole of the agreement. The terms of the agreement should not be a matter of controversy between the parties in the Court which has to decide whether the agreement should or should not be filed. Once the Court is satisfied that the agreement which is in writing and is before it, was entered into by the parties, it can proceed under para 17, but where no writing is produced and the terms of it are not admitted, the Court cannot order it to be filed without first ascertaining the terms, as to which it would have to hold an inquiry, which does not appear to be contemplated in the provisions of para 17. [P 887 C 1, 2]

Shiva Prasad Sinha—for Appellants.

K. N. Katju, Gopalji Mehrotra and *R. K. S. Toshniwal*—for Respondents.

Judgment.—This is a defendant's appeal from an order of the Court below filing an agreement of reference to arbitration. The application was rather a belated one and was filed on 12th May 1933, on the strength of an agreement of reference to arbitration, dated 12th May 1930. The agreement was not filed along with the application, but it was stated that it had been given to the head arbitrator. Certain terms of the agreement were mentioned in para. 6 of the plaint. The defendant admitted only a part of para. 6 and did not admit the rest of the allegations containing the terms of the agreement. The fact that an agreement of reference to arbitration had been entered into was admitted. It was pleaded that, as the original agreement was not forthcoming, it could not be ordered to be filed. There was a further plea that the person who had agreed on behalf of the defendant had no authority to do so.

The Court below has come to the conclusion that the "Pairokar" of the defendant had authority to act on his behalf, and has also thought that, although the original document is not forthcoming yet an order for filing can be made. We do not think it necessary to go into the question whether the "Pairokar" had or had not authority to act on behalf of the defendant, because in our opinion this application must be dismissed on another ground. Para. 17, Sch. 2, Civil P. C., provides that:

> Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

Notice is to be issued to all the parties to the agreement under Sub-Cl. (2) and under Sub-Cl. (4):

> Where no sufficient cause is shown the Court shall order the agreement to be filed, and shall make an order of reference to arbitrator appointed in accordance with provisions of the agreement . . . . .

Obviously para. 17 contemplates that the agreement should be in writing and should be before the Court, so that it may be ordered to be filed in order that an arbitrator may be appointed in accordance with its provisions and he may be called upon to act upon the agreement. Now, it is not necessary that the document should be in the form of a written contract signed by the parties so as to be an instrument or document; but it is certainly necessary that there should be some writing which should embody the whole of the agreement. Obviously the intention seems to be that the terms of the agreement should not be a matter of controversy between the parties in the Court which has to decide whether the agreement should or should not be filed. Once the Court is satisfied that the agreement which is in writing and is before it, was entered into by the parties, it can proceed under para. 17, but where no writing is produced and the terms of it are not admitted, the Court cannot order it to be filed without first ascertaining the terms as to which it would have to hold an enquiry, which does not appear to be contemplated in the provisions of para. 17. It is not merely a case of proving the contents of a document which has been lost, which may be done by secondary evidence; but the agreement itself has to be ordered to be filed and therefore it should exist in writing before the Court. As it is not necessary that it should be signed by the parties, any writing, so long as it embodies the whole of the agreement, would be sufficient. Other provisions in the schedule also show that a written agreement is necessary. In order that earlier provisions of the schedule may be applied under paragraph 19, it is necessary to see that they are consistent with the agreement filed under para. 17. On the other hand, where an award has been made out of Court, paras. 20 and 21 do not require that the agreement of reference to arbitration should itself have been in writing, and the award based even on an oral agreement of reference can be ordered to be filed. It therefore seems to be against the spirit of paras. 17 to 19 that an agreement of reference to arbitration, where nothing in writing is produced before the Court, should be ordered to be filed.

In the present case, the terms of the agreement were not wholly admitted by the defendant, and the Judge has merely remarked that the contents of it are mostly admitted by the parties, which implies that they are not admitted wholly. No copy, proved to have been the duplicate of the agreement, has been produced in this case; and it is therefore impossible to know the exact terms agreed to by the parties, particularly after a lapse of so many years. Apart from all this, the Court can order the agreement to be filed under para. 17 (4) only where no sufficient cause is shown to the con-

trary. It seems to us that where the original document is not forthcoming and its terms cannot be ascertained exactly, and therefore it would be impossible for the arbitrator to decide how to act, sufficient cause is shown for not ordering the agreement to be filed. On these grounds we allow the appeal and set aside the order of the Court below dismissing the application with costs in both Courts.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 888

SULAIMAN, C. J. AND BENNET, J.

Ram Sewak—Plaintiff—Appellant.

v.

Bahal and *others*—Defendants—Respondents.

Second Appeal No. 30 of 1932, Decided on 8th April 1935, from decision of Sub-Judge, Benares, D/- 25th August 1931.

Res-judicata—Property alleged as belonging to *R* attached by *S* in execution of decree against *R*—Suit by *RS* that it did not belong to *R* and that he was absolute owner—*R* and *S* impleaded and suit decreed—Subsequent attachment of same property by *B*, another creditor of *R*, and purchase of property by *N*—Declaratory suit by *RS*—Decree in original suit is binding on *B* and *N* and as such they cannot call upon *RS* to prove his title again.

Certain property was attached by *S* in execution of a decree against *R* as belonging to him. A suit filed by *RS* to which both *R* and *S* were impleaded for a declaration that he was the absolute owner of the attached property was decreed. Subsequently *B*, another creditor of *R*, attached the same property in execution of his decree and it was purchased by *N*; then *RS* filed another declaratory suit:

Held: that the question of title decided in the prior suit was binding on *R* and all the subsequent representatives. As *B* attached the property subsequent to the decree, he must be deemed to be a representative of *R*. Hence previous judgment operated as res judicata against *R* and also against his attaching creditor *B*; hence it must operate as res judicata against the auction-purchaser *N* as well and they cannot call *RS* to prove his title over and over again: 1928 *Cal* 130, *Dist.* [P 888 C 2 ; P 889 C 1]

Shiva Prasad Sinha—for Appellant.

Harnandan Prasad—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for a declaration that a certain property belongs to the plaintiff and does not belong to Raghubir and is not attachable and saleable in execution of the decree of Bahal and others against Raghubir. There was a suggestion in the trial Court that a previous decree obtained by the plaintiff against Raghubir was a collusive decree, but no issue was framed on the point, and although the defendants lost in the first Court, they did not raise that question again in the grounds of appeal to the lower appellate Court. The point must be taken to have been abandoned. On the question of fact the finding is in favour of the respondent that the deed of gift executed in favour of the plaintiff's father was not a genuine transaction, but was a fictitious document executed with some ulterior motive. It follows therefore that the plaintiff is not entitled to base his claim on the deed of gift.

The only question that remains is the question of res judicata. It appears that on a previous occasion one Sitaram had attached this property in the hands of his judgment-debtor Raghubir in execution of his decree against him. The present plaintiff, Ram Sewak, brought a suit against Sitaram and Raghubir for a declaration that he was the owner of the property, that Raghubir had no interest in it at all and that accordingly it was not saleable in execution of Sitaram's decree. Raghubir did not contest the suit, but Sitaram did. The suit was decreed, and it was held that the plaintiff was the full owner. This happened in July 1927. Subsequently in 1929, another judgment-creditor of Raghubir, namely, Bahal, executed his own simple money decree against Raghubir and got this property attached a second time and put it up for sale. The property was purchased at auction by the contesting defendant, Nand Keshore. Before however the sale could be confirmed, the present suit was instituted. We are informed that the confirmation of the sale has been postponed awaiting the result of this litigation. It seems to us that the suit brought by Ram Sewak against Sitaram and Raghubir was for a declaration of title in respect of this very property. Raghubir was not a mere pro forma defendant but a principal party thereto, and the relief claimed was both against him and Sitaram. The question was one of title as to whether the property belonged to Raghubir or to Ram Sewak, and the finding of the Court is binding on Raghubir and all the subsequent representatives. It is not open to any representative of Raghubir to go behind that decree, unless fraud and collusion is proved.

The position of Bahal was that of an attaching creditor, but he attached the property subsequent to the decree passed in the earlier suit. He must

be deemed to be the representative of Raghubir so far as Ram Sewak is concerned. He is bound by the decree in the same way as Raghubir. It will be intolerable for Ram Sewak if all simple money creditors of Raghubir were to call upon him to prove his title over and over again. We think that the principle of res judicata certainly applies to this case, and the previous finding binds Bahal. The counsel for the respondent relies strongly on 1928 Cal 130 (1). In that case a suit had been brought by the judgment-creditor against his judgment-debtor and a third party claimant and the suit was dismissed. The judgment-debtor could not have been anxious to let the suit be decreed so that his own property be sold in execution of the plaintiff's decree against him. The dispute therefore was between a representative of the judgment-debtor on the one hand as plaintiff, and the judgment-debtor and a third party on the other. It was in these circumstances that it was held by the Calcutta High Court that the decision that the property did not belong to the judgment-debtor but belonged to the third party was not res judicata. In that case the two parties were arrayed on the same side as co-defendants, and it was no real concern of the defendant to see that the claim was decreed against him. The facts of that case are therefore clearly distinguishable from this particular case.

When the previous judgment operates as res judicata against Raghubir and also against his attaching creditor Bahal, it follows that it must operate as res judicata against the auction-purchaser Nand Keshore as well, for Nand Keshore is either the representative of the judgment-debtor Raghubir or of the attaching creditor Bahal or of both.

The appeal is accordingly allowed, the decree of the lower appellate Court is set aside and the decree of the first Court is restored with costs in this Court. The parties will bear their own costs in the Courts below because on the questions of fact the defendants have succeeded.

K.S. *Appeal allowed.*

1. Rukeya Banu v. Najira Banu, 1928 Cal 130=105 I C 647=55 Cal 448.

A. I. R. 1935 Allahabad 889

SULAIMAN, C. J. AND BENNET, J.

Gulzari Lal—Decree-holder — Appellant.

v.

Sheo Charan Lal and *others* — Judgment-debtors—Respondents.

Letters Patent Appeal No. 48 of 1933, Decided on 2nd April 1935, against decision of Bajpai, J., D/- 20th September 1933.

(a) Execution — Sale confirmed and becoming absolute — Application to set aside sale on ground that judgment-debtor had no saleable interest is not competent.

An application for setting aside a sale on the ground that the judgment debtor had no saleable interest in the property made under R. 91 has to be disposed of under R. 92, but once an order confirming the sale has been made by the execution Court, the question no longer is as to the setting aside of the sale. It has already been confirmed and the sale has become absolute. There is no provision under O. 21 which would entitle an auction-purchaser to reopen the question whether the sale should or should not be set aside, ignoring the order confirming the sale which would stand in his way unless it is reviewed or set aside in appeal. The auction-purchaser has got the ordinary period of 30 days allowed by Art. 166, Lim. Act, to make inquiries and satisfy himself whether the judgment-debtor had any saleable interest in the property at all. But once the confirmation has been made, he can neither bring a separate suit to challenge the order, nor have it set aside on discovery of a defect in the title of the judgment-debtor. Of course, where a case of fraud or misrepresentation, etc., is made out it may be open to him to apply for review of the order or seek relief by a separate suit : 1927 *Mad* 394, *Rel on.* ; 6 *I C* 804, *Dist.* [P 890 C 2]

(b) Limitation Act (1908), Arts. 181 and 166—Art. 181 is residuary article—Application to set aside execution sale is governed by Art. 166 and not by Art. 181.

Article 181 is a residuary article and cannot apply when there is a specific article which is applicable. All applications made under Civil Procedure Code to set aside a sale in execution of a decree are governed by Art. 166 and as such Art. 181 does not apply : 1931 *All* 145, *Rel on.* [P 891 C 1]

(c) Civil P. C. (1908), S. 115—Order passed under S. 115 is not appealable.

No appeal lies from an order passed by the Judge of the High Court under S. 115. [P 891 C 1]

Gopi Nath Kunzru—for Appellant.

Baleshwari Prasad—for Respondents.

Judgment.—This purports to be a Letters Patent appeal from an order of a Judge of this Court dismissing what had been styled by the appellant an execution second appeal which the learned Judge thought should have been headed as a second appeal from order.

It appears that the decree-holder held a simple mortgage decree against certain judgment-debtors and attached some property alleging that it belonged to his judgment-debtors. This property was put up for sale and was purchased at auction by the contesting respondents. No application for setting aside the sale was made within 30 days by the auction-purchaser with the result that the sale was ultimately confirmed by the Court. Subsequently a third party brought a suit for a declaration that the property which had been attached and put up for sale had not belonged to the judgment-debtors at all but is his own property. To this the auction-purchaser was made a party. The suit was decreed and it was held that the property had not belonged to the judgment-debtors at all.

Upon this the auction-purchaser filed an application purporting to be under O. 21, R. 91, Civil P. C., to the Execution Court asking for the sale to be set aside on the ground that the judgment-debtors had no saleable interest at all and for a refund of the purchase money paid by them. The first Court dismissed the application holding that an application under R. 91 could lie only before the confirmation of the sale and that after the confirmation of the sale, it was not maintainable and further holding that the application was barred by time.

On appeal the District Judge has allowed the application. In his opinion an application under O. 21, R. 91, could be filed even after the confirmation of the sale and the proper article applicable was 181 and not 166 of the Limitation Act. He has relied on the authority of 6 I C 804 (1). In that case the property had been sold in September 1907, and the sale was first set aside in that very month, though in appeal later on the sale was accepted and confirmed under a compromise in 1909. The rights had therefore been acquired by the auction-purchaser by the sale in 1907 and under S. 6 (c), Imperial General Clauses (Act 10 of 1897), the provisions of the old Act might well have been considered to be still applicable. On the other hand, in 1927 Mad 394 (2), it has been held that an application for setting aside a sale made more than 30 days after the sale was barred by Art. 166, Limitation Act, and further that no application under R. 91 could be made after the confirmation of the sale.

It seems to us that the scheme of O. 21, Rr. 82 to 96 is that after a sale has taken place, it can be set aside on an application made either under R. 89, or R. 90 or R. 91. But where no application under either of these Rules is made or is made and has been disallowed, the Court under R. 92 makes an order confirming the sale and thereupon the sale becomes absolute. If however such an application is allowed then the sale is set aside. The order is final and no suit to set aside the order made under that rule can be brought by any person against whom such order is made. R. 93 then provides that where a sale of immovable property is set aside, the purchaser shall be entitled to an order for payment of his purchase money with or without interest. But the right to recover this purchase money arises only when the sale is set aside under R. 92. An application for setting aside a sale on the ground that the judgment-debtor had no saleable interest in the property made under R. 91 has to be disposed of under R. 92, but once an order confirming the sale has been made by the execution Court the question no longer is as to the setting aside of the sale. It has already been confirmed and the sale has become absolute. There is no provision under O. 21, which would entitle an auction-purchaser to re-open the question whether the sale should or should not be set aside, ignoring the order confirming the sale which would stand in his way unless it is reviewed or set aside in appeal. It would seem to follow that the auction-purchaser has got the ordinary period of 30 days allowed by Art. 166, Limitation Act, to make enquiries and satisfy himself whether the judgment-debtor had any saleable interest in the property at all. But once the confirmation has been made, he can neither bring a separate suit to challenge the order, nor have it set aside on discovery of a defect in the title of the judgment-debtor. Of course, where a case of fraud or misrepresentation, etc., is made out it may be open to him to apply for review of the order or seek relief by a separate suit. That is not the case here.

It also seems to us that Art. 166 in terms applies to such an application

1. Gopal Saran Narain Singh v. Muhammad Ahsan, (1910) 6 I C 804.
2. Muthukumaraswami Pillai v. Muthuswami Thevan, 1927 Mad 394=100 I C 522=50 Mad 639.

and would govern all applications made under the Civil Procedure Code to set aside a sale in execution of a decree. This Article was applied by a Bench of which one of us was a member in 1931 All 145 (3) to an application to set aside a sale on the ground that no notice under O. 21, R. 22, had been received. Art. 181 is the residuary Article and cannot apply when there is a specific Article which is applicable. Applications under R. 91 therefore must be made within 30 days of the sale which necessarily implies that it must be made before the sale is confirmed. We therefore agree with the view expressed by the Judge of this Court that the lower appellate Court was wrong in applying O. 21, R. 91, to the case.

But in view of the provision of section 104 (2), no second appeal lay to the High Court and the Judge was perfectly right in declining to entertain the appeal. The only other section under which he could act was S. 115, Civil P. C. The Judge had that section in his mind and in view of the fact that the decree-holder himself had got the property attached and put it up for sale declined the exercise of his discretion in favour of the decree-holder. No appeal lies from an order passed by the Judge under section 115, Civil P. C. We accordingly dismiss this appeal with costs.

K.S. *Appeal dismissed.*

3. Kashi Ram v. Hashmat Banoo, 1931 All 145= 130 I C 708.

A. I. R. 1935 Allahabad 891

SULAIMAN, C. J. AND BENNET, J.

Miru and *others* — Defendants — Appellants.

v.

Ramgopal—Plaintiff—Respondent.

Letters Patent Appeal No. 26 of 1934, Decided on 2nd April 1935, against decree of Young, J., D/- 2nd January 1934.

Religious Endowment—Temple or mosque on site of private owner in existence for long time and worship performed by public—Inference is that land is dedicated property and not that temple or mosque stands there with leave and license of owner.

Where the Court finds that a mosque or a temple has stood for a long time and worship has been performed in it by the public, it is open to the Court to infer that the building does not stand there merely by the leave and license of the owner of the site, but that the land itself is a dedicated property and the site is a consecrated land, and is no longer the private property of the original owner. Such a building does not come under the Easements Act and it is one of those cases which is excepted by S. 2, Easements Act: 1934 *All* 868 and 40 *Cal* 297 (*P C*), *Rel. on.*; 11 *I C* 436 and 27 *All* 356, *Dist.* [P 894 C 1]

M. A. Aziz and *Ishaq Ahmad* — for Appellants.

G. S. Pathak and *S. K. Mukerji*—for Respondent.

Bennet, J.—This is a Letters Patent appeal by the defendants from the judgment of a Single Judge of this Court. The plaintiff is the sole zamindar of a certain mahal and in his plaint he sets out that Rahim Bakhsh formerly occupied a khasra plot No. 119 in the abadi and Rahim Bakhsh made a katcha platform on the said plot for offering prayers, and that this was the condition of affairs at the time of the partition in 1904, that there was no pacca or katcha mosque in the said plot, and that the defendants now desire to make a pucca mosque on the plot. The plaintiff therefore asked for an injunction against the defendants to restrain them from constructing any katcha or pucca mosque in this plot. The written statement alleged that there had always existed a katcha mosque on the plot in question, that in the last rainy season before the suit, which was brought in 1929, the mosque required repairs and the defendants demolished the mosque and dug up the foundations and desired to rebuild it with the katcha bricks, but the Hindus objected to bricks being used from their tanks and accordingly the defendants brought pucca bricks from Saharanpur. It was claimed that in para. 8 contesting defendants have a right to build a mosque in a pucca manner, that the site of the mosque cannot be the property of the plaintiff or anyone else, that it is wakf property and that every Mahomedan has a right to make a pucca mosque in place of a katcha mosque. The trial Court framed the issue whether any katcha mosque has been in existence on plot No. 119 and it found in the negative. The lower appellate Court reversed the finding on this issue and held that "in my opinion.....the mosque existed in the year 1904." The finding was that there had been originally a raiyat Rahim Bakhsh in the house and he had left the house and gone to another house and that the house had been used as a place of worship by the Mussalmans of the village for more than 30 years, that Rahim Bakhsh had died 10 or 11 years before the suit, that various constructions had been made to adapt the house to a mosque during the time

it was a katcha mosque, that is, there was a room and in front a thatched verandah, and a platform with a pucca drain and hummam for heating water and a bath room and a lavatory and a hand tube well. The lower appellate Court inspected the spot and came to a careful finding of fact on the issue before it.

Considerable argument has been made as to the correctness of that finding and the Single Judge of this Court set the finding aside and held that the facts known would not result in the finding that there was a mosque. The Judge observed: "I am satisfied that the decision of the lower appellate Court cannot be supported."

We find that the lower appellate Court based its finding on not only the oral evidence produced by the parties, but also certain documentary evidence. This documentary evidence consisted of three documents, firstly, there was a khasra Ex. A of the year 1311 Fasli (1903-04). This khasra states that plot No. 119 was entered as "masjid." During the partition the usual partition proceedings were drawn up under section 114, Land Revenue Act, detailing how the partition is to be made. In this partition proceeding at a certain place, following what is laid down in S. 121, there was a note in regard to places of worship and burial grounds. The partition proceeding entered that there was a mosque, and this entry was crossed out by a line and it was stated that on this No. 119 was a chabutra for the purpose of prayers. Considerable argument was made by counsel for the plaintiff in regard to this entry but it should be noted that where the entry is made at all in this portion of the partition proceedings, the entry must be one in regard to S. 121, Land Revenue Act, which deals with places of worship and burial grounds. As the number is not a burial ground, it must come into the other category of a place of worship. The defendants were tenants in the village and they were not parties to the partition proceedings. On the other hand, plaintiff's predecessor was a party to the partition proceedings. All the co-sharers in the partition proceedings were Hindus. In the particular qura which was formed for the plaintiff Ex. D, there is this No. 119 shown again as masjid, that is in the year 1907. The plaintiff's predecessor therefore consented to the entry in his qura of this No. 119 as masjid. If he had had an objection to that entry, he could have made an application to the Court under S. 111, Land Revenue Act. The fact that he did not make any objection to the entry shows that he acquiesced in the entry. On this evidence we consider that the lower appellate Court had sufficient grounds to come to the finding of fact at which it arrived. That finding of fact is that the number in question has been used since before the partition in 1904 for the purpose of a mosque.

We now come to the legal arguments on the point. Learned counsel for the respondent argued that the Easements Act, Chap. 6, should apply and that the question was merely one of license under Chap. 6, and that in this case under S. 60 the zamindar could revoke the license. He argued that the case did not come under S. 60, because there was no transfer of property under sub-S. (a) and that under sub-S. (b) the katcha building was not a work of a permanent character. He referred to the ruling reported in 27 All 356 (1). That was a case in which a tenant had a certain shed in his yard outside his house and the tenant allowed the Mahomedans of the village to use this for purposes of prayer. The tenant himself then erected a permanent building on the site of the temporary shed, and the tenant described the permanent building as a mosque. The zemindars sued for demolition. This Court laid down that the claim of the zemindars was well-founded. The case is easily distinguishable from the present case, because in the present case there is a finding that the plot has long been used for a mosque and that the use has been by the Mahomedan inhabitants of the locality and not merely by a particular tenant who allowed other people to come there for the purpose of prayer. Further, in the ruling in question there was a condition in the wajib-ul-arz that a tenant should not build a new house outside the compound of his dwelling house without the zamindar's permission. The ruling laid down that a tenant might make a dwelling within his compound, but in the case of the erection of a mosque which would by dedication become vested in the religious body for whose observance it was used, the contention of the defendants was unsound. The present case also differs because in the ruling there had been no mosque until the erection was made which was the cause of the suit. In the present case the finding is that since 1904 and be-

1. Basi Mal v. Ghayas Uddin, (1904) 27 All 256= 2 A L J 27=1904 A W N 276.

fore it there has been a mosque on the site. We do not think therefore that the ruling has any bearing on the present case. A reference is also made in 11 I C 436 (2). That was a case for specific performance of a contract by a Hindu to dedicate certain property for the maintenance of a mosque. The property was at the time in the hands of a receiver. There is always a discretion for the Court to grant or withhold specific performance and the Court acted apparently in the exercise of this discretion and held that it was not for a lawful purpose. Learned counsel argued at considerable length that a Hindu zamindar could not lawfully dedicate land for a mosque. We do not think that any difficulty exists of that nature in the present case. It is not stated that the zemindar dedicated the property to the mosque. It is stated that the zemindar allowed the defendants to dedicate the building as a mosque by their user of the building for the purpose of a mosque with the consent, express or implied, of the zemindar. The case is somewhat similar to that reported in 1934 All 868 (3), where it was held by a Bench of which one of us was a member, that in the case of a land being used as a grave-yard from time immemorial, there was a presumption of the consent by the Hindu zemindars.

It has also been held by their Lordships of the Privy Council in 40 Cal 297 (4), that a grave-yard by user became wakf. We do not think that the provisions of the Easements Act or of any part of Chap. 6, in regard to license apply where a zemindar allows the Mahomedan population to use a building as a mosque. The provisions in Chap. 6, appear to us altogether inconsistent. In such a case we consider that where there is a finding that a mosque exists, this necessarily implies that there is no longer any question of easement or of license. Under the Mahomedan law the mosque is the property of God and not the property of the zemindar. Learned counsel for the plaintiff objected that there was no case of a transfer such as is necessary for transfer of property, but we consider that the consent of the zemindar to the use of a building as a mosque is sufficient. We note that it is specially provided in S. 2, sub-S. (b), Easements Act, that there is nothing in that Act which will affect any customary or other right not being a license in or over immovable property, which the Government, the public or any person may possess in respect of other immovable property. That is, the Act deals with certain cases of easements which are connected with the property of the persons who enjoyed the easement and S. 18 recognizes the case of easements which may be acquired by virtue of legal custom, but besides those provisions of the Act there are customary and other rights in or over an immovable property which are not affected by the Act. We consider that the case of a mosque does not come under the Easements Act and that it is one of those cases which is excepted by S. 2. This appears to be the correct method of dealing with the property which is used for a mosque and we do not consider that such property can be dealt with satisfactorily in any other manner. Under these circumstances we consider that the appeal should be allowed and we allow this Letters Patent appeal with costs and restore the judgment of the lower appellate Court.

Sulaiman, C. J.—I agree and would like to add a few words only on the question of law which has been raised as to the nature of the right claimed in this case.

It is quite obvious that if a person holds a mere license, he is not entitled to vary the user so as to claim a higher right than what was granted. A right to perform any religious worship whether claimed by a Hindu, Mahomedan or Christian over the land of another may depend on grant, if so claimed by the grantee. It may also, if claimed by an individual, be acquired as a private easement, provided he is the owner of a dominant tenement. But in addition to such individual rights, a right of worship may also be acquired as a customary right which can be availed of by a large body of persons by virtue of such custom. Again, a right to perform worship may be claimed as a part of public right, which, of course, would be a right vested in an entire community. Under S. 2 of that Act, these last two classes of rights would be saved from the provisions of the Easements Act. But where there is merely a right to perform worship, e. g., to offer prayers, such a right would not authorise the persons entitled to it, to put up a building on the land in order to make it more

2. Fuzlur Rahaman v. Anath Bandhupal, (1911) 11 I C 436.
3. Sheoraj Chamar v. Muder Khan, 1934 All 868—149 I C 797.
4. Court of Wards v. Ilahi Baksh, (1913) 40 Cal 297=17 I C 744=40 I A 18 (P C).

convenient for them to perform the same worship.

But where a building has stood on a piece of land for a long time and the worship has been performed in that building, then it would be a matter of inference for the Court which is the Judge of facts, as to whether the right has been exercised in that building for such a sufficiently long time as to justify the presumption that the building itself had been allowed to be consecrated for the purposes of such rights being performed. Where there is a mosque or a temple, which has been in existence for a long time and the terms of the original grant of the land cannot now be ascertained, there would be a fair presumption that the sites on which mosques or temples stand are dedicated property. There can be no legal impediment to such a dedication, as the owner of the land can make a grant of the site even to persons of a different community and creed, and allow them then to dedicate that site by building a place of worship on it. Where therefore the Court finds that a mosque or a temple has stood for a long time and worship has been performed in it by the public, it is open to the Court to infer that the building does not stand there merely by the leave and license of the owner of the site, but that the land itself is a dedicated property and the site is a consecrated land, and is no longer the private property of the original owner. There is nothing legally objectionable in non-Muslim owners making a grant of a land to Muslims and in that way to enable them to build a mosque on such land, just as it would not be legally objectionable for Muslims to make grants of lands to persons belonging to other religions, which the latter may utilise for the purpose of building houses of worship. In the case of grave-yards, it has been held in several cases that long user justifies the inference that the land itself is a dedicated or consecrated property, or that even if it is not dedicated, it has become wakf property. The presumption would be all the greater in the case of a building, which is used as a mosque or a temple.

If the finding merely were that there is a right to perform worship on a piece of ground, there would, of course, be no right to put up a pucca building on that land for such a purpose. But if the finding is that there is already a mosque or a temple on the land, though the structure is katcha, the necessary inference would be that the site has become a consecrated and dedicated property, and then there can be no objection to the building being converted into a pucca building. It is no longer the case of a mere license which cannot be exceeded beyond the terms on which it was granted. I therefore concur in the order proposed by my learned brother.

K S. *Appeal allowed.*

A. I. R. 1935 Allahabad 894

KENDALL, J.

Iqbal Uddin and *another*—Defendants—Appellants.

v.

Ram Nath — Plaintiff and others — Defendants—Respondents.

Second Appeal No. 1080 of 1933, Decided on 29th April 1935, from decision of Addl. Sub-Judge, Benares, D/- 10th May 1933.

Partition Act (4 of 1893), S. 4—Unused hut is not a dwelling house.

A hut which is capable of being used as a dwelling house but not so used for a number of years is not a dwelling house within the scope of S. 4: 1928 *Cal* 539 and 1919 *Cal* 1055, *Dist.*

[P 894 C 2; P 895 C 1]

Mansur Alam—for Appellants.

K. N. Malaviya and *Kanhaiya Lal Misra*—for Respondents.

Judgment.—This appeal arises from a suit for partition by a stranger to whom a part of the property of an undivided family had been transferred. The plaintiff-respondent obtained a decree for partition of his share. The appellants wished to buy out his share, and they made a report under S. 4, Partition Act of 1893. Both the Courts have held that the property concerned is not a "dwelling house" within the meaning of that section. The lower appellate Court has remarked:

> The fact that the land is khandal from six or seven years, coupled with the fact that Mt. Nabban lives in mohalla Sari Gobbardan, points out that its owners have given up the idea of using it as a dwelling house.

The learned counsel for the appellants wished to assail the finding that Mt. Nabban lives in mohalla Sari Gobhardhan on the ground that there is no evidence to support it. But there is no certificate to support this plea, and I have therefore not allowed it to be taken in this Court. The next argument is that the property consists of some vacant land, a hut, and that the hut is still capable of being used as a dwelling house, though it may be that the undivided family has not ac-

tually been using it as such for a number of years. I have been referred to two decisions of the Calcutta High Court in support of the appellants' plea, the first of which is the case of 1928 Cal 539 (1). This only goes so far as to show that it is the owner ship of a dwelling house, and not its actual occupation which brings the operation of the section into play. If the house in question however is not a dwelling house, there is no relevancy in the ruling, and the finding of the Court in the present suit is that this hut is not a dwelling house. In 45 Cal 873 (2), it has merely been held that the land and its appurtenances which are ordinarily and reasonably necessary for the enjoyment of a dwelling house may be included in the expression as well as the house itself. This again clearly has no relevancy in the present case where the house itself is not a dwelling house. It appears to me that the question at issue has really been decided by the findings of fact, and that there is no force whatever in the appeal. It is therefore dismissed with costs.

Mr. Mansur Alam has asked for leave to appeal under the Letters Patent on the ground that S. 4, Partition Act, ought to be capable of application where a house, although it has been found not to be used as a dwelling house, is still capable of being used as such, and as this question may be of some importance, leave to appeal is given.

B.D./V.V. *Appeal dismissed.*

1. Nil Komal Bhattacharjya v. Kamakshya Charan, 1928 Cal 539=109 I C 67.
2. Pran Krishna v. Keshab Chandra, 1919 Cal 1055=45 I C 604=45 Cal 873.

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* A. I. R. 1935 Allahabad 895

ALLSOP, J.

Managing Committee, George High School—Defendant—Appellant.

v.

Abdul Karim Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 1106 of 1933, Decided on 30th April 1935, from decision of Sub-Judge, Azamgarh, D/- 13th September 1933.

*** (a) Land Acquisition Act (1894), S. 16—Word "Encumbrance" covers customary right.**

The word "encumbrance" is sufficiently wide to cover a customary right, for if rights of way and other customary rights are not destroyed by acquisition, it would often be impossible for the Government to acquire and use land in such way as might be necessary: 1916 *P C* 3, *Rel. on.* [P 896 C 1]

(b) Land Acquisition—Acquisition of property by Government over which customary right exists — Member of public is not entitled to get damages unless he is especially affected by interference with such right.

A member of public will not get damages for a private encroachment on a public right, unless he can show that he is in some way especially affected. Hence where by acquisition of certain property by Government customary rights existing over it are interfered with, a member of the public is not entitled to get damages unless he is especially affected; and if he is specially affected, he may obtain compensation from the Collector under the Land Acquisition Act. [P 896 C 1]

(c) Easements — Right to discharge water from particular properties over another is right of easement.

The right of discharging water from particular properties over another property is a right of easement. [P 896 C 2]

(d) Easements—Easement and Customary right – Distinction.

The distinction between a customary right and an easement is that an easement pertains to a particular property and a customary right pertains to the public or a certain section of the public but not to the owner of any property as such. [P 896 C 1,2]

Mukhtar Ahmad—for Appellant.

Kanhaya Lal Misra and *R. K. S. Toshniwal*—for Respondents.

Judgment.—The appellants are the Managing Committee of the George High School at Azamgarh. The respondents Abdul Karim Khan and others were the plaintiffs in the trial Court. It appears that some land was acquired for the appellant by the Government under the provisions of the Land Acquisition Act, over this land there used to be a drain through which water used to flow from the property of the plaintiffs. The appellants closed this drain and the plaintiffs then instituted the suit upon the allegation that the accumulation of water had caused them damage. They prayed for a perpetual injunction restraining the defendants-appellants from interfering with the flow of water through the drain. The trial Court dismissed the suit upon the ground that any rights which the plaintiffs might have had over the land was destroyed under the provisions of S. 16, Land Acquisition Act. The section is as follows:

When the Collector has made an award under S. 11 he may take possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances.

The plaintiffs went in appeal to the lower appellate Court who has decreed the suit. He has made a distinction between easements and customary

rights and seems to hold that a customary right is not an encumbrance within the meaning of that word in S. 16, Land Acquisition Act. It is difficult to see why a customary right of way or a similar right should not come within the meaning of the word "encumbrance." The whole object of the Land Acquisition Act is to enable the Government acquiring land for public purposes and to use such land in any way which may be convenient or necessary for the public in general. If rights of way and other customary rights were not destroyed by acquisition, it would often be impossible for the Government to acquire and use land in such way as might be necessary. It has been suggested that these customary rights should not be destroyed by acquisition because there is no method of compensating the persons who might exercise the right. I do not think that there is any force in this objection. A member of the public would not get damages for a private encroachment on a public right of this nature unless he could show that in some way he was especially affected and similarly it seems to me that if he was especially affected, it might be possible for him to obtain compensation from the Collector under the provisions of the Land Acquisition Act. However that may be, there is not the slightest doubt in my mind that the word "encumbrance" is sufficiently wide to cover a customary right such as that to which the Judge of the lower appellate Court refers.

I may mention the case of 41 Bom 291 (1). In that case it was conceded before their Lordships of the Privy Council that acquisition of land under the Land Acquisition Act would destroy a right of passage. The decision in that case was based partly upon the assumption that that would be so. There is no authority quoted by the Judge of the lower appellate Court or brought to my notice here by the respondents that a customary right as distinguished from an easement is not included within the meaning of the word "encumbrance" in S. 16, Land Acquisition Act. I may also mention that I am not at all satisfied that the Judge of the lower appellate Court was correct in assuming that this right of discharging water over the land in suit was a customary right and not an easement. The distinction, as I understand it, is that an easement pertains to a particular property and a customary right pertains to the public or a certain section of the public, but not to the owner of any property as such. In the present case it seems to me that the right consisted in discharging water from particular properties over the property in suit and I should think that the right in each case was a right of easement. It does not matter however whether it was a right of easement or a customary right. In either case the right is destroyed by acquisition. The judgment of the lower appellate Court cannot be upheld.

I allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. The appellants will get their costs throughout from the respondents.

K.S. *Appeal allowed.*

1. Bombay Corporation v. G. I. P. Ry., 1916 P C 3=38 I C 923=43 I A 310=41 Bom 291 (PC).

A. I. R. 1935 Allahabad 896

SULAIMAN, C. J.

Ziaul Hasan—Applicant.

v.

Aziz Ahmed—Opposite Party.

Criminal Misc. Appeal No. 4 of 1935, Decided on 25th March 1935.

Contempt of Court — Answers to interrogatories defamatory of presiding officer — Proceedings for contempt of Court should not be taken — Proper remedy is by way of complaint by such officer for defamation under S. 499, Penal Code.

When in his answers to the interrogatories served on him, the accused stated that the Chief Reader had friendly relations and influence over the Court which acted dishonestly and imposed a fine of Rs. 40 :

Held : this was clearly a defamatory statement against the presiding officer, which would be a criminal offence under the Indian Penal Code and for which the officer concerned had a remedy by way of filing a complaint. Cognizance should not be taken of this offence as one falling under the Contempt of Courts Act.

K. Masud Hasan—for Applicant.

Judgment. — This is an application praying that the proceedings should be taken against the opposite party for contempt of the Court of the Magistrate inasmuch as in his answers to the interrogatories served on him he stated that the Chief Reader had friendly relations and influence over the Court which acted dishonestly and imposed a fine of Rs. 40. This is clearly a defamatory statement against the presiding officer, which would be a criminal offence under the Penal Code and for which the officer concerned has a remedy by way of filing a complaint. I would not take cognizance of this offence as one falling under the Contempt of Courts Act.

K.S. *Order accordingly.*

A I. R. 1935 Allahabad 897

SULAIMAN, C. J. AND BENNET, J.

Hafiz Mohd. Ibrahim — Judgment-debtor—Appellant.

v.

Bhagwan Das — Decree-holder—Respondent.

Letters Patent Appeal No. 72 of 1934, Decided on 27th March 1935, against order of Bajpai, J., D/- 20th September 1933.

Succession Act (1925), S. 214 (1) (b)—Personal remedy under mortgage-deed barred before suit on mortgage—Decree for sale of mortgaged property—Decree-holder dead—Application for execution of mortgage decree by legal representative—No succession certificate is necessary as application is not one to obtain order for payment of debt within meaning of S. 214 (1) (b).

Section 214 (1) (b) prevents the Court from proceeding upon an application of a person claiming to be so entitled, to execute against debtor of a deceased person a decree or order for the payment of his debt, except on the production by the person so claiming, of a succession certificate. But the application for execution must be for obtaining an order for the payment of his debt. [P 898 C 1]

Where the personal remedy under the mortgage-deed had become barred by time long before the suit was brought and the mortgagee was simply entitled to a decree for sale of the mortgaged property:

Held: that an application by the legal representative of decree-holder for the execution of the mortgage decree for realisation of the amount by sale of the mortgaged property was not an application to obtain an order for the payment of his debt and as such no succession certificate was necessary. [P 898 C 2]

(b) Civil P. C. (1908), O. 21, R. 58 – Scope.

Rule 58 does not apply to a mortgage decree for sale. [P 898 C 1]

A. M. Khwaja,—for Appellant.

S. N. Gupta—for Respondent.

Sulaiman, C. J.—This is a Letters Patent appeal arising out of certain objections raised by one of the judgment-debtors in the execution department. In 1915 two persons executed a simple mortgage-deed of a house in favour of Lalman. In 1922 a sale-deed of the equity of redemption was executed by the mortgagors who in 1924 purported to transfer their rights under the sale-deed to one Mt. Hyderi Begum. Some time after this one of the mortgagors died. A suit was brought for sale on the mortgage-deed in 1927 by one Sukh Ram, the representative of Lalman, against the surviving mortgagor and the heirs of the deceased mortgagor, including the present appellant Ibrahim. The suit was brought almost at the close of the period of limitation. In the written statement an objection was taken that it was defective for non-joinder inasmuch as the transferee in whom the property had vested had been left out of the suit. Presumably because it would have been too late to implead her, no steps were taken to bring her on the record. The position taken up by the plaintiff however was that the transfers of 1922 and 1924 were null and void and did not pass the property to Hyderi Begum. The Court appears to have framed an issue relating to the validity of the said transfers and decided that issue in favour of the plaintiff. A preliminary decree for sale was passed on 29th February 1928, against the defendants, including the appellant Muhammad Ibrahim. This was followed by a final decree. In the execution department Muhammad Ibrahim took an objection that the property had vested in Hyderi Begum who was not impleaded within the period of limitation, and that he being one of the heirs of the deceased is entitled to claim the property in his own right and that the property could not be sold. He also took the objection that the application for execution which was filed by Bhagwan Das claiming to be the legal representative of Sukh Ram, who had died, could not be proceeded with until a succession certificate had been obtained. It was further pleaded that the applicant Bhagwan Das was not the representative of the deceased decree-holder and had no locus standi to maintain the application.

The first Court held that the application could not be entertained for want of a succession certificate and also expressed the opinion that there was no evidence to prove that Bhagwan Das was the representative of the deceased decree-holder. It accordingly dismissed the application. On appeal the lower appellate Court took the view that the decree for sale having been passed against Muhammad Ibrahim it was no longer open to him in the execution department to raise the question of the title of Hyderi Begum, his predecessor. It also considered that it was wholly unnecessary to decide whether the applicant Bhagwan Das was entitled to execute the decree or not, and gave him time to obtain a succession certificate holding that if he does produce the certificate he would be entitled to proceed with the execution, and if he does not, he would not be so entitled. On appeal to this Court a Judge has come to the conclusion that there is no question of res judicata in

the present matter at all, particularly as it was admitted on behalf of the respondent Bhagwan Das that Muhammad Ibrahim had been impleaded merely in his capacity of a judgment-debtor as one of the heirs of the original mortgagor, Mt. Wazir Begum. The learned Judge has accordingly held that S. 47, Civil P. C., has no application nor does O. 21, R. 58, Civil P. C., apply to a mortgage decree.

Dealing with the question of the non-production of the succession certificate the Judge has expressed the opinion that the Court below had not ordered the execution of the decree, nor had ordered any process to issue, but had merely decided a preliminary objection raised by the judgment-debtor, particularly as the objection as to the non-production of the succession certificate had not been raised till the judgment came to be written.

It seems to us that the Judge of this Court has taken the correct view in holding that the question of res judicata does not arise at the present stage. The applicant Muhammad Ibrahim is setting up a new title derived from Mt. Hyderi Begum, who was no party to the suit, and is not setting up his title as one of the mortgagors. The question whether his defence can at all be barred by the principle of res judicata will arise properly when a suit between the parties as to the question whether title has passed to the auction-purchaser or not arises. The position of Muhammad Ibrahim is really that of a stranger to the proceeding and his remedy would have been if it were a case of an objection under O. 21, R. 58, but as it was a mortgage decree for sale, that rule has no application, and the question of the title of Muhammad Ibrahim cannot be decided in the proceeding under S. 47, Civil P. C. We therefore leave the question open whether Mt. Hyderi Begum had or had not validly acquired an interest in the property open.

We are however of the opinion that this is not a case to which S. 214, Succession Act, can apply, and that accordingly there was no necessity whatsoever for the applicant to obtain a succession certificate. S. 214 (1) (b) prevents the Court from proceeding upon an application of a person claiming to be so entitled, to execute against such debtor, a decree or order for the payment of his debt, except on the production, by the person so claiming, of a succession certificate. But the application for execution must be for obtaining an order for the payment of his debt. The personal remedy under the mortgage-deed had become barred by time long before the suit was brought and the mortgagee is simply entitled to a decree for sale of the mortgaged property. It is therefore difficult to hold that the application for the execution of the mortgage decree for realization of the amount by sale of the mortgaged property is an application to obtain an order for the "payment" of his debt. No succession certificate is therefore necessary at all. We do not think it necessary to decide in this case whether even if S. 214 had applied and a succession certificate had been obtained subsequently by the applicant, it would necessarily have a retrospective effect so as to make a previous application filed by him in time as a valid application, even though the certificate was granted after the period of limitation had expired.

The question of the status of the applicant must therefore be decided by the lower appellate Court. He was entitled to maintain the application for execution only if he can satisfy the Court that he was the legal representative of the deceased decree-holder within the meaning of the provisions of O. 22, R. 5, Civil P. C. The trial Court recorded a finding against the applicant, but the lower appellate Court has not decided this point.

We accordingly allow this appeal and setting aside the order of the learned Judge of this Court as well as the decree of the lower appellate Court, send the case back to that Court for disposal according to law. The costs incurred heretofore will abide the result. As the appeal was not decided on a preliminary point, the appellant is not entitled to a refund of the court-fee.

K.S. *Appeal allowed.*

A. I. R. 1935 Allahabad 898

KENDALL, J.

(Firm) Ram Prasad-Thakur Prasad— Appellants.

v.

(Firm) Kamta Prasad-Sita Ram— Respondents.

Civil Revn. No. 616 of 1934, Decided on 25th April 1935, against order of Small Cause Court Judge, Gorakhpur, D/- 21st September 1934.

(a) Partnership Act (9 of 1932), Ss. 58, 59 and 69 — Registration — Suit by partner against firm—Suit cannot lie unless firm is duly registered and person suing is recorded

as partner—S. 69 is mandatory—Subsequent amending of plaint does not make valid institution.

Before instituting a suit by a partner against a firm, the firm must be duly registered and the Registrar must have recorded the person suing as a partner in the firm. Subsequently registering the firm and amending the plaint does not make a valid institution; merely making an application for registration before the suit is not sufficient. S. 69 is mandatory. [P 899 C 2]

(b) Partnership Act (9 of 1932), Ss. 69 and 74—Right to realize money accruing before Act—Right is unaffected—Procedure however is governed by Act.

Where the plaintiff's right to realize money from the defendant accrues before the Act came into force, nothing in the Act could affect that right. But the Act lays down the proper procedure, namely that the registration of the firm should be completed in the manner set out in S. 59 before the suit can be instituted. The Act regulates only the procedure which must be followed. [P 899 C 2]

Sankar Saran—for Applicant.

S. B. L. Gour—for Opposite Party.

Judgment. — This application has raised a technical question in connection with the Indian Partnership Act of 1932. The plaintiff, purporting to be a firm, entered a plaint on 27th October 1933, which was admitted and registered on 28th November. On 23rd March 1934, he made an application to amend the plaint after having obtained a certificate to the effect that the firm had been registered in accordance with S. 59 of the Act. The plaint was amended accordingly, after which the written statement was filed in which the objection was raised that the suit, as framed, was barred by S. 69 of the Act. The trial Court appears to have rejected the plaint, giving as a reason that it was admitted by the plaintiff that the firm was not registered when the suit was filed.

It has been argued in the first place that this statement of the Court is incorrect, as the plaintiff never admitted that the firm had not been registered when the suit was filed. It has now been proved by an affidavit that the plaintiff made an application for registration on 25th October 1933, i. e., two days before the plaint was filed and it has been pointed out that under S. 58 of the Act

> The registration of a firm may be effected at any time by sending by post or delivering to the Registrar . . . . a statement in the prescribed form . . . . .

This had been done, and therefore it is argued the registration had been effected and the suit was good. If section 58 stood alone, this argument might have some force, but S. 59 shows that registration amounts to more than what is said in S. 58. The Registrar, under S. 59, must be satisfied that the provisions of S. 58 have been duly complied with, and he must record an entry of the statement in his register. Further, it is provided in S. 69 as follows:

> No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm . . . unless the firm is registered and the person suing is or has been shown in the Register of firms as a partner in the firm.

It is necessary therefore not only that the firm should be registered, but the person suing must be shown as a partner in the firm and it is admitted that on the date when the plaint was filed the second part of this condition had not been carried out. On behalf of the applicant it has been argued by Mr. Shanker Saran that S. 74 of the Act will have the effect of curing any irregularity in the procedure. Under that section

> Nothing in this Act . . . shall affect or be deemed to affect . . . ; (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act . . .

The plaintiff's right to realise money from the defendant by means of a suit, if necessary, had accrued before the Act came into force, and it is, therefore argued that nothing in the Act can affect that right. This is perfectly true. Nothing in the Act could affect the plaintiff's right to realise money from the defendant by means of a suit. The question however is not one of right, but of procedure. The Act lays down the proper procedure namely, that the registration of the firm should be completed in the manner set forth in section 59 before the suit can be instituted. The plaintiff never had a right to institute a suit in a manner that violated the provisions of the Act. Such a right, in fact, could not exist; and even if it could be deemed to exist, it certainly did not exist before the Act came into force. It appears to me to be clear that the Act has not affected the plaintiff's right in any way, but has only regulated his procedure, and this procedure he was bound to follow. The provisions of S. 69 are mandatory, and appear to be as rigid as those of S. 80, Civil P. C.

It has been finally argued on behalf of the applicant that, as the plaint was amended under the orders of the Court on 4th April 1934, the suit should have been deemed to have been instituted on that date, and as the certi-

ficate was obtained before that date, it ought to be held that the provisions of S. 69 have not been violated. The terms of S. 69 however are very specific, namely, that

No suit . . . shall be instituted . . . unless the firm is registered and the person suing is or has been shown in the Register of firms as a partner in the firm.

It cannot be said that the suit was instituted only when the plaint was amended. It was undoubtedly instituted before the provisions of the Act had been complied with. I am therefore of opinion that the decision of the trial Court is correct, though it may be inaccurate in stating that the plaintiff had admitted that the firm was not registered when suit was filed. The plaintiff's proper remedy is, as the lower Court has pointed out, to file a fresh suit, and if necessary to ask the Court to give him the benefit of S. 14, Limitation Act. It will be for the trial Court to decide whether the provisions of that section apply. The application is dismissed with costs.

B.D/V.V. *Application dismissed.*

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* * A. I. R. 1935 Allahabad 900

SULAIMAN, C. J. AND BENNET, J.

(*Firm*) *Balakram-Atma Ram*— Plaintiff—Appellant.

v.

Secy. of State—Defendant — Respondent.

Letters Patent Appeal No. 92 of 1934, Decided on 9th April 1935, against decree of Young, J., D/- 12th March 1934.

*** * Railways Act (1890), S. 77 — Suit for damages against state railway — Notice to Collector under S. 80, Civil P. C., is not sufficient notice under S. 77— Two separate notices are necessary — Collector does not represent Government of India in railway matters.**

Section 80, Civil P. C., and S. 77, Railways Act, are clearly independent and two separate notices are necessary before a suit for damages against Secretary of State in case of a state Railway can be maintained. There must be a notice given to the Railway Administration under S. 77, Railways Act, within six months of the date of the delivery of the goods, and the plaintiff must also give notice to the Collector under S. 80, Civil P. C., and wait for a period of two months before he sues. The Collector of a District does not represent the Government of India in railway matters. Hence for purposes of S. 77, Railways Act, a notice to a Collector under S. 80, Civil P. C., cannot be considered to be a notice to the Government, in the case of State Railway : 1928 *Bom* 421 and 1917 *Cal* 640, *not foll.*. [P 901 C 1, 2]

Shabd Saran—for Appellant.

Muhammad Ismail—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for damages against the Secretary of State on account of the loss of 18 cases of vegetable oil which were consigned to Shahjahanpur from Bombay. The consignment was not delivered at Shahjahanpur and the plaintiff sent notice to the Collector of Shahjahanpur under S. 80, Civil P. C., claiming damages and after having waited for over two months brought the present suit. Admittedly no separate notice under S. 77, Railways Act, was served on any officer of the railway. The suit was contested inter alia on the ground that it must fail for want of a notice under S. 77, Railways Act. The first Court held that the notice not having been given, the suit was not maintainable, and dismissed the claim. On appeal the lower appellate Court came to the conclusion that the notice given to the Collector was quite sufficient and the defect was cured. On appeal to this Court a Judge has come to a contrary conclusion and restored the decree of the first Court.

The only point for consideration in this Letters Patent appeal is whether the notice given to the Collector dispensed with the necessity of serving any other notice under S. 77, Railways Act. Obviously the object of the two provisions are quite distinct and separate. S. 80, applies to all suits brought against the Secretary of State and it requires that no suit shall be instituted until the expiration of two months next after notice in writing has been given to a Secretary to the Local Government or the Collector of the District. S. 80 therefore provides a period for the notice, and the person who has given such notice must wait for that full period before he brings any suit. That the Collector does not necessarily represent the Secretary of State for India in Council in all cases is apparent from the fact that the Legislature has thought fit to name him specifically in this section.

Section 77, Railways Act, is meant for an entirely different purpose. It is confined to suits brought against the Railway Administration for loss, destruction or deterioration of goods, and provides that no person shall be entitled to a refund or to compensation unless his claim has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage

by railway. The object obviously is that prompt notice should be given to the railway company to enable them to make enquiries and settle the matter out of Court by paying compensation to the plaintiff, if possible. The period of six months prescribed in this section is by way of a bar of limitation and is not like the period prescribed in S. 80, Civil P. C., which has to be excluded from computation under S. 15 (2), Limitation Act. It follows that the two sections being clearly independent, two separate notices are necessary before the suit can be maintained. There must be a notice given to the Railway Administration under S. 77, Railways Act, within six months of the date of the delivery of the goods, and the plaintiff must also give notice to the Collector under S. 80, Civil P. C., and wait for a period of two months before he sues.

The advocate for the appellant contends before us that "Railway Administration" has been defined in section 3 (6), Railways Act, as meaning the manager of the railway, including the Government. He then argues that notice to Government is quite sufficient. This must be conceded. He then infers that notice to the Collector would be notice to the Government of India and would therefore be sufficient. This contention cannot be accepted. The Collector of a District does not represent the Government of India in railway matters, and unless there is a statutory provision to that effect a notice sent to the Collector of a District would not be a notice served on the Government of India. As already pointed out, the reason why a notice to the Collector for purposes of S. 80, is sufficient is that there is a specific provision to that effect in that section, and not that the Collector represents the Secretary of State in all matters.

Section 140, Railways Act, lays down that a notice or other document required or authorised by this Act to be served on a Railway Administration may be served, in the case of a railway administered by the Government, on the manager. That obviously indicates the way in which a notice required by Section 77, Railways Act, is to be served. Indeed, it has been held in a number of cases by this Court that the word "may" in this section is the equivalent of the word "must" and that there is no other way open except that provided in the section: see 28 All 552 (1), 33 All 544 (2) and 1923 All 301 (3). Even without going to this length, it is quite sufficient to say that for purposes of S. 77, a notice to a Collector cannot be considered to be a notice to the Government, in the case of a State Railway. The advocate for the plaintiff has relied strongly on 44 Cal 16 (4). In that case attention was concentrated on the question whether S. 140 was exhaustive and must be strictly complied with. One Judge simply took it for granted at p. 25, that the notice served upon the Government through the Collector within six months was sufficient to satisfy the requirements of S. 77. No reason was given and no authority was quoted, and it is even doubtful whether the point was at all pressed at the bar. The other learned Judge had some doubts on this point, for at p. 27 he remarked:

Whether the Collector is the proper person to receive notice under S. 77, on behalf of the Government when notice is served on the Government and not on the manager, I express no opinion.

But as the learned Government Pleader for the railway had omitted to suggest that he was not the proper person, the learned Judge did not differ from the view held by his learned colleague. That case cannot therefore be taken to be any conclusive authority on this point. The next case on which reliance is placed is 52 Bom 548 (5). There again one learned Judge following the opinion of one of the Judges in 44 Cal 16 (4), remarked at p. 555, that notice served under S. 80, Civil P. C., on the Collector within six months may be considered to be a good notice under S. 77 to the Railway Administration. The use of the word "may" might suggest that that was not the final opinion intended to be expressed. In any case the other learned Judge refrained from expressing any such opinion. With great respect we are not prepared to accept such a view.

It seems to us that in view of the provisions of S. 77 and S. 140, Railways Act, it is impossible to hold that

1. G I. P. Ry. Co. v. Chandra Bai, (1906) 28 All 552=1906 A W N 101=3 A L J 323.
2. G. I. P. Ry. Co. v. Ganpat Rai, (1911) 33 All 544=10 I C 122.
3. Cawnpore Cotton Mills Co., Ltd. v. G. I. P. Ry., 1923 All 301=71 I C 614=45 All 353.
4. Radhe Shyam v. Secy. of State, 1917 Cal 640 =34 I C 130=44 Cal 16.
5. Hirachand Succaram v. G. I. P. Ry. Co., Bombay, 1928 Bom 421=113 I C 511=52 Bom 548.

a notice served on the Collector of a District is a sufficient notice served on the Government of India for the purposes of S. 77. We accordingly dismiss this appeal with costs.

K.S. *Appeal dismissed.*

A. I. R. 1935 Allahabad 902

HARRIES, J.

(*Hakim*) *Syed Mohammad*—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. No. 310 of 1935, Decided on 9th July 1935, from order of Addl. Sess. Judge, Moradabad D/- 31st October 1934.

Practice—Judicial Officer can comment adversely on person only if evidence before him warrants it—He cannot do so on information received from outside sources—Such comments should not be allowed to remain part of judgment.

The Judicial Officer may comment upon the conduct of a person in a case and comment severely if the evidence before him warrants such comment. On the other hand, if the evidence produced in the case does not warrant a comment upon a person, no comment on that person should be made. A Judicial Officer is not entitled to use his personal knowledge during the conduct of a case and cannot and should not comment on any party in that case as the result of information received not in the case itself, but is from outside sources. Where the comments complained of cannot be justified upon the evidence on the record, they should not form part of the judgment and cannot be allowed to remain as part of the judgment. [P 903 C 1,2]

M. A. Aziz—for Applicant.

Asst. Govt Advocate—for the Crown.

Order. — This is an application by Hakim Syed Mohammad for revision of an order of the learned Sessions Judge of the Bijnore District, refusing to expunge certain remarks concerning the applicant contained in a judgment delivered by Chaudhri Harpal Singh Saheb, First Class Magistrate, Bijnore, dated 14th May 1934, in the criminal case of King Emperor v. Hakim Syed Mohammad and others.

The case of King-Emperor v. Hakim Syed Mohammad and others arose out of an affray which took place in a mosque at Dhampur on 1st March 1934 at about 8-30 p. m. The case for the prosecution was that the present applicant together with Khan Mohammad and six other persons formed an unlawful assembly with the object of belabouring two persons, namely, Khallan Khan and Rahimdad Khan, and that in pursuance of this common object they did belabour these two persons and also attacked them with knives causing each of them injuries of varying severity. The case, as presented by the prosecution, was that the real instigator of the whole affair was the present applicant, but, after hearing the whole of the evidence, the learned Magistrate came to the conclusion that the case was only proved against Khan Muhammad and consequently acquitted the applicant and the six other persons charged with him. In his judgment the learned Magistrate states:

> A careful examination of the first information report Ex D, the dying declaration Ex. E, and the evidence of the prosecution witnesses recorded before me has convinced me that the case against the accused persons other than Khan Mohammad is extremely doubtful and appears to be the result of a natural tendency to exaggerate facts, when parties concerned are torn up into factions, as they are in this case.

From this observation it is clear that the learned Magistrate was wholly unable to hold upon the evidence that the present applicant had been a party to the attack or had instigated it in any way. It must be remembered that the case for the Crown as presented was that the applicant was the ring-leader and the person really responsible, but upon the evidence the learned Magistrate was constrained to hold that no case whatsoever had been established against him. In the circumstances indicated above the learned Magistrate saw fit in the concluding portion of his judgment to make some very sweeping statements with regard to the applicant. He said:

> He (meaning the applicant) appears to be a hot-partisan of a group of desperados in Dhampur and he seems to be hopelessly mixed up in the local politics of a militant type. It is therefore a matter for serious consideration whether the influence which he exercises as an Honorary Magistrate and the awe which he is able to inspire as a gun license-holder should be allowed to continue in the peculiar conditions of the locality, as disclosed in this case.

The evidence called in this case in no way justifies these comments made by the learned Magistrate. The learned Magistrate was unable to find as a fact that the applicant was the ring-leader in this affair, for if he had been he would undoubtedly have been convicted. As far as the case against the applicant was concerned the learned Magistrate was of the opinion that it was extremely doubtful and appeared to be the result of a natural tendency to exaggerate facts, when parties concerned are torn up into factions as was the case here. How in those circumstances the learned Magistrate felt justified in stating that the applicant appeared to be a hot partisan of a

group of desperados and as an Honorary Magistrate exercised great influence upon them and inspired in them awe by reason of his being a licenced gun holder, I am quite unable to understand. There is no reference in the case about the applicant being a licensed gun holder and therefore what such a remark has to do with the present case, I cannot understand. It appears to me that the learned Magistrate was using his own private knowledge of the applicant and that these comments were based not upon evidence which he had heard in the case but rather upon information which he had received from other sources. Upon revision to the learned Sessions Judge the latter remarked that:

The remarks of the learned Magistrate are partly though not wholly, I am afraid, based on the material on the record in this case and a Sub-Divisional Officer might not be unjustified in strengthening his impression on the material on record by his outside information against the man in such matters as these.

With this view of the learned Sessions Judge I entirely disagree. In my judgment a Judicial Officer may comment upon the conduct of a person in a case and comment severely if the evidence before him warrants such comment. On the other hand, if the evidence produced in the case does not warrant a comment upon a person, no comment on that person should be made. A Judicial Officer is not entitled to use his personal knowledge during the conduct of a case and cannot and should not comment on any party in that case as the result of information received, not in the case itself, but from outside sources. From the finding of the learned Magistrate the most that could be said against the applicant was that he was present when this affray took place and did nothing to prevent it. Quite clearly from the result of the case he neither instigated nor assisted in the assault and no inference should be drawn against him from the mere fact that he did nothing. He may have done nothing for many reasons and the first and the obvious reason is fear. His conduct on this day was far from being the conduct of a man at the head of a group of desperados and far from being the conduct of a man who exercised great influence on others and who was held in awe by others because he was an Honorary Magistrate and the holder of a gun license.

Having regard to the fact that the comments complained of cannot be justified upon the evidence on the record I am of opinion that they should not have formed part of the judgment and cannot be allowed to remain as part of the judgment. In the result therefore I direct that the words following, namely:

In my view, the material on record more than justifies a concluding remark on my part against Hakim Saiyed Mohammad in view of his position as an Honorary Magistrate of the place. He appears to be a hot partisan of a group of desperadoes in Dampur and he seems to be hopelessly mixed up in the local politics of a militant type. It is therefore a matter for serious consideration whether the influence which he exercises as an Honorary Magistrate and the awe which he is able to inspire as a gun license holder should be allowed to continue in the peculiar conditions of the locality, as disclosed in this case,

be expunged from the judgment of the learned Magistrate in this case. I accordingly allow this application.

K.S. *Application allowed.*

A. I. R. 1935 Allahabad 903

SULAIMAN, C. J. AND BENNET, J.

Imam Baksh and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 980 of 1934, Decided on 5th April 1935, from order of Addl. Magistrate, Almora, D/- 31st July 1934.

(a) U. P. Municipalities Act (1916), Ss. 245 (3) and 298 F — Bye-law under S. 298-F — Commissioner has no power to make such bye-law applicable within one mile outside municipal limits.

Section 245 (3) entitles the Commissioner to make the provisions of S. 245 and of any bye-law made under heading G of S. 298 applicable to areas within one mile of municipal limits; but it does not authorize him to make other bye-laws made under headings applicable to such areas and such bye-laws are ultra vires so far as this area is concerned. [P 904 C 2]

(b) U. P. Municipalities Act (1916), Ss. 245 and 298 F — Bye laws under S. 298-F cannot be made applicable outside municipal limits unless limits are extended by Government under S. 3.

Bye-laws framed under S. 298-F cannot be made applicable even to areas within one mile outside municipal limits, unless such limits are extended by Local Government under S. 3.

[P 905 C 1, 2]

Gopi Nath Kunzru and *B. L. Dave*—for Applicants.

Asst. Govt. Advocate—for the Crown.

Sulaiman, C. J.—This is an application in revision from the order of the Additional Magistrate of Almora, dismissing the applicants' appeal from their convictions by the Magistrate and sentences of fine imposed upon them.

The applicants are butchers who used to keep stalls in the municipal market of Almora but ultimately left that market, shifted outside the municipal limits and opened meat stalls within a mile of the municipal limits. Under a notification published in the Government Gazette of 1st October 1932, the provisions of S. 245, Municipalities Act, were extended by the Commissioner, to whom the power had been delegated by the Local Government. In the notification the words actually used are that the limits of the board are extended, etc., but there is no doubt that what was intended was that the provisions of S. 245 were being made applicable to this extended area, inasmuch as that particular section was actually quoted in the notification.

The notice of this extension of the limits for purposes of S. 245 was given to all these persons, but they did not obtain any license for carrying on their business and slaughtered animals without bringing them to the municipal office to get them passed. Accordingly the Officiating Executive Officer made a complaint to the City Magistrate that these accused persons had infringed the municipal bye-laws already notified. Before the Magistrate as well as the appellate Court there was some dispute as to whether the limits to which the Act was made applicable were in excess of the maximum of one mile provided in section 245 (3). The lower appellate Court is satisfied that so far as the shops occupied by the accused are concerned they are well within one mile. It therefore seems wholly unnecessary to consider whether the appellate Court's finding that the entire limits are within one mile is based on any legal evidence. If the accused have been carrying on business at places within one mile of the limits of the Municipal Board, then the notification is applicable to these places, notwithstanding its inapplicability to certain other areas which may be beyond one mile. We see no force in this objection.

The trying Magistrate came to the conclusion that the business carried on by the accused was likely to be a nuisance, and therefore the bye-law framed by the Municipal Board under S. 298 would be applicable. No doubt he thought that to a certain extent the purpose of the board for imposing a license fee appeared to be to increase their revenue because owing to the transfer of the shops to the outskirts the income of the board from the meat market had been affected, and that the fact that the board Inspector did not compel the goats of those shops which were within the limits to be examined, clearly showed that the board was concerned more with their income rather than the health of the public. All the same he came to the conclusion that the bye-laws made by the board were perfectly valid and a breach of the bye-laws was an offence committed by the accused. On appeal this view has been affirmed by the lower appellate Court.

There can be no doubt that the Commissioner under the authority vested in him has made the provisions of S. 245, Municipalities Act, applicable to the area over which the accused's shops stand. But S. 245 (3) entitled him to make the provisions of that section and of any bye-law made under heading G of S. 298 applicable and did not authorise him to make other bye-laws made under headings applicable to such areas. Professedly it were the bye-laws under the headings F and J which were made applicable. 'For this the learned Commissioner had no authority and the bye-laws therefore are ultra vires so far as this area is concerned.

It may well be that bye-law F which refers to markets, slaughter-houses, sale of food, etc., can prohibit the use of any place as a shop for the sale of meat and prescribe conditions under which licenses may be granted, and provide for inspection and regulation of the conduct of business would be applicable to a meat trade of this kind. On the other hand, bye-law G relates to offensive trades like boiling or storing of blood, etc., storing hides etc., tanning, etc.

It may be argued that G (13) (b) and (c) provide for inspection and regulation of the conduct of business in a place, so as to secure cleanliness therein or to minimize any injurious, offensive or dangerous effect arising or likely to arise therefrom. But these are intended to relate to offensive trades of the kind mentioned in G. It may also be assumed that under J (d) a bye-law can fix charges of fees for any municipal service rendered. But bye-laws under F and J cannot be made applicable under S. 245 (3) at all, and admittedly the bye-laws under G have not been made applicable by the notification to the area outside the municipal limits.

The next point which has been argued by the learned Assistant Go-

vernment Advocate is that even independently of the bye-laws, the board had authority under the substantive section itself, S. 245, to serve notice on the accused and to demand that they should take out a license on payment of a fee and that a non-compliance with this notice renders them liable under S. 245 (2) to be convicted and fined.

Now, Section 245 refers to nuisances from certain trades and professions and the marginal heading also indicates that the object is to regulate offensive trades. And that is why only bye-laws under G are mentioned in sub-S. (3). For the regulation of meat trade there are special bye-laws under S. 298 F, which cannot be made applicable by virtue of S. 245 to areas outside the municipal limits. Where a board is satisfied that any building or place within the limits of the municipality which any person uses or intends to use as a place of business for disposal of any article is likely to occasion a public nuisance, the board may require by notice the owner or occupier to refrain from using it for such purpose, or only to use, or allow it to be used, the building or place for such purposes under such conditions or after such alterations as the board imposes with the object of rendering the use of the building or place for such purposes free from objection. Obviously this section deals with particular cases which are brought to the notice of the board and in respect of which the board is satisfied that there is a danger of a public nuisance being occasioned. It does not contemplate the framing of general bye-laws which would be applicable to all places and buildings within the municipal limits and would govern all residents. Now, section 294, Municipalities Act, empowers a board to charge a fee to be fixed by a bye-law for any license, sanction or permission which it is entitled or required to grant under this Act. Without framing a bye-law the board is not entitled to demand a license fee. Nor can section 294 be made applicable under section 245 (3). It follows that if S. 245 does not authorise a board to frame a bye-law under F it has no power to demand a license fee. We are therefore unable to accept the contention urged on behalf of the Crown that the Municipal Board had authority under the substantive S. 245 to demand the license fee or insist on payment of license fee before business is carried on. Of course it is open to the board to approach the Local Government for the extension of the limits of the Municipal Board under S. 3 of the Act. Without such extension there seems to be no provision in the Act under which bye-laws under F which are appropriate can be made applicable outside municipal limits.

We accordingly allow this revision and setting aside the convictions and sentences passed on the accused acquit them of the offences with which they were charged and direct that the fines, if paid, be refunded.

K.S. *Revision allowed.*

A. I. R. 1935 Allahabad 905

HARRIES, J.

Lachman Prasad—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 341 and 343 of 1935, Decided on 8th July 1935, against order of Sess. Judge, Shahjahanpur, D/ 9th January 1935.

(a) Cantonments Act (1910), Ss. 141 (1), (2), and 268 — Offences not specified in Sch. 4 — Court cannot proceed with their trial except upon complaint or on information received from cantonment authority or person authorised by such authority—Letters addressed to sub-divisional Magistrate purporting to be signed by executive officer held did not satisfy provisions of S. 266.

Offences under S. 141 (1), read with S. 268, Cantonments Act, and offences under S. 141 (2), Cantonments Act are not specified in Sch. 4 of the Act and therefore no Court can proceed with the trial of any of these offences except on the complaint of or upon information received from the Cantonment Authority concerned or a person authorised by such authority by a general or special order in that behalf.[P 906 C2]

There was upon the record only a letter addressed to the Sub-Divisional Magistrate purporting to be signed by the Executive Officer of the Cantonment Authority. No evidence was called to prove this letter. It was not proved that it was signed by the officer for the Cantonment Authority nor was it proved that the officer was authorised by the cantonment authority.

Held : that the terms of S. 266, were not complied with and the proceedings held on that letter and orders thereon were invalid.

[P 906 C 2 ; P 907 C 1]

(b) Cantonments Act (1910), S. 141 (1) and (2)—Failure to comply with notice served under S. 141 (1) — Person cannot be convicted under S. 141 (2)—Sub S. (2) contemplates a recurring and not a continuing offence.

The use of the word 'again' in sub-S. (2) suggests that the offence contemplated in sub-S. (2) is a recurring and not a continuing offence. In other words, the legislature contemplated

the service of a notice upon a person and eventually a cleaning up of the premises with or without an offence committed under S. 141 (1) read with S. 268 Cantonments Act The legislature then provided that if within three months of the service of the original notice the premises were again found to be filthy, proceedings could be commenced at once without a fresh notice. After the expiry of three months fresh notices would be required under S. 141 (1) of the Act. Hence where a person fails to comply with a notice under S. 141 (1) he cannot be prosecuted under S. 141 (2). He can be dealt with under S. 141 (1) read with S. 268 and in case of a continuing failure to comply with it, he is liable to an additional fine. [P 907 C 2]

Lakshmi Narain Gupta — for Applicant.

Assist. Govt. Advocate—for the Crown.

Order.—These are two applications for revision of an order of the learned Sessions Judge of the Shahjahanpur District confirming orders of a learned Magistrate convicting the applicant of an offence under S. 141 (1) read with S. 268, Cantonments Act, and of an offence under S. 141 (2) of the same Act. The applicant was the occupier of certain premises within the cantonment area. On 18th September 1934 a notice was served upon him by the Executive Officer of the Cantonment authority requiring him to remove certain filth which had accumulated on his premises and to render the same clean and sanitary within 24 hours of the service of the notice. The applicant did nothing and appears to have informed the Cantonment Authority that it was impossible for him to remove all the rubbish which had accumulated on the premises within 24 hours. The Cantonment authority gave him a short extension of time, but nothing was done within that period.

In due course proceedings were commenced against the applicant for breaches of the sections of the Cantonments Act, previously mentioned. He was convicted of an offence under section 141 (1) read with S. 268, Cantonments Act, and fined a sum of Rs. 10. He was further convicted of an offence under S. 141 (2), Cantonments Act, and fined Rs. 20. Upon an application to the learned Sessions Judge of the Shahjahanpur District, for revision of these orders the learned Sessions Judge confirmed the convictions and sentences imposed. It is now urged that the convictions in these cases must be set aside by reason of non-compliance with the terms of S. 266, Cantonments Act. That section provides:

Save as otherwise expressly provided in this Act, no Court shall proceed to the trial of any offence made punishable by or under this Act, other than an offence specified in Sch. 4, except on the complaint of, or upon information received from the Cantonment Authority concerned or a person authorised by the Cantonment Authority by a general or special order in this behalf

Offences under S. 141 (1) read with S. 268, Cantonments Act, and offences under S. 141 (2), Cantonments Act, are not specified in Sch. 4 of the Act, and therefore no Court can proceed with the trial of any of these offences except on the complaint of or upon information received from the Cantonment Authority concerned or a person authorised by such authority by a general or special order in that behalf. In the present case there is no evidence whatsoever to show how the proceedings were commenced. There is upon the record a letter addressed to the Sub-divisional Magistrate, Shahjahanpur, purporting to be signed by the Executive Officer of the Cantonment Authority. No evidence was called to prove this letter and the production of it proves nothing at all. It may or may not be signed by the Executive Officer, but there was no evidence to prove his signature.

This letter is an application in the first person by the Executive Officer, but on the other hand, it is signed by him for the Cantonment Authority. Assuming the latter to be proved, I am of opinion that the letter is a personal application by the Executive Officer for the prosecution of the applicant and not an application by the Cantonment Authority. If the letter is a personal application for the prosecution of the applicant, then it should have been shown that the Executive Officer was authorized by the Cantonment Authority by a general or special order to act on its behalf in such a proceeding. No such evidence was produced before the Court. Certain documents were put in tending to show that this prosecution was instituted at the express instructions of the Cantonment Authority. There is a document on the record addressed to the Cantonment Authority mentioning that the applicant had failed to comply with the notice served upon him and suggesting a prosecution. Who wrote this document does not appear and there is no signature upon it. Above the writing upon this document appear the words "Prosecute. A. G. Woodhouse", but there is no evidence upon the record to show who Mr. Woodhouse is. He may or may not be the Cantonment Authority, though I am informed that he probably is the Cantonment Authority. No attempt

of any kind was made to prove this document or the signature of Mr. Woodhouse or indeed to show that Mr. Woodhouse was in any way connected with the Cantonment Authority. It has been urged that this document shows an express order by the Cantonment Authority to the Executive Officer to prosecute, but, with this view, I cannot agree. There is no evidence to show that the Executive Officer sent the letter to Mr. Woodhouse or that Mr. Woodhouse instructed him to prosecute. The words on the letter are "Prosecute. Sd/- A. G. Woodhouse" and as far as the document is concerned it might have been addressed to anyone. These documents, had they been proved properly, would undoubtedly have established somebody's authority to prosecute or might have established that the complaint was made on the authority not of an officer, but of the Cantonment Authority itself. However the prosecution saw fit to tender no evidence to prove any of these essential facts beyond putting in documents which, as they did not prove themselves, amounted to no evidence whatsoever. Courts must remember that putting in a document which purports to be written by X and addressed to Y proves nothing whatsoever until the writer of that document is called or somebody who can identify his handwriting. Certain documents by reason of their nature prove themselves, but these documents required proof and no proof of any kind was forthcoming.

In the result therefore I am bound to hold that the terms of S. 266, Cantonments Act, were not complied with and it was not proved that the complaint or report was made in the manner required by the Act. In such circumstances the Court is prohibited by the express terms of the section from proceeding with the trial and as it did proceed its orders were clearly invalid. On this ground the two convictions must be set aside.

It has been further contended that the conviction under S. 141 (2), Cantonments Act, is clearly illegal because the facts of this case disclose no offence under that sub-section. There was clearly a failure to comply with the notice served under S. 141 (1) of the Act, and that being so, the applicant was by reason of that sub-section read with S. 268 of the Act, liable to a fine not exceeding Rs. 200 and further, S. 268 provides that in the case of a continuing failure to comply with the notice the applicant was liable to an additional fine which might extend to Rs. 20 for every day after the first during which he persisted in such failure. In this case, some six days after the service of the notice it was found that nothing had been done and that being the case, the applicant could have been fined under S. 141 (1) read with Section 268, Cantonments Act, a sum not exceeding Rs. 200 together with a sum not exceeding Rs. 20 for each day in which he persisted in the failure. However he was prosecuted for the same failure under another sub-section, viz., S. 141 (2), Cantonments Act. That sub-section reads:

> **If, within three months from the date of the service of a notice under sub-S. (1), any building or land in respect of which the notice was issued is again in a filthy or insanitary state, the owner, lessee or occupier, as the case may be, shall be punishable with fine which may extend to two hundred rupees.**

It has been urged by the prosecution that where a man has failed to comply with a notice within 24 hours he commits one offence and then immediately afterwards commits a second offence under S. 141 (2) because his land is found within three months of the date of the notice again in a filthy condition. If that be the true construction a person may commit an innumerable series of offences under this sub-section between the expiry of 24 hours of the notice and of three months of the notice. In my view that is not the construction which should be placed upon this section. It is to be observed that the word "again" is used in the sub-section and the use of that word suggests that the offence contemplated in sub-S. 2 is a recurring and not a continuing offence. In other words, the legislature contemplated the service of a notice upon a person and eventually a cleaning up of the premises with or without an offence committed under S. 141 (1) read with S. 268, Cantonments Act. The legislature then provided that if within three months of the service of the original notice the premises were again found to be filthy proceedings could be commenced at once without a fresh notice. After the expiry of three months fresh notices would be required under S. 141 (1) of the Act. In my judgment this is the only fair construction to put upon the section and that being so, the present applicant could not have been convicted of an offence under S. 141 (2) of the Act, even if a proper complaint or report upon which the summons was based had been proved.

In the result therefore I allow these two applications, set aside the convictions and sentences and direct that if the fines or any part of them have been paid, they must be refunded.

K.S. *Applications allowed.*

A. I. R. 1935 Allahabad 908

KENDALL, J.

Chandra Shekhar Dixit — Plaintiff—Applicant.

v.

Burhwal Sugar Mills Co. Ltd., Cawnpore—Defendant—Opposite Party.

Civil Revn. No. 709 of 1934, Decided on 2nd May 1935, against order of Small Cause Court Judge, Cawnpore, D/- 28th September 1934.

Master and Servant — Servant resuming work after expiry of sick-leave — Again getting ill, he absented and applied for leave —Leave not granted but services dispensed with — Master held not liable to give one month's notice.

In matters of absence of servant from duty it is impossible to distinguish between a servant who will not and a servant who cannot perform the duties for which he was hired. In interpreting the law it is necessary of course to consider the matter strictly as one of contract and not to be swayed by sentimental considerations.

The servant *C* fell ill in March 1933, and was absent from his work, and he made an application for leave on 17th March. *B*, the master, allowed him four days leave, but *C* continued to be absent owing to illness until 28th March, when he was allowed to resume his work. *C* continued to work until 5th April, but on the 6th, it is said he was attacked by dysentery and again applied for leave. No order granting *C* leave was sent to him, but on the 8th *B* wrote to *C* to say that his services were dispensed with:

Held **: that no doubt it was unfortunate for *C* that he was ill, but as *C* was unable to perform the duties entrusted to him, that is to say, to carry out his contract to work regularly, he must be held to have been guilty of wrongful conduct in the absence of any specific contract between the parties to cover this exact case : 1930 *Sind* 17, *Ref.*** [P 908 C 2]

S. N. Seth—for Applicant.

I. B. Banerji—for Opposite Party.

Judgment.—The question that has been raised in this application for revision is whether the plaintiff who was employed by the defendant as a clerk was entitled to a month's notice on dismissal in the circumstances stated in the judgment of the trial Court. It is contended on behalf of the applicant by Mr. Shambhu Nath Seth that the practice between master and servant is for either side to give a month's notice for termination of their contract, or in lieu of a month's notice, one month's salary must be paid to the servant unless he has been guilty of wrongful conduct. No objection has been taken on behalf of the opposite party to this statement of the law, and the question is whether in the circumstances in this case the applicant forfeited his right to a month's notice or salary in lieu thereof by wrongful conduct.

The plaintiff fell ill in March 1933, and was absent from his work, and he made an application for leave on March 17. The defendant allowed him four days leave, but the plaintiff continued to be absent from illness until March 28, when he was allowed to resume his work. He continued to work until April 5, but on the 6th it is said he was attacked by dysentery and again applied for leave. No order granting him leave was sent to him, but on the 8th the defendant wrote to him to say that his services were dispensed with. The trial Court has found that the plaintiff was in the wrong and could not claim damages in lieu of notice. It is urged that there was no wrongful conduct on his part because he did not misconduct himself in any way, but he merely fell ill and was unable to work. There is some authority for holding that in matters like this it is impossible to distinguish between a servant who will not and a servant who cannot perform the duties for which he was hired. See the case of 117 I C 778 (1), in which a Bench of the Sind Judicial Commissioner's Court followed the English Law on the subject. In interpreting the law it is necessary of course to consider the matter strictly as one of contract and not to be swayed by sentimental considerations. It is unfortunate for the plaintiff that he was ill, but whether the law will compel him or his employer to suffer for the consequence of his illness is another matter. There was no specific contract between the parties to cover this exact case, and the consequence is I am afraid, that if the plaintiff was unable to perform the duties entrusted to him, that is to say, to carry out his contract to work regularly, he must be held to have been guilty of wrongful conduct. I cannot therefore hold that the decision of the trial Court is otherwise than in accordance with law, and the application is dismissed with costs.

B.D. *Application dismissed.*

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1. Detaram v. Forbes, 1930 Sind 17=117 I C 778.

A. I. R. 1935 Allahabad 909

KENDALL, J.

Mahesh Prasad — Decree-holder — Applicant.

v.

Shyam Lal and *another*—Judgment-debtors—Opposite Parties.

Civil Revn. No. 3 of 1935, Decided on 8th May 1935.

Limitation Act (1908), Art. 182, Cl. (5)—Decree-holder on receiving part satisfaction from judgment-debtor granting him two months time and asking dismissal of his execution—Order of dismissal—Fresh execution filed three years after order of Court—Held time commenced from order of Court which was final and execution was barred—Two months' time cannot be taken into account.

Decree-holder made application to the Court to the effect that he had received Rs. 100 from the judgment-debtor and the case might be dismissed in part payment as two months' time had been given to the judgment-debtor to pay the balance. The Court in consequence recorded an order recording part satisfaction and dismissing the execution. The decree-holder made another application more than three years after the last order passed by the Court:

Held: that the order of the Court dismissing the previous execution was a final order, as referred in Cl. (5), Art. 182 and time began to run from the date of the final order and the fresh execution application was time barred. The decree-holder was not entitled to take into consideration the two months' period allowed to the judgment-debtor: 1932 *All* 273; 1927 *All* 16 (*F B*) and 1931 *All* 458, *Expl.* [P 910 C 1]

Benod Behari Lal—for Applicant.

Shiva Prasad Sinha — for Opposite Parties.

Judgment.—The circumstances out of which the application has arisen are as follows: The applicant is a decree-holder who had obtained a decree for money on 31st January 1928. He made an application for execution on 20th August 1928, and this application was dismissed in part payment on 5th September 1928. He made a second application on 25th February 1930, and on 9th July 1930, he made an application to the Court to the effect that he had received Rs. 100 from the judgment-debtor and the case might be dismissed in part payment as two months' time had been given to the judgment-debtor to pay the balance; and the Court in consequence recorded an order in the following words:

Pus hukum hua keh mokadma haza juzwi wasul me khariz kia jawi aur kharcha zima madiun rahe.

It is therefore ordered that this case be dismissed in part payment and the costs be borne by the judgment-debtor.

The decree-holder has now made a third application on 8th September 1933 which the Executing Court has dismissed on the ground that it was made more than three years after the last order passed by the Court. It is argued on behalf of the decree-holder-applicant that the period of 2 months' grace allowed by the decree-holder to the judgment-debtor ought to be taken into consideration, and that limitation should therefore not be deemed to run from 9th July 1930, when the order was passed by the Court dismissing the application, because it is said that that was only a provisional order and there was still two months' grace at the end of which the application must be deemed to have been dismissed, so that limitation should only be deemed to run from 9th September 1930, the end of that period of grace. There can be no doubt that the law applying to such a case as that contained in Art. 182, Limitation Act. The time from which the period begins to run, therefore is:

the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order,

as set forth in Cl. 5, Col. 3 of that Article. The Executing Court has relied on the decision of a Full Bench of this Court in 1932 All 273 (1). The law of Limitation that the Full Bench were considering in that case was section 48 Civil P. C., and not Art. 182, Limitation Act, but the principle laid down is that which has been enunciated by their Lordships of the Privy Council, namely, that:

A man may bind himself not to execute a decree within a certain period, but he cannot by binding himself not to execute the decree for a certain period add to the time which the law allows him to execute it.

I have been referred on behalf of the applicant to two cases of this Court in which a somewhat different view is said to have been taken, namely, 1927 All 16 (2) and 1931 All 458 (3). In the earlier case, which was a Full Bench case, it has been held that where the execution of a decree has been suspended through no act or default of the decree-holder, he has a right to ask the Court to revive and carry through the execution proceedings which have been suspended and this right can be exercised by means of a proper application to that effect made

1. Gobardhan Das v. Dau Dayal, 1932 All 273=138 I C 583=54 All 573 (F B).
2. Chhattar Singh v. Kamal Singh, 1927 All 16 =100 I C 692=49 All 276 (F B).
3. Prem Narain v. Ganga Ram, 1931 All 458=133 I C 316.

within three years of the date on which the right to make it accrued, as such application would be one for which no period of limitation has been expressly provided and would therefore fall under Art. 181 of the Schedule to the Limitation Act (i. e., not Art. 182). The Bench in that case came to the conclusion that the application with which they were concerned was not a fresh application but an application for revival of the proceedings in execution. In other words, the application of which it was held to be a revival had not been finally disposed of by the previous order passed by the Court. In the second case it was found that the Executing Court had passed an interim order staying execution and that the parties afterwards agreed that three months' time should be allowed to the judgment-debtors to pay the amount, failing which, execution should proceed and subsequently the Court ordered:

The execution be struck off for the present, sc that it was open to the decree-holder to apply to the Court to revive and carry through the pending execution .... and it was not incumbent upon him to file a fresh application to initiate a new execution.

The crux of the matter therefore is whether the order of the Court passed on 9th July 1930, was only a provisional order suspending the application for execution as in the two cases on which the opposite party relied, or whether it was a "final order passed on an application made" as referred to in Cl. 5, Art. 182, Limitation Act. I am clearly of opinion that in this case the order was a final order. It is certainly remarked that the decree-holder had given the judgment-debtor two months' time in which to pay the balance of the decretal amount, but the order of the Court is not that the proceedings are suspended but that the application is dismissed, and moreover, costs are given against the judgment-debtor. Further the decree-holder himself did make a fresh application on 8th September 1933, which appears to be an application for a new proceeding and not merely one reviving a proceeding which has only been suspended. It follows therefore that limitation under Art. 182 of the Act must run from the date of that order and the decision of the Executing Court is perfectly correct. The application is therefore dismissed with costs.

B.D. *Application dismissed.*

A. I. R. 1935 Allahabad 910

SULAIMAN, C. J. AND BENNET, J.

Ram Gopal and *another* — Decree-holders—Appellants.

v.

Ram Kunwar and *others* — Judgment-debtors—Respondents.

Exe. Second Appeal No. 626 of 1933, Decided on 2nd January 1935, from decision of Sub-Judge, Bareilly, D/- 7th July 1932.

Civil P. C. (1908), S. 47 and O. 21, R. 91 —Decree-holder purchasing property at auction-sale—Possession resisted—In a possessory suit title was held in third party—Application to add costs of suit etc., must be made within thirty days from the date of auction sale.

A decree-holder who purchases at an auction sale ought not to be placed in a better position as regards a judgment-debtor than a stranger who makes a purchase. There is no guarantee at an auction sale that the judgment-debtor has no saleable interest in the property. There is no warranty of title at an auction sale and what is sold is merely the right, title and interest of the judgment-debtor and it is for the purchaser, whether he is a decree-holder or stranger, to ascertain the title for himself. If there is any disadvantage in the matter it ought to be the disadvantage of the decree-holder because it is his business to ascertain previously whether the judgment-debtor has any title or not in the property which is put up to sale : 1935 *All* 470; 1921 *All* 377; 1931 *All* 377 and 1933 *All* 63, *Rel on* ; 1933 *All* 218, *Dist.* [P 911 C 2]

Decree-holder purchased certain property at auction sale. Possession was resisted by a third person. In a possessory suit against the third party, it was held that the title to the property was in the third person. The decree-holder made an application to the Court asking that the auction-purchase money and interest on it and costs of the suit against objector and other costs should be entered in the application for execution of the Original Small Cause Court decree against the judgment-debtors and that the decree-holders be allowed to realise this amount by other means:

Held : that S 47 could not be invoked as the decree-holder had failed to apply under O. 21, R. 91. Such application must be made before the sale is confirmed and within thirty days from the auction-sale as laid down by Art. 166, Limitation Act. [P 911 C 1]

M. L. Agarwala—for Appellants.
G. S. Pathak—for Respondents.

Judgment.—This is a second appeal by decree-holders whose application in execution under S. 47, against the judgment-debtors has been dismissed by the two lower Courts. The application sets out the following facts:

The decree-holders had a Small Cause Court decree against the judgment-debtors and in execution the decree-holders purchased a certain house for Rs. 350, and that amount was set off from the decretal amount. The sale certificate was obtained and proceedings for possession were taken and a person called Mohan resisted the decree-holders when they attempted to obtain possession. The date of this resistence is not stated. Subsequently the decree-holders filed a suit No. 677 of 1929, against Mohan for possession, but the decree-holders did not make the judgment-debtors parties to that suit. The decree-holders lost their suit against Mohan and it was held that Mohan was the owner of the house and that the judgment-debtors were not the owners of the house. The present application asks that the auction-purchase money Rs. 350, and interest on it and costs of the suit against Mohan and other costs should be entered in the application for execution of the Original Small Cause Court decree against the judgment-debtors and that the decree-holders may realise this amount by other means; in other words, the applicants desire that the certificate of satisfaction which they granted for the amount which they had paid at auction-sale should be set aside.

There is no provision in O. 21, R. 91, for such an application, but the application must be made before the sale is confirmed and the application must be made within thirty days from the auction-sale as laid down by Art. 166 of the schedule of the Limitation Act. The present application does not purport to be one under O. 21, R. 91, because such an application would long be barred by time. The auction-sale took place on 28th April 1923, and was confirmed on 26th May 1927, and the present application was brought on 9th December 1930. The application is headed "under S. 47, Civil P. C.", and the learned counsel argues that this section is authority for the present application. He is not able to quote any ruling as a precedent, but he refers to 1933 A L J 60 (1), and the observations at p. 66. It is true that on that page certain remarks are made and that the principle of equity was applied in regard to a case where it was found, as in the present case, that certain property which had been the subject of an auction-sale and purchase by a decree-holder did not belong to the judgment-debtor, but the parties to that ruling were two rival decree-holders and the question between them was a rateable distribution of assets. Such a rateable distribution is made under S. 73, Civil P. C., and the Court held that it should in the interest of equity apply its inherent powers under S. 151, Civil P. C., as between two rival decree-holders. That was a different question from the present case where we have on the one side a decree-holder and on the other side a judgment-debtor, and we do not consider that the principle of that ruling can be applied to the present case. We consider that a decree-holder who purchases at an auction-sale ought not to be placed in a better position as regards a judgment-debtor than a stranger who makes a purchase, and no principle of equity has been shown to us under which we could hold a different view. This point has been already laid down in an unreported ruling of this Court, Second Appeal No. 1198 of 1933, 1935 All 470 (2), in which the ruling of 1933 A L J 60 (1), was considered. There are a number of rulings of this Court for the proposition that there is no guarantee at an auction-sale that the judgment-debtor has no saleable interest in the property. This is laid down in 1921 All 377 (3), 1931 All 377 (4) and 1933 All 63 (5).

It is well established therefore that there is no warranty of title at an auction-sale and that what is sold is merely the right, title and interest of the judgment-debtor and it is for the purchaser, whether he is a decree-holder or a stranger, to ascertain the title for himself. If there is any disadvantage in the matter it ought to be the disadvantage of the decree-holder because it is his business to ascertain previously whether the judgment-debtor has any title or not in the property which is put up to sale. We do not think that in the present case we can hold that S. 47, can be invoked to provide a rule where the decree-holder has failed to apply within the period of limitation allowed by a rule of O. 21. O. 21 does supply a remedy for a decree-holder who finds

1. Dubey Amba Lal v. Ram Gopal Madho Prasad, 1933 All 218 = 144 I C 492 = 55 All 221=1933 A L J 60.
2. Mangal Sen v. Mathura Prasad, 1935 All 470 =157 I C 33.
3. Ram Saroop v. Dalpat Rai, 1921 All 377=58 I C 105=43 All 60.
4. Anand Krishna v. Kishen Devi, 1931 All 377 =132 I C 417=53 All 496.
5. Sahu Deputy Shankar v. Mangal Sen, 1933 All 63=143 I C 429=54 All 948.

that the property which he has purchased at auction-sale is not property in which the judgment-debtor has a saleable interest. It is for the decree-holder to bring his application in proper time under that rule. In other words, a decree-holder ought to ascertain immediately after the auction-sale whether there is anyone in hostile possession of the property, and if he neglects to do so he has only himself to blame. We do not see any principle of law under which the present application can lie.

Accordingly we agree with the Courts below and we dismiss this second appeal with costs.

B.D. *Appeal dismissed.*

A. I. R 1935 Allahabad 912

ALLSOP, J.

Chandra Mohan Lal — Plaintiff — Appellant.

v.

Mt. Mathuri Kuer and *another*—Defendants—Respondents.

Second Appeal No. 1094 of 1933, Decided on 30th April 1935, from decision of Dist. Judge, Aligarh, D/- 11th February 1933.

Landlord— Lambardar — Lambardar collecting rents and paying revenue on behalf of cosharers — Preferential treatment to lambardar disallowed.

The lambardar collected rents on behalf of the cosharers and paid revenue. He collected more profits than the revenue paid, and claimed full share of the gross profits:

Held: he could not give himself preferential treatment. [P 912 C 2]

Gopi Nath Kunzru—for Appellant.

Panna Lal and *S. B. L. Gour* — for Respondents.

Judgment.—This second appeal arises out of a suit in which the plaintiff claimed in his capacity as lambardar sums alleged to have been paid by him as Government Revenue on behalf of the defendants, his co-sharers in the mahal. It has been found that the revenue paid was Rs. 1,743 and that the lambardar collected a sum of Rs. 2,079-1-2 on account of profits. The lambardar alleged that there was an agreement between him and the co-sharers by which they were all to collect their own share of the profits. But the learned Judge of the lower appellate Court has found as a fact that the lambardar did not act upon the agreement and that he collected rents, instituted suits, ejected tenants and generally behaved as though no agreement had taken place. The position then is that the lambardar was collecting rents on behalf of the co-sharers as well as for himself.

It has been urged that he was entitled out of his collections to set apart for himself his full share of the gross profits of the mahal and that it was only the balance which was to be shared between the co-sharers and consequently that the lambardar must be held to have paid out of his own share of the profits certain sums on account of the revenue due from the co-sharers. There is no force in this argument. The position simply is that the lambardar was collecting rents and paying the revenue. He collected more profits than the amount of revenue which he had to pay. It is obvious that he cannot give himself preferential treatment. Out of the sum he collected he was bound to pay the revenue and the balance was to be distributed among all the persons who were entitled to shares, i. e., the lambardar himself and the other co-sharers.

An argument has been addressed to me in respect of one co-sharer, the allegation being that he became a co-sharer only in the year 1337 Fasli. The suit was in respect of the cesses for the year 1336 Fasli and revenue and cesses for the year 1337 to 1339 Faslis. It appears that the lambardar collected a sum of about Rs. 263 on account of arrears for years previous to 1337 Fasli. It is said that in so far as this particular co-sharer is concerned, he is not entitled to any share of these arrears and consequently that he at least is bound to pay back some of the revenue paid on his behalf. In the first place, even if the sum of Rs. 263 is deducted from the profits it still appears that there was more in the hands of the lambardar than was necessary for the payment of revenue. In the second place, this particular co-sharer acquired his title from the deceased husband of the other defendant and consequently the defendants between them are entitled to a full share of profits of 2/3rds of the mahal, the remaining 1/3rd going to the lambardar. There is no force in this appeal and I dismiss it with costs.

B.D./V.V. *Appeal dismissed.*

A. I. R. 1935 Allahabad 913

ALLSOP, J.

Ramji Lal and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 103 of 1935, Decided on 8th April 1935, from order of Sess. Judge, Muzaffarnagar, D/- 6th December 1934.

(a) Penal Code (1860), S. 99— Public servant not acting in good faith — S. 99 does not apply.

Where the act is not done by a public servant in good faith, provisions of S. 99 are not applicable. [P 913 C 2]

(b) Penal Code (1860), S. 103 — Free fight with lathis between two parties in respect of release of woman—Two of accused injured in same way as others on other side—Accused stopping beating on release of woman—Merely because injury is caused to more persons on other side, accused held did not exceed right of private defence.

The whole of the party were preventing the release of a woman. There was nothing whatsoever to show that she would have been released if the persons injured had not been attacked. There was a free fight with lathis. Two of the accused were injured in the same way as the persons on the other side, though they had between them fewer injuries than the others, but the difference was not great. The nature of the injuries was the same, that is, they were the usual injuries caused in a lathi fight, contusions and contused wounds on the head and other parts of the body. The accused did not continue to beat the other side after the woman had been released:

Held: that the accused who had a right of private defence had not exceeded that right even though more persons on the other side were injured. [P 914 C 1]

G. S. Pathak—for Applicant.

Assist. Govt. Advocate— for the Crown.

Order.—The six applicants have been fined Rs. 26 each under S. 147, Penal Code and Rs. 26 each under S. 323, Penal Code, for rioting and voluntarily causing simple hurt to certain other persons. They have also been bound over to keep the peace under S. 106, Criminal P. C.

It appears that a case under S. 498, Penal Code, was proceeding between the husband of one Mst. Chandro and some person or persons who were connected with the applicants. A bailable warrant was issued for the arrest of this Mst. Chandro and was delivered to a head constable and three constables. These officers proceeded to the village where the woman was alleged to be living, i. e., the village of Barhauna. The complainant in the 498 case and friends or relations of his from the village of Barla joined the police party. All these persons reached Barla early in the morning and proceeded to arrest Mt. Chandro with the result that they were attacked and some of them were injured.

The defence was that the police party had entered the house, where Mt. Chandro was, in the early hours of the morning before day break and that they had been beaten because they were mistaken for dacoits. The Courts below very rightly disbelieved this story. They have found however that the fact that the warrant was a bailable warrant was never conveyed to Mst. Chandro or to her friends. The learned Magistrate has given quite good reasons for thinking that this was so and the learned Sessions Judge has agreed with him. The result of this finding was that the Courts below came to the conclusion that the arrest of the woman was strictly not a legal arrest; but they found further that the applicants had exceeded such right of private defence as they may have had. The learned Sessions Judge was also inclined to apply the provisions of S. 99, Penal Code, and to hold that no right of private defence existed. It is clear from the reasons given by the Magistrate for thinking that the fact that the warrant was bailable was not communicated and that the failure to give the information was deliberate. The Magistrate was influenced in part by the fact that the complainant in the case under S. 498, Penal Code, and his friends were particularly desirous of obtaining possession of the woman.

I think that the Courts below both considered that the police and those with them had deliberately refused to give the woman an opportunity of giving bail because they wished that she should be actually handed over to them. If this was so, and I think there is good reason for thinking that it was so, there can be no doubt that the police officers were not acting in good faith. The provisions of S. 99, Penal Code were therefore not applicable. There can be no doubt that in the strictly legal sense the arrest was an illegal one and the woman was the victim of an offence of illegal confinement. The applicants had every right to protect her from the commission of this offence.

The only question was whether they exceeded their right of private defence. Neither of the Courts below have given any real reason for thinking that the right of the private defence had been exceeded. The learned Sessions Judge

has said that the police party was savagely attacked; but I can see no justification for the use of this adverb. The learned Magistrate seems to have thought that the applicants exceeded their right of private defence because they caused injuries to four members of the party of the complainant in the case under S. 498, Penal Code, while the woman was being held not by them, but by the head constable. I cannot agree with this conclusion. It is obvious that the whole of the party were preventing the release of the woman and there is nothing whatsoever to show that she would have been released if the persons injured had not been attacked. It is obvious that there was a free fight with lathis. Two of the applicants, Nawal and Ramji Lal, were injured in the same way as the persons on the other side. It is certainly true that they had between them fewer injuries than the others, but the difference is not great. The nature of the injuries was the same, that is, they were the injuries caused in a lathi fight, contusions and contused wounds on the head and other parts of the body. It does not appear that the applicants continued to beat the other side after the woman had been released. Once it is held that the applicants had a right of private defence in this matter the conclusion must be legally that they were not guilty of any offence.

I set aside the convictions, the sentences and the order under S. 106, Criminal P. C. If the fines or any part of them have been paid the money shall be refunded. If any bond has been executed under the provisions of S. 106, Criminal P. C. it shall be cancelled.

K S. *Convictions set aside.*

A. I. R. 1935 Allahabad 914

KENDALL, J.

Bhairon Lal—Applicant.

v.

Harbans Chaudhary and *others*—Opposite Parties.

Civil Revn. No. 714 of 1934, Decided on 8th May 1935.

Civil P. C. (1908), Ss. 151, 152, 153—Decree granted on plaint giving wrong name of defendant—Application for amendment—Procedure under inherent powers.

Plaintiff named a wrong person as defendant. Decree was granted against the wrong person. Subsequently, plaintiff applied that necessary correction be made as he had made an accidental slip in putting a wrong man as defendant:

Held: that if the plaintiff really made an accidental mistake of this kind there must be a remedy such as that contemplated in Ss. 151 to 153. If there was an error that could be corrected by proceedings under Ss. 151 to 153, then the proper course for the Court was to send a notice to the other person to be substituted and give him an opportunity of showing that the error was not merely one that could be cured by summary procedure of this kind. If he could show that the error was not of this nature, then the plaintiff's application would no doubt have to be dismissed. But if he failed to show this, then there would be no reason why the Court should not make the necessary correction under the provisions of Ss. 151 to 153. [P 914 C 2 P 915 C 1]

Harnandan Prasad and *H. C. Asthana*—for Applicant.

K. C. Mukerji—for Opposite Party.

Judgment.—The circumstances out of which this application for revision has arisen are given in the order of the learned Munsif. The plaintiff having made an application that by mistake he had not named Bhairon Lal, son of Chunni Lal, in the plaint, but had named Hira Lal son of Chunni Lal with the result that the decree was given against Hira Lal, as well as other defendants whereas the decree really should have been given against Bhairon Lal, the Court has made the following order:

It is therefore ordered that the decree is set aside and the suit will be re heard.

It is claimed on behalf of the present applicant Bhairon Lal that the Court could not set aside the decree which it had itself given merely on the ground that Bhairon Lal had not been impleaded as a defendant. If the plaintiff really made an accidental mistake of this kind and named Hira Lal in the plaint instead of Bhairon Lal, it appears to me that there must be a remedy such as that contemplated in Ss. 151 to 153, Civil P. C. There might be an error arising from an accidental slip e. g., the naming of Hira Lal instead of Bhairon Lal, but on the other hand the fact remains that Bhairon Lal has not been heard in his defence, and so it is not possible at this stage to say whether there has merely been an error arising from an accidental slip or a misconception in the framing of the suit. If there was an error that could be corrected by proceedings under Ss. 151 to 153, Civil P. C., then it appears to me that the proper course for the Court was to send a notice to Bhairon Lal and give him an opportunity of showing that the error was not merely one that could be cured by a summary procedure of this kind. If he could show that the error was not of this nature,

then the plaintiff's application would no doubt have to be dismissed. But if he failed to show this, then there was no reason why the Court should not make the necessary correction under the provisions of Ss. 151 to 153, Civil P. C. In this case however the order would be, not that the decree should be set aside and the suit reheard, but merely that a nominal correction should be made in the record of the proceedings.

To this extent therefore the application must be allowed. The order should not be one for setting aside the decree and rehearing the suit de novo. Bhairon Lal should be given a chance of showing that the error was not merely a nominal one, and the Court may then pass orders in the light of the above remarks. In the circumstances I need make no order as to costs, which will abide the result. It is therefore ordered that the decree is set aside and the suit will be re-heard.

B.D. *Application allowed.*

A. I. R. 1935 Allahabad 915

GANGA NATH, J.

Parshadi Lal — Defendant—Appellant.

v.

Chandan and *others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 824 of 1933, Decided on 2nd April 1935, from decision of Sub-Judge, Muttra, D/- 3-4-1933.

Limitation Act (1908), Arts. 49 and 29—Suit for return of property wrongfully attached and released is governed by Art 49 and not by Art. 29—Time runs from date when property is wrongfully taken or when detainer's possession becomes unlawful i. e., after it is released from attachment.

A suit for return of property which has been wrongfully attached and subsequently released from the attachment is governed by Art. 49 and not by Art. 29 as it is not one for compensation for wrongful seizure. Time for such suits begins to run from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful, i. e., after it is released from attachment.

[P 915 C 2 ; P 916 C 1]

N. P. Asthana and *B. N. Sahai*—for Appellant.

Hari Ram Jha—for Respondents.

Judgment.—This is a defendant's appeal and arises out of a suit brought against him and the other respondents by the plaintiff to recover his produce and in the alternative its price. The appellant had a decree against defendants 4 and 5, in execution of which he got attached the produce of the plaintiff-respondent. On the responsibility of the appellant, the produce was put in the custody of the Shahanas, defendants 2 and 3. The plaintiff filed an objection to the attachment which was allowed and the attachment was removed. Thereafter the defendant-appellant brought a suit under O. 21 R. 63, Civil P. C., for declaration that the property was liable for attachment and sale in execution of his decree and that it belonged to his judgment-debtor defendants 4 and 5. The suit was dismissed. The property continued in the custody of the appellant's Shahanas. The plaintiff brought this suit to get back his produce. The defendant-appellant contended that the plaintiff had got back the produce, that he (defendant) was not liable and that the suit was time-barred. The trial Court gave a decree to the plaintiff for Rs. 200 for the price of the produce against defendants 2 and 3, and the appellant. On appeal by defendant 1, the learned Subordinate Judge confirmed the decree of the trial Court and dismissed the appeal.

Against this decision is the present appeal. Both the Courts have found that the appellant was liable inasmuch as he got the property put in the custody of the Shahanas defendants 2 and 3 on his responsibility. It has also been found by the lower Court that the produce has not been returned to the plaintiff. It has been urged by the learned counsel for the appellant that Art. 29, Limitation Act, applies to the case and the suit is barred. As already stated, on the objection of the plaintiff the property was released from the attachment and consequently no attachment subsisted over the property in dispute. It was open to the plaintiff to have brought a suit after his property had been released from attachment for the price of his property if it was not forthcoming as well as for any damages which might have been caused to him by the wrongful attachment. In this case, the plaintiff does not claim any damages for the wrongful attachment. He simply claims his property and its price if the property be not available. The suit is not for compensation for wrongful seizure of movable property under legal process. On the other hand, it is for the return of the property after it had been released from the wrongful attachment. Art. 49 Limitation Act will apply to the present case, which applies to suits for specific movable pro-

perty or for compensation for wrongfully taking or injuring or wrongfully detaining the same. Time for such suits begins to run from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. In this case, the possession of the defendant-appellant and his Shahanas became unlawful after the property was released from attachment. The suit is not time-barred. There is no force in the appeal. It is ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

Permission to file a Letters Patent appeal is granted.

K.S. *Appeal dismissed.*

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* A. I. R. 1935 Allahabad 916

BENNET, J.

Nanku and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 224 of 1935, Decided on 26th July 1935, from order of Addl. Sess. Judge, Budaun, D/- 18th March 1935.

*** (a) Hindu Law — Guardianship — Wife minor—Husband is guardian but must enforce his right only by recourse to law.**

A husband is no doubt the guardian of his minor wife but he has no right to enforce his rights over his wife otherwise than by a suit in the Courts: 1919 *All* 36 and 1931 *Cal* 446, *Dist.*

[P 916 C 2; P 917 C 1]

*** (b) Child Marriage Restraint Act (18 of 1929)—Wife under fourteen years of age—Husband should not be given possession of wife—Husband and wife.**

It is against the policy of the Act that a husband should obtain possession of his wife if she has not attained the age of 14 years. Obtaining possession of the minor wife by her husband would not be for her benefit as the law clearly provides that such marriages shall not take place.

[P 917 C 1, 2]

(c) Penal Code (1860), S. 352 — Husband entitled to possession of his wife, cannot use criminal force—Husband and wife.

For a husband to take his wife would not be an offence. But a husband has no legal right to cause injury, fear and annoyance to his wife by using criminal force. Therefore even if the right of the husband to take away his wife existed, the right must not be enforced by the use of criminal force.

[P 918 C 2]

(d) Arms Act (1878), S. 19 (f)—Servant in possession of gun—Master having license for gun—Servant using it in riot, is guilty under S. 19 (f).

No doubt the possession by a servant of a gun is legal if his master has a license for the gun.

[P 919 C 1]

But it is not possible for a person licenced to possess gun to authorize the possession of that gun by his servant for an unlawful purpose. Where therefore the servant of such person has used the gun in a riot, he is guilty under S. 19 (f), Arms Act.

[P 919 C 1]

T. A. Bradley—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—This is an appeal on behalf of four persons Nanku, Asharfi Singh, Shankar and Ramlal who have been convicted by the Sessions Court of Budaun under Ss. 148 and 352/149, Penal Code, and Shankar has also been convicted under S. 19 (f), Arms Act. Sentences of one and two years' R. I. under S. 148 and three months' and one month's R. I. under S. 352/149, Penal Code, have been imposed and an additional one year's R. I. under the Arms Act on Shankar. The circumstances are somewhat peculiar. It is admitted that the accused Nanku, whose age is given as 20 years, was married four years ago to a child Mt. Chandrakali whose age is about ten years and her age at that period was apparently six years. She stayed with her husband for 15 days only after the marriage and she was then brought back to the home of her father Durga Prasad. Durga Prasad refused to allow his daughter to go back to her husband. The reason which he has given in cross-examination is "I do not send my daughter to her husband as she is too young and as her husband cannot support her properly." For the defence it was alleged that Durga Prasad had some intention of remarrying her to someone else. Learned counsel alludes to a passage where Durga Prasad states "In our community a woman can be remarried" ("hamlogon men dusri shadi hai"). But this passage apparently means that widows can be remarried and it does not mean that a woman who has her husband alive can be remarried in this caste of Sunars. Learned counsel points out that the allegation that Durga Prasad was going to marry his daughter to someone else was pleaded by the accused to the committing Magistrate; but the mere making of an allegation is no proof and there is no evidence on the record that Durga Prasad had any such intention. In fact Durga Prasad specifically denied that he ever said anything of the sort to Nanku.

Now, Nanku desired to obtain possession of his wife and learned counsel argues that it was legal for him to obtain possession of her because as her husband he was entitled to be her legal guardian. Learned counsel refers to Mulla's Principles of Hindu Law, Edition 7, paras. 442 and 443, where it is

stated that the husband is a lawful guardian of his minor wife and is entitled to require her to live with him however young she may be, unless there is a custom enabling the wife to live with her parents until she has arrived at puberty. In para. 444 the remedy of the husband is stated to be a suit for restitution of conjugal rights, and in para. 442 no agreement between the parties would be an answer to such a suit. But it is not written anywhere in Mulla that a husband has any right to enforce his rights over his wife otherwise than by a suit in the Courts. Learned counsel Mr. Bradley for the appellants contends that this is a case in which Nanku was entitled to take his wife away, whether she desired to come home or not; in other words that it was a case where a man is entitled to the doctrine of self-help. He relies on S. 89, Penal Code, which states:

> Nothing which is done in good faith for the benefit of a person under 12 years of age or of unsound mind by or by consent either express or implied of the guardian or other person having lawful charge of that person is an offence by reason of any harm which it may cause . . . to that person.

To obtain the benefit of this exception it is necessary to show that the act was done for the benefit of the minor. In the present case it appears that Nanku desired to have possession of his wife for his own benefit. But it does not follow that for Nanku to obtain possession of the person of his wife would be for her benefit. She has not attained the age of puberty and apparently the presumption is that Nanku desired to have her for the purpose of having sexual connexion with her. This purpose is one which it is the policy of the law to prevent. Under Act 19 of 1929, an Act to restrain the solemnisation of child marriages, otherwise known as the Sarda Marriage Act, it is stated to be an offence if after 1st April 1930, when the Act came into force, any marriage is celebrated with a female under 14 years of age. Now the marriage in question having taken place four years before the Sessions trial in 1935 must have taken place in 1931, that is after this Act came into force. The celebration therefore of this marriage was a criminal offence. Clearly it is against the policy of the Act that a husband should obtain possession of his wife if she has not attained the age of 14 years laid down in the Act. I cannot therefore consider that the obtaining possession of this minor by Nanku would be for her benefit as the law clearly provides that such marriages shall not take place. No doubt the Act does not make the marriage illegal and after the girl has attained 14 years the objection would no longer arise, but the girl is at present only 10 years of age and the objection does not exist. Moreover this question of guardianship for which learned counsel relied on two rulings: 42 All 146 (1), at p. 149 and 58 Cal 897 (2), is a question which has arisen in connexion with convictions under S. 366, Penal Code., for kidnapping from lawful guardianship. In the present case the trial and convictions are not under that section, but are under Ss. 148 and 352/149, Penal Code.

The next legal argument which was addressed to me was that Ss. 148 and 149 would not apply because it is not shown that there were five persons concerned in the transactions. Seven persons were placed on trial before the learned Sessions Judge and he has acquitted three of these persons. The argument therefore is that on his findings there were only four persons concerned in these transactions. But I find that at the end of his judgment the Sessions Judge states "that a number of guilty persons have escaped." He therefore was of opinion that there were a large number of persons concerned in these transactions than the four whom he convicted. In the first report there were seven persons named and the complaint was that 15 or 20 other persons unknown with these seven persons, that is 22 to 27 persons in all committed the riot in question. The prosecution evidence is to that effect. As regards the three persons who were acquitted by the Sessions Court two of these persons Jadon Singh and Har Prasad were arrested on the spot by Sub-Inspector Krishna Kumar Chaturvedi. He stated that these persons "were resisting the scouts and others who were helping the girl." The learned Sessions Judge in considering the evidence of the prosecution against these accused Jadon Singh and Har Prasad on pp. 89 and 90 omits to notice the evidence of this Sub-Inspector as to what they were doing when they were arrested. I see no reason to disbelieve the evidence of the Sub-Inspector and accordingly it appears to me that these two persons were also taking part in the riot.

1. Emperor v. Sital Prasad, 1919 All 36=54 I C 402=21 Cr L J 50=18 A L J 64=42 All 126.
2. Saharali Mahommad v. Kamizuddin Mahammad, 1931 Cal 446=1931 Cr C 598=132 I C 246=32 Cr L J 888=35 C W N 195=58 Cal 897.

Learned counsel has addressed some arguments to me in regard to the other four persons who were convicted; but it appears to me that they were undoubtedly taking part in the riot also. There were therefore at least six persons who took part in this affair who were known besides a number of others who were apparently not known. In regard to the accused Buddha who was also acquitted, the Court below merely gave him the benefit of the doubt.

I now come to deal with the question of what occurred according to the prosecution. The prosecution stated that Durga Prasad, the father of Mt. Chandrakali, went for a walk to see a certain mela and his daughter who was sitting near the mela was suddenly seized by Nanku and a large party of persons, three of whom had guns and the rest had lathis. Nanku caught hold of the arm of the girl and dragged her for a considerable distance. Her brother Ramsarup, a boy of 12, ran up and raised an alarm. The accused Shankar had a bandoleer of cartridges and a gun and he fired a shot and another shot was fired half a minute later. Two boy scouts who were on duty at the fair, Durga Prasad and Muhammad Ibrahim, came up and made an attempt to prevent the party of the accused forcibly taking away the girl. Nanku snatched the gun and pointed it at the chest of the scout Durga Prasad and threatened to fire. The scout Muhammad Ibrahim ran away. Sub-Inspector Krishna Kumar Chaturvedi came up with some constables and saw Nanku dragging along Chandrakali who was screaming, and the accused helping Nanku and resisting the scouts and the Sub-Inspector arrested Jadon Singh, Har Prasad, Nanku and Shankar. The guns had been taken away by the other accused who ran away, but Shankar was found in possession of the bandoleer of cartridges in which there were 23 live. 12 bore cartridges. A number of witnesses are produced to support this story. It is obvious that the Sub-Inspector and the two boy-scouts who belonged to the Baden-Powell Scouts are independent witnesses and have no reason to give false evidence. The boy-scout Durga Prasad aged 18 years, states that he saw Nanku and a number of persons with him dragging this girl along who was screaming and that there was a crowd. Muhammad Ibrahim gives similar evidence. It is obvious that what was going on was a riot and that there were a large number of persons concerned in it in the party of the accused. I am of opinion therefore that Ss. 148 and 149, Penal Code, do apply.

Learned counsel argued further that S. 352, Penal Code, (criminal force), would not apply because in the definition of "criminal force" in S. 350 there is the element "in order to the committing of any offence." He argues that for a husband to take his wife would not be an offence. It may be that the particular offence of kidnapping would not exist, but it appears to me that the latter portion of the definition of S. 350 does apply, that is to cause injury, fear or annoyance to the person to whom the force is used. I consider that Nanku in dragging his wife forcibly caused injury, fear and annoyance to her, and I do not consider that a husband has any legal right to cause injury, fear and annoyance to his wife. His wife was at the time living with her father. If Nanku had a legal right to obtain possession of his wife the means which he should have used were to have recourse to the Courts and not to use force. I may point out that under S. 141, Fourth, it is a part of the definition of an unlawful assembly where criminal force is used to enforce any right. Even therefore if the right existed the right must not be enforced by the use of criminal force, and where five or more persons employ criminal force for the enforcement of a right they constitute an unlawful assembly.

One point taken in the grounds of appeal was that it was not suggested that the appellant Nanku was armed with a deadly weapon and his conviction under S. 148 was illegal. The witness Durga Prasad, the boy-scout, states that Nanku pointed his gun at him and threatened to fire at him. This is also stated by the scout Muhammad Ibrahim. The same statement occurs in the evidence on p. 11 of Durga Prasad and in the statement to the police on p. 17 of Muhammad Ibrahim scout. Learned counsel invited attention to these two places because he said that the statement was not there, but his argument is incorrect. These two witnesses stated that there were 3 guns, one with Nanku, one with Asharfi Singh and one with Shankar. These three persons have been correctly convicted under S. 148, Penal Code. The remaining accused Ramlal has not been convicted under that section. There was also a conviction of Shankar under S. 19 (f), Arms Act. For his defence it is argued that there are various rulings of this Court that the possession

by a servant of a gun is legal if his master has a license for the gun. In those cases the servant was carrying the gun for a lawful purpose on behalf of his master. In the present case the gun was used by Shankar in a riot and he fired the gun for that purpose. Obviously this was not possession for a lawful purpose. It is not possible for a person licensed to possess gun to authorise the possession of that gun by his servant for an unlawful purpose. Therefore I consider that the rulings in question do not apply and that Shankar has been correctly convicted under S. 19 (f), Arms Act.

The only question remaining is the question of sentences. The Sessions Court has provided that the sentences should be consecutive. I consider that the sentences imposed are severe in the case of Nanku and accordingly I reduce his sentence from two years' R. I. under S. 148 to one year's R. I. I also reduce the sentence on Shankar under S. 19 (f), Arms Act, from one years' R. I. to six months' R. I. Otherwise I maintain the convictions and sentences and dismiss the appeal. Those accused who are on bail must surrender to their bail and undergo the remainder of their sentences. The courageous conduct of the B. P. Boy Scouts Durga Prasad and Muhammad Ibrahim is commended and this judgment may be shown to Iqbal Ahmad, J., Provincial Commissioner.

B.D. *Sentences reduced.*

A. I. R. 1935 Allahabad 919

HARRIES AND RACHHPAL SINGH, JJ.

Jaddu Ahir and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1003 of 1934, Decided on 27th March 1935, from order of Sess. Judge, Benares.

Penal Code (1860), S. 302—If there is reasonable doubt in guilt of accused, he should be acquitted—It cannot be reason for inflicting lesser penalty.

The Indian Penal Code provides two penalties for murder, namely, death and the lesser penalty of transportation. The lesser sentence was never intended to be imposed in a case where there appears to be some doubt. If the Court at the end of a case is left in any reasonable doubt about the matter, it must acquit; but, on the other hand, if it is left in no reasonable doubt concerning the guilt of the accused, the appropriate penalty must in all cases be imposed. Where there is a doubt in a murder case, the Court should not and cannot pass a sentence of transportation for life. [P 920 C 1]

K. N. Malaviya and *S. K. Tagore*—for Appellants.

Govt. Advocate—for the Crown.

Harries, J.—The appellant Jaddu was charged before the learned Sessions Judge of the Benares District with an offence under S. 302, Penal Code. He was convicted of an offence under that section and sentenced to death. The appellant Ghurbari was charged with abetment of the offence committed by the appellant Jaddu and he was found guilty, convicted and sentenced to transportation for life. Against these convictions and sentences each appellant has preferred an appeal to this Court and the record has also been forwarded to this Court for confirmation of the death sentence passed on the appellant Jaddu.

The charge against Jaddu was that he together with one Kishun, who became an approver in the case, murdered one Zahur Khan at about a ghari before sunset on 7th April 1934, on the bank of the Ganges near the village Bargawan. The charge against Ghurbari was that he instigated and abetted the crime and that he was actually near the scene of crime when it was actually committed.

The case against Jaddu was that he was guilty of premeditated and brutal murder and against Ghurbari it was alleged that he had actually planned it and had used his influence to get Jaddu and Kishun to commit it. Further it was said that Ghurbari brought Jaddu and Kishun to the scene of the murder and remained near by apparently to see that his instructions were faithfully carried out. The learned Sessions Judge accepted the case for the prosecution and sentenced Jaddu to death, whereas Ghurbari was only sentenced to transportation for life. In the circumstances of this case it is difficult to understand why Jaddu was sentenced to death, whereas the person who instigated and planned the whole affair was only transported for life. In our judgment if the case for the prosecution was proved, the appropriate sentence on both was a sentence of death. It is true that Ghurbari did not actually wield the lathi which caused the death of Zahur Khan, but without his instigation and without his influence over Jaddu and Kishun this crime would in all probability never have been committed. In those circumstances it was impossible to attribute a lesser degree of guilt to Ghurbari than to Jaddu. The learned Sessions Judge in

summing up the case against Jaddu said that it was clear; whereas in the case of Ghurbari he said the prosecution case was not quite so strong. It was apparently for this reason that he sentenced Jaddu to death and transported Ghurbari. The Indian Penal Code provides 2 penalties for murder, namely, death and the lesser penalty of transportation. The lesser sentence was never intended to be imposed in a case where there appears to be some doubt. If the Court at the end of a case is left in any reasonable doubt about the matter it must acquit, but on the other hand if it is left in no reasonable doubt concerning the guilt of the accused the appropriate penalty must in all cases be imposed. Where there is a doubt in a murder case the Court should not and cannot pass a sentence of transportation for life. If the doubt amounts to a reasonable doubt the accused must be acquitted. If there was a doubt in the mind of the learned Sessions Judge concerning the guilt of Ghurbari he ought to have been acquitted, but on the other hand if there was no doubt in his mind concerning the guilt of this appellant he should have been sentenced to death. In our judgment there was no justification whatsoever for differentiating between the guilt of the two appellants in this case.

Having regard to the view which we took at an early stage of the case for the prosecution it was unnecessary to issue notice upon Ghurbari to show cause why his sentence should not be enhanced, but on the other hand if we were not satisfied of the innocence of Ghurbari we should have had no hesitation whatsoever in serving such a notice upon him and if we were eventually satisfied of his guilt of imposing a sentence of death. (His Lordship then dealt with the prosecution case and after examining the prosecution evidence proceeded). In the result therefore we allow the appeals of Jaddu and Ghurbari and direct that the convictions and sentences passed on them be set aside and that they be set at liberty forthwith unless required by the authorities upon any other charge.

K.S. *Appeals allowed.*

A. I. R. 1935 Allahabad 920

ALLSOP, J.

Nek Ram and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 975 of 1934, Decided on 8th April 1935, from order of Sess. Judge, Agra.

(a) Hindu Law—Brother's right to arrange sister's marriage is superior to that of mother's right — Girl not consenting to marriage—No criminal offence committed by brother.

Under the Hindu law the brother is the person who has the right to arrange for his sister's marriage superior to that of a mother. A brother should not therefore be sentenced to imprisonment for a criminal offence merely because the girl afterwards says that she was not a consenting party to her marriage. [P 921 C 1,2]

(b) Penal Code (1860), S. 366— Girl not physically removed from lawful custody—Her marriage by her brother—No offence of abduction held committed.

The girl was not physically removed from the custody of her mother. She had already been taken out of that woman's custody by the Court. She was married by her brother to a suitable person:

Held : that the marriage itself could not be treated as a constructive form of kidnapping because her brother was the person who was entitled to give the girl away in marriage. So no criminal offence was committed [P 921 C 2]

B S. Darbari—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—There are five appellants in this case. Two of them Nek Ram and Nathu Ram have been sentenced to a fine of Rs. 500, a third Grend Singh to a fine of Rs. 100 and the two remaining ones Tej Singh and Harnarain to rigorous imprisonment for a period of two years and three years respectively. Nek Ram, Grend Singh and Tej Singh have been sentenced under S. 366, Penal Code, and Nathu Ram and Harnarain under S. 366, read with S. 109 Penal Code. The charge framed was one of abduction with the intent that the woman or girl concerned should be married against her will. This girl Mst. Gulkandi is the sister of the appellant Tej Singh and the daughter of one Mst. Chandrawalli who was left a widow 14 years before the alleged occurrence. Harnarain appellant is Mst. Chandrawalli's brother. The allegation was that the five appellants entered into a conspiracy in order to marry this girl Mst. Gulkandi to Nek Ram. The defence was that she had already been married to Nek Ram sometime before.

The prosecution originated from a report made by a chaukidar at the police station. This man is the chaukidar of the village in which Nek Ram and his brother Grend Singh lived. He reported that a marriage was taking place in his village, that the girl was about 12 years of age and that he had information that she had been taken away from some other village without the consent of her guardian. The police went to the village next day and made some arrests.

The conspiracy, if there was one, began much earlier, because in May of the year 1934, Nek Ram made a complaint that his wife, Mst. Gulkandi, had been enticed away from him and instituted a case under S. 498, Penal Code. On the 11th of May he asked for a warrant for the arrest of Mt. Gulkandi and she was arrested that night in the house of Jhamman Thakur who is alleged to be Mt. Chandrawalli's paramour. On the 12th of May the Magistrate delivered the girl to the custody of the appellant Harnarain who is her maternal uncle. According to some of the appellants, the girl remained with Harnarain from the 12th to the 20th of May and was then taken by him to Nek Ram's house on the occasion of Nek Ram's nephew's marriage. She is alleged to have stayed in Nek Ram's house from the 20th of May till the 4th of June. Harnarain himself said that he did not keep the girl in his custody, but took her to the house of Nathu Ram, another appellant who is also a relation of hers and is mukhia of his village. He said that this man sent her to Nek Ram's house on the 4th of June, the day when she was arrested, so that he could be married to her. Nathu Ram said that he had nothing to do with the matter.

The main point is that under the Hindu law the appellant Tej Singh who is the girl's eldest brother and who is now 21 years of age was the person who had the right to arrange for her marriage. A brother has a right superior to that of a mother. It is to be noticed that the case was not originated by any report or complaint made by the mother although she has given evidence since for the prosecution. The girl was about 16 years of age. It has been suggested on behalf of the prosecution that even a brother could not marry her against her will. But it is surely not right that a brother who is entitled under the Hindu law to arrange for his sister's marriage should be sentenced to imprisonment for a criminal offence merely because the girl afterwards says that she was not a consenting party. The learned Sessions Judge who saw the appellants and the witnesses has given it as his opinion that the marriage between the girl and Nek Ram, was entirely suitable. Nek Ram was about 30 years of age and was apparently quite well off. There does not appear to have been anything improper about the marriage. Doubtless there may have been some dispute between Tej Singh on the one side and Mt. Chandrawalli on the other about the affairs of the family because of the alleged relations between Mt. Chandrawalli and Jhamman Singh, or as Mt. Chandrawalli says, because Tej Singh had taken to evil courses.

There does not however appear to have been any abduction or kidnapping in this particular case. The girl was not physically removed from the custody of Mt. Chandrawalli because she had already been taken out of that woman's custody by the Court. The marriage itself could not be treated as a constructive form of kidnapping because Tej Singh was the person who was entitled to give the girl away in marriage.

I do not consider that in the circumstances there can be said to have been any abduction. There is no real evidence of any abduction. The relations were between an elder brother and a girl of 15. The learned Sessions Judge seems to have been influenced in some measure by his feeling that Tej Singh should have applied to be made the guardian of the girl under the Guardians and Wards Act and should then have applied for permission to get her married. Tej Singh had however already the right under the Hindu law to arrange for the marriage and I can see no reason why he should have been compelled to make an application to the Court. I am clearly of opinion that no criminal offence was committed in this case.

I allow the appeal and setting aside the sentences and convictions direct that the fines or any part of them which may have been paid shall be refunded and that the bail bonds of the appellants shall be cancelled.

B.D. *Appeal allowed.*

A. I. R. 1935 Allahabad 922

COLLISTER, J.

Roshan Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 144 of 1935, Decided on 28th June 1935, from order of Sess. Judge, Aligarh, D/- 6th February 1935.

Penal Code (1860), S. 408—*R* in service of *A*—Arrears of pay not paid—Accused collecting rent and desiring to submit amount to *A*—Dishonest intention held not proved; hence no offence under S. 408—*R* held entitled to retain till payment of his pay under Contract Act S. 221.

R was employed by *A* to collect rents. He collected rents in respect of *A's* properties and spent the collection of one property for the benefit of the estate. He was always willing to submit the collections of the other property but *A* declined to accept it until entire collection of rent was submitted. A certain sum was due from *A* to *R* on account of arrears of his pay. Thereafter *A* filed a complaint under S. 408 :

Held : that under S. 221, Contract Act, accused *R* was entitled to retain the rent collections until his pay was paid.

Held further : that as no dishonest intention was proved, no offence under S 408, was committed. [P 922 C 2; P 923 C 1]

B. S. Darbari—for Applicant.

Govt. Pleader—for the Crown.

Judgment.—This is an application in revision by one Roshan Lal, in respect of his conviction under S. 408, Penal Code. He has been sentenced to one month's R. I. and to pay a fine of Rs. 60.

It appears that the applicant was the Karinda of one Mst. Asharfi Kuer, sister of Lala Madan Lal, complainant, and it was his duty to collect rents in the villages of Bamnoti and Girdharpur. A complaint was filed against him, in which it was alleged that he had committed criminal breach of trust in respect to Rs. 350 odd relating to the village of Bamnoti, and in respect to Rs. 79-8-11 relating to the village of Girdharpur. In defence it was pleaded by the applicant that the money alleged to be due from him in respect to Bamnoti had been legitimately spent by him in the interests of the estate, but that the complainant did not accept this plea and had compelled the applicant to make certain entries in the account books admitting his liability. He also pleaded that his salary for 15 months at Rs. 20 a month was due to him. As regards Girdharpur, he pleaded that he had offered to pay this sum to the complainant, but the latter refused to take it unless the whole sum of Rs. 436 odd were paid.

The trial Court acquitted the applicant in respect to the sum of Rs. 350 odd relating to Bamnoti, but it convicted him in respect to the sum of Rs. 79-8-11 relating to Girdharpur. The appellate Court set aside the conviction on the ground that the trial was illegal and the applicant was retried in respect to this sum of Rupees 79-8-11. On 11th February 1935, he was convicted in respect to this sum and his conviction has been upheld in appeal. The main points taken before me in this revision are (1) that the applicant has all along been willing and ready to pay this sum to the complainant, and (2) that in any case there was no dishonesty on his part, in view of the fact that salary for 15 months was due to him. This latter point does not appear to have been taken before the learned Judge, except perhaps in an indirect and indefinite way in para. 8 of the grounds of appeal where it was pleaded that no dishonest intention had been proved; but a plea to this effect does appear in the written defence which the applicant filed at his trial. The applicant admitted at his trial that this sum of Rs. 79-8-11 was in fact due from him, but he pleaded that he had always been ready to pay it but the complainant had refused to accept payment on the ground that he was entitled to the whole sum of Rs. 436 odd. This plea does find some corroboration in the fact that a money order for Rs. 79-9-0 which was sent by the applicant to the complainant on 15th November 1934, was refused.

I am very much inclined to believe that the applicant was in fact always willing to pay this sum of Rs. 79 odd and that the complainant refused to accept it, unless the whole sum which he claimed to be due to himself were paid. Two witnesses for the complainant have stated that the applicant refused to pay this money on the ground that he had no funds with him. Even if this evidence be true, it is doubtful whether the applicant can properly be convicted under S. 408. He did undoubtedly raise a plea that his salary for 15 months was due to him. This point was put to the complainant and the latter has admitted that the applicant was in his service for 15 months and that he did not pay him his salary. Under S. 221, Contract Act, an agent is entitled to retain goods or other property of his principal until the amount due to himself for services in

respect of the same has been paid or accounted for to him. In the circumstances, I think that the complainant had no good claim upon the applicant until the latter's salary was adjusted. The applicant would probably have found the means of paying this sum of Rs. 79 odd if the complainant had been willing to write off the Rs. 300 due for arrears of salary. I accordingly allow this revision and set aside the conviction and sentence. The applicant's bail bonds are hereby cancelled. The fine, if paid will be refunded.

B.D. *Conviction set aside.*

A. I. R. 1935 Allahabad 923

ALLSOP, J.

Ghafoor and *others* — Defendants — Appellants.

v.

Abdullah Khan — Plaintiff— Respondent.

Second Appeal No. 830 of 1933, Decided on 4th April 1935, from decision of Dist. Judge, Meerut, D/- 8th May 1933.

U P. Land Revenue Act (3 of 1901), S. 36 —Expropriatary tenant agreeing to pay certain amount as rent — Revenue Court fixing agreed amount as rent — Tenant cannot challenge rent so fixed.

Where the expropriatary tenant agrees to pay a certain amount as rent as agreed in a kabuliat, and the Revenue Court enters that amount as rent of the holding as stated in the kabuliat in a suit against him for arrears of rent, he cannot challenge the rent so fixed by the Revenue Court. It is the duty of the Revenue Court to fix a rent and in the absence of evidence to the contrary it should be presumed that the Court did fix the rent: 1920 *All* 143, *Dist.* [P 924 C 1]

S. B. L. Gaur—for Appellants.

M. L. Aggarwala—for Respondent.

Judgment.—This is a second appeal arising out of a suit for the recovery of arrears of rent for an agricultural holding. The suit was decreed and the defendants are appellants before me. In the year 1919 the defendants who were zamindars mortgaged their proprietary rights and became ex-proprietary tenants of a certain area of sir, i. e., the area in suit. An application was apparently made by the mortgagee to the Revenue Court to fix the rent according to an agreement into which the parties had entered. That agreement was evidenced by a kabuliyat executed by the defendants. The Court wrote an order saying that the nature of the tenancy should be changed and the rent should be entered in accordance with the kabuliat. After 1919 the defendants continued to pay rent at the rate fixed, i. e., at the rate of Rs. 96 a year. Then the suit was instituted which has given rise to this appeal. The defendants in the written statement did not raise the plea that they were not bound to pay rent at the rate fixed but they said that they had discharged their liability by making certain payments. A decree was passed against them. They then made an application for review of judgment upon the ground that certain legal points had been overlooked. This application for review was allowed. There was an appeal against the order allowing it, but that appeal was dismissed upon the ground that no appeal was competent. The Assistant Collector then proceeded to try the suit anew and dismissed it.

In appeal to the lower appellate Court the suit was decreed. The argument of the defendants was that they were not bound to pay any rent at all for this ex-proprietary holding because no rent had been fixed by the Revenue Court under the provisions of S. 36, Land Revenue Act. The argument is merely this that the form of the order itself shows that the Court which passed the order did not intend to fix a rent but merely directed that the agreement between the parties should be given effect to in the records. We do not know at all whether the Court in 1919 made any enquiry into the amount of rent which ought to have been fixed under the provisions of the Tenancy Act in respect of the rents of ex-proprietary holdings. A most careful enquiry may have been made for all we know. It is only the final result which was expressed in the Court's order that the rent fixed should be the rent to which the parties had agreed. It does not necessarily follow because the parties agreed that a certain rent should be paid that therefore that could not possibly have been the rent which the Court itself would have fixed.

Learned counsel for the appellants has relied on 1920 All 143 (1). It appears to me that that case is authority against him. In that case when the parties appeared before the Revenue Court the ex-proprietary tenant told the Court that he was willing to pay a certain rent and the Court accordingly directed that that was the rent to be fixed upon the holding. In that case it appears that the record of the

1. Har Prasad v. Khazan, 1920 All 143=57 I C 441=18 A L J 684.

proceedings was before the Courts who were dealing with the suit for arrears of rent and there was nothing upon that record to show that there was any other enquiry made by the officer who fixed the rent. Even then it was held that the rent having been fixed by the Revenue Court, it was not open to the tenant in a subsequent suit for arrears of rent to say he was not liable for payment upon the ground that the rent was in excess of that which should have been fixed under the provisions of the Tenancy Act.

The reason why the appellants are relying upon the ruling which I have mentioned is that the learned Judges have said that there was a clear order fixing the rent and that it was a mere order saying that as the parties had agreed upon a rent, that rent should be recorded. The argument is based on the assumption that the Court would have held, if the order had been an order of that kind, that it was not a good order. It does not seem to me that this is at all a necessary inference. It was the duty of the Revenue Court in this case to fix the rent and in the absence of evidence to the contrary we must presume that the Court did fix the rent. There is nothing in the form of the order which would lead to the conclusion that the Court failed to do its duty or to go into the question of what rent be fixed. I have no doubt that the Revenue Court did in the year 1919 fix the rent at Rs. 96 a year and that is the end of the matter.

Evidence was adduced in the Court below to show that the rent which should have been fixed in accordance with the terms of the Tenancy Act was about Rs. 55 a year. This conclusion was reached on the basis of the rents for the year 1337 Fasli, i. e., 1930. We cannot say what the conditions were in the year 1919 and it does not follow that the rent in 1919 would have been Rs. 55 a year. In any case however as the rent was fixed rightly or wrongly, there is nothing more to be said. The appeal is dismissed with costs.

B.D. *Appeal dismissed.*

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* A. I. R. 1935 Allahabad 924

SULAIMAN, C. J. AND BENNET, J.

Ganga Saran Singh and *another* — Plaintiffs—Appellants.

v.

Mt. Sirtaji Kuer and *another*—Defendant and Plaintiff—Respondents.

Second Appeal No. 1378 of 1931, Decided on 1st August 1935, from decision of Sub-Judge, Azamgarh, D/- 29th June 1931.

(a) Hindu Law—Aryasamaj is not a new faith distinct from Hinduism—(*Obiter*).

(*Obiter*).—Aryasamaj faith cannot be regarded as a new religion entirely distinct from Hinduism in the same way as Christianity or Islam would be. [P 925 C 1]

*** (b) Hindu Law—Remarriage—Divesting of estate — No presumption that remarriage terminates estate held by a widow when remarriage is not under Hindu Widows' Remarriage Act.**

Section 2, Hindu Widows' Remarriage Act does not apply to the case of those widows who are not bound to take advantage of the provisions. In such a case the burden would be on the party who alleges that there was some well-settled rule of law which divested the widow of her estate and such party must establish a particular incident of the custom involving such forfeiture, as there could be no presumption from the mere fact that remarriage is allowed that there was necessarily a termination of the estates held by the widow. [P 925 C 1]

Where, a widow has validly remarried not according to the faith to which she belonged, but according to the Aryasamaj faith which she adopted, according to which remarriage is perfectly valid it is incumbent on the reversioners in these circumstances to show that among Aryasamajists there is a rule or customary law that a Hindu widow remarrying loses her husband's estate. In the absence of such proof she has not lost her estate merely because she has remarried under the Aryasamaj Rule which permits remarriages: 1932 *All* 617, *Foll.*; 35 *All* 466, *Dist.* [P 925 C 1, 2]

Shiva Prasad Sinha—for Appellants.

Basudeva Mukerji—for Respondents.

Sulaiman, C. J.—This is an appeal by the plaintiffs reversioners arising out of suit brought for possession of the property in the hands of Mt. Sirtaji, who had been a widow of their collateral. The plaintiffs' case was that Mt. Sirtaji had remarried and had forfeited the estate of her husband which has now vested in them. Mt. Sirtaji denied that she had remarried, but it is now found definitely by the lower appellate Court that she had not been unchaste during the lifetime of her husband and has in fact remarried according to the Aryasamajic faith after the death of her husband. The learned Judge however

took the view that the Sanatandharama is absolutely different from the Aryasamaj religion and that the latter is in fact a new religion, and applied the analogy of the case of a Hindu widow becoming a Muslim or a Christian and then remarrying and not forfeiting her estate. In appeal it is contended before us that Aryasamaj is not a new religion, but is a sect of Hinduism. It is not necessary for us to decide this point finally; but prima facie it would seem to appear that Aryasamaj faith cannot be regarded as a new religion entirely distinct from Hinduism in the same way as Christianity or Islam would be.

It is not denied that according to the Aryasamaj faith remarriage is perfectly permissible. There was however no evidence led on the question whether remarriage among Aryasamajists involved a forfeiture of the Hindu widows' estate or not, and there is accordingly no finding by the lower appellate Court on this point. It has been held by the Full Bench of this Court in 1932 A L J 941 (1), that S. 2, Hindu Widows' Remarriage Act (15 of 1856) does not apply to the case of those widows who are not bound to take advantage of the provisions of that Act, but can remarry independently of such provisions. In such a case it was laid down that the burden would be on the party who alleges that there was some well-settled rule of law which divested the widow of her estate and that such party must establish a particular incident of the custom involving such forfeiture, as there could be no presumption from the mere fact that remarriage is allowed that there was necessarily a termination of the estate held by the widow.

If the defendant had not remarried but had merely become unchaste, it cannot be disputed that she would not have lost her estate. It is equally clear that from the point of view of the Sanatan-dharmics the remarriage being invalid there has been no valid marriage at all and she is practically in the position of an unchaste woman. Even from this point of view she would not lose the estate. She has validly remarried not according to the faith to which the plaintiffs belong, but according to the faith which she adopted according to which remarriage is perfectly valid. It seems to us that it was incumbent on the plaintiffs in these circumstances to show that among Aryasamajists there is a rule or customary law that a Hindu widow remarrying loses her husband's estate. In the absence of such proof we must hold that the defendant has not lost her estate merely because she has remarried under the Aryasamaj rule which permits such remarriages. The case in 35 All 466 (2) is not in point as we are not assuming that she has been converted into an entirely distinct religion.

Lastly the learned advocate for the appellants urges before us that an opportunity should be given to his clients to produce evidence to show that there is such a rule of forfeiture among the Aryasamajists. It was specifically alleged by the plaintiffs in their plaint that the widow had on account of such remarriage forfeited her estate, and the learned Munsif framed an issue, whether the defendant had remarried, and how did it affect the case? The plaintiffs however did not produce any evidence on this alleged custom, nor was the point urged before the lower appellate Court. We do not therefore think that in the circumstances it would be fair to the defendant to allow the plaintiffs an opportunity at this late stage to produce fresh evidence on this point. They had an opportunity of which they have not availed themselves. We accordingly dismiss this appeal with costs.

B.D. *Appeal dismissed.*

1. Bhola Umar v. Kausilla, 1932 All 617=140 I C 631=1932 A L J 941 (FB).

2. Abdul Aziz Khan v. Nirma, (1913) 35 All 466=20 I C 335=11 A L J 678.

A. I. R. 1935 Allahabad 925

COLLISTER, J.

Bhujharat and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 445 of 1935, Decided on 6th August 1935 from order of Sess. Judge, Basti, D/- 23rd March 1935.

Cattle Trespass Act (1 of 1871), S. 22—Court finding seizure illegal—Complainant sustaining loss—Court is bound to award compensation.

There is nothing whatsoever in the language of S. 22 to support the view that compensation can only be given to the complainant if he actually lays a claim for it in his petition of complaint. If the Court is of opinion that the seizure was illegal and that loss has been caused to the complainant thereby, it is its duty to award compensation for such loss to the complainant: 1923 *Pat* 292 and 1930 *Nag* 149, *Diss from*; 1928 *Mad* 369, *Foll.* [P 926 C 1]

Saila Nath Mukerji and *Shri Ram*—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment.—The 19 applicants have been convicted under Section 147 and 5 of them have been ordered under Section 22 of the Cattle Trespass Act, to pay compensation of Rs. 5 each to the complainant. The applicants appealed to the Additional Sessions Judge and the result was that some of the sentences under S. 147, Penal Code, were reduced and the amount of compensation to be paid by applicants Nos. 1 to 5 was reduced from Rs. 20 each to Rs. 5 each. The only point which arises for determination in this revision is whether compensation under S. 22, Cattle Trepass Act, can legally be awarded when it is not claimed. This is the point which has been argued before me. In 72 I C 71 (1), a learned Judge of the Patna High Court, held that a Court is not justified in awarding compensation under S. 22, where such compensation has not been claimed in the petition of complaint. In 121 I C 665 (2), a learned Judge of the Judicial Commissioners' Court at Nagpur has expressed a similar view. No reasons are given for this decision in either of the above two cases; it is merely laid down that if a complainant does not claim compensation, he cannot be compensated.

The Patna case has been dissented from by the Madras High Court in 1928 Mad 369 (3), where it was held that there is no restriction in the Act that the Court cannot award compensation unless it is claimed in the complaint. There is, so far as I can see, nothing whatsoever in the language of S. 22 Cattle Trespass Act, to support the view that compensation can only be given to the complainant if he actually lays a claim for it in his petition of complaint. What the section says is:

> If the seizure be adjudged illegal, the Magistrate shall award to the complainant, for the loss caused by the seizure and detention, reasonable compensation . . . . . .

The only meaning which I can read into these words is that if the Court is of opinion that the seizure was illegal and that loss has been caused to the complainant thereby it is its duty to award compensation for such loss to the complainant. It has been found in the present case that the complainant did suffer a loss. In my opinion the award of compensation in this case was not illegal and was in accordance with the provisions of S. 22, Cattle Trespass Act. This application is accordingly dismissed.

B.D. *Application dismissed.*

1. Baijnath Sahai v. Emperor, 1923 Pat 292=72 I C 71=24 Cr L J 311=4 P L T 231.
2. Ramdularey v. Manohar, 1930 Nag 149=121 I C 665=31 Cr L J 278=26 N L R 158.
3. Kolandai Chetty v. Perumal Kavundan, 1928 Mad 369=108 I C 80=29 Cr L J 325.

A. I. R. 1935 Allahabad 926

HARRIES, J.

Shri Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 332 of 1935, Decided on 9th July 1935, by Addl. Sess. Judge, Agra, D/- 11th April 1935.

(a) Criminal P. C. (1898), S. 133—Nuisance—Latrine in private compound—S. 133 is not applicable.

Nuisance contemplated in S. 133 is a nuisance in any way, river or channel which is or may be lawfully used by the public or which is in public place. Where therefore a latrine has been constructed upon the applicant's own land, that is in a private place the provisions of S. 133 can have no application : 1928 *All* 128, *Foll.* [P 927 C 1]

(b) Criminal P.C. (1898), S.133—Nuisance—Nuisance not in existence but only potential—S. 133 is not applicable.

Section 133 can have no application to some thing which may become a nuisance, that is to a potential nuisance, but applies only where the nuisance is in existence in a way, river or channel which is or may be lawfully used by the public and which is in existence in a public place. [P 927 C 1]

(c) Nuisance — Latrine becoming a nuisance—Order should be to stop the nuisance rather than to demolish the construction.

Where a latrine has been completed and is a nuisance the owner should be directed to remove the nuisance and to prevent the user of the latrine amounting to a nuisance rather than to demolish the building which is being so used: 1928 *All* 128, *Foll.* [P 927 C 2]

B. S. Darbari—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—This is a reference by the learned Additional Sessions Judge of the Agra District recommending that an order passed by a learned Magistrate under S. 133, Criminal P. C., ordering the applicant to demolish the whole of a latrine within three days from the receipt of notice be set aside on the ground that the order of the Court below was made without jurisdiction and is illegal. The facts of the case shortly are that at the time in question the applicant was building a latrine upon his own land and it appears that the authorities were afraid that such a latrine when completed and in use would amount to a nuisance.

Consequently upon information received, the learned Magistrate commenced proceedings against the applicant under S. 133, Criminal P. C., and in due course an order was passed requiring the applicant to remove the nuisance by demolishing the whole of the latrine and closing the door within ten days.

In my judgment this order is clearly illegal and must be set aside. S. 133, Criminal P. C., provides that whenever a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the 1st Class considers, on receiving a police report or other information and on taking such evidence (if any) as he thinks fit that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place, such Magistrate may make a conditional order requiring the person causing such nuisance within a time to be fixed in the order to remove such obstruction or nuisance, etc. When this conditional order has been made the person alleged to be guilty of creating the nuisance is entitled to be heard, but the order can be made absolute in certain circumstances under the provisions of S. 137, Criminal P. C. In the present case the learned Magistrate following the provisions of the Code made this conditional order, passed against the applicant, absolute.

It is to be observed in the first place that the nuisance contemplated in S. 133, Criminal P. C., is a nuisance in any way, river or channel which is or may be lawfully used by the public or which is in a public place. The latrine in question was being constructed upon the applicant's own land, that is, in a private place and that being so, the provisions of this section can have no application. This has been expressly held in a case decided by a single Judge of this Court, namely the case in 26 A L J 86 (1). Further, the latrine was in course of construction and being so it might be regarded as a potential nuisance, but it could not at the date of these proceedings be an actual nuisance. In my judgment, S. 133, Criminal P. C., can have no application to something which may become a nuisance that is a potential nuisance, but applies only where the nuisance is in existence in a way, river or channel which is or may be lawfully used by the public and which is in existence in a public place. For this reason also the order of the learned Magistrate is clearly contrary to law.

Even if this latrine had been completed and that its mode by the user constituted a nuisance it would still be improper to order the demolition of the building. In such a case the proper order would be to direct the owner to take such steps as would result in the user of the latrine ceasing to be a nuisance to the public. In short, where a latrine has been completed and is a nuisance the owner should be directed to remove the nuisance and to prevent the user of the latrine amounting to a nuisance rather than to demolish the building which is being so used. This is the view taken by this Court in 1928 All 128 (1), cited above and with that view I agree. In the result, therefore, I accept the reference of the learned Additional Sessions Judge and direct that both the conditional and the final orders of the learned Magistrate in this case be set aside.

B.D. *Order accordingly.*

1. Gouri Shanker v. Sri Krishna, 1928 All 128= 107 I C 242=29 Cr L J 223=26 A L J 86.

A. I. R. 1935 Allahabad 927

ALLSOP, J.

Mt. Kishan Dei and *others*—Defendants—Appellants.

v.

Mangal Sen—Plaintiff—Respondent.

Second Appeal No. 728 of 1933, Decided on 1st April 1935, from decree of Sub-Judge, Agra, D/- 1st February 1933.

Restitution of Conjugal Rights — Hindu husband marrying second wife—No sufficient reason to live separate.

The husband is entitled to marry more than once under the Hindu law, and the second marriage would not be a ground for his previous wife's refusing to live with him. [P 928 C 1]

Mahboob Alam—for Appellants.

B. S. Darbari—for Respondent.

Judgment.—This appeal arises out of a suit for restitution of conjugal rights in which a decree was passed in favour of the plaintiff. The parties are both very young. The wife, i. e., the appellant left her husband and instituted proceedings for maintenance under section 488, Criminal P. C. She obtained an order from a Magistrate for maintenance at the rate of Rs. 10 a month on 14th July 1931. An application for revision in the Court of the Sessions Judge was dismissed on 22nd September 1931. In the meanwhile, on the 15th of September the husband had instituted the suit which has given rise to this appeal.

The only defence to the suit was that the husband had been guilty of

cruelty. The learned Judge of the trial Court came to the conclusion that he had been so guilty and dismissed the suit. On the other hand, in the appellate Court it was found that no real cruelty had been established. The learned Judge came to the conclusion that the whole trouble was due to the fact that the husband had married a second wife. As he very rightly said, the husband was entitled to do this under the Hindu law, and the marriage would not be a ground for his previous wife's refusing to live with him. It appeared that she maintained that when she went to live with her husband, he being only about 13 or 14 years of age, she found that he was carrying on an intrigue with another woman who used to visit his house. Considering the age of the boy and the fact that he was apparently living with his parents at that time I consider that the learned Judge was quite right in disbelieving the story. The defendant said that she was beaten, but, as I have already said, the learned Judge disbelieved her statement. As it has been found as a fact that there was no legal cruelty there is really no force in this appeal.

It has been argued that the husband accused his wife of unchastity, but the only evidence appears to be that of a person who declares that there was a panchayat in which the plaintiff and his father were fined because they could not establish an imputation of this kind which they had made. I do not think that a charge of this nature made as it were in defence would be a sufficient ground for refusing to pass a decree for restitution of conjugal rights. In my opinion there is no force in this appeal and I dismiss it with costs. Leave to appeal under the Letters Patent is refused.

B.D. *Order accordingly.*

A. I. R. 1935 Allahabad 928

BENNET, J.

Sri Kishen—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 203 of 1935, decided on 29th July 1935, from order of Sessions Judge, Allahabad, D/- 26th February 1935.

(a) Criminal P. C. (1898) S. 297—Misdirection—Judge telling, 'there is no reason to disbelieve a particular witness'—No evidence by defence—No cross-examination contradicting that witness—No misdirection.

When a Judge tells the jury that there is absolutely no reason to disbelieve certain witnesses as there was no evidence for the defence and as the witnesses were not discredited in any way by cross-examination, it does not amount to misdirection. [P 929 C 1]

(b) Criminal P. C. (1898), S. 298 (2)—Judge not telling jury that they were sole Judges of facts on every occasion — Telling them at end of charge is sufficient.

It is not necessary for the Judge on every occasion on which he expresses his opinion on a point of fact to tell the jury that they are sole Judges of question of fact. If he makes that statement quite clearly to the jury at the end of his charge, that is sufficient. [P 929 C 2]

(c) Criminal P. C. (1898), S. 297—Charge to jury—No evidence for defence — Judge discussing evidence for prosecution—Charge cannot be called one-sided.

Under S. 297 the Judge must sum up the evidence for the prosecution and defence. But where there is no evidence for defence, only the evidence for the prosecution remains to be summed up and hence a discussion only of evidence for the prosecution, cannot be called a wholly one-sided charge. [P 929 C 2]

K. D. Malaviya—for Appellant.

Government Pleader and *Kumuda Prasad*—for the Crown.

Judgment.—This is a criminal appeal on behalf of one Sri Krishen who has been convicted by a jury and sentenced by the learned Sessions Judge of Allahabad under S. 408, Penal Code, on 2 charges to 5 years' rigorous imprisonment and fine of Rs. 500 and in default six months' further rigorous imprisonment on each charge. The points which have been taken by learned counsel for the appellant are that there was misdirection to the jury. In ground No. 1 it was alleged that the Judge did not even tell the jury that they were judges of evidence and facts. This however is admitted to be inaccurate as on the last page of the judgment the Judge clearly stated to the jury:

You have to judge from the circumstances and evidence referred to above whether the guilt of the accused is proved beyond reasonable doubt.....If you entertain any reasonable doubt as to the guilt of the accused Sri Kishen, he is entitled to the benefit of the doubt.

The case therefore is distinguished from the ruling relied on by learned counsel in 35 Cal 531 (1), as in that ruling it is stated on p. 533:

He has made no reference to the separate function of the jury as the sole judges of fact.

Learned counsel also alluded to 53 Cal 372 (2) at p. 376, where the duty of a Judge in making a charge to a jury was laid down—a passage with

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1. Natabar Ghose v. Emperor, (1908) 35 Cal 531 =7 C L J 599=12 C W N 774=8 Cr L J 6.
2. Khijiruddin Sonar v. Emperor, 1926 Cal 139 =92 I C 442=27 Cr L J 266=53 Cal 372=42 C L J 504.

which I agree. The particular passages which are stated to be objectionable are as follows: (a) On p. 57: "There is absolutely no reason to disbelieve Ram Prasad and Kunjbehari Lal." Now under the Criminal Procedure Code, S. 297, it is the duty of the Judge to sum up the evidence for the prosecution and defence, and in S. 298 (2) it is provided:

> The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

The point which was in issue was whether when money was received from the Imperial Bank of India, Allahabad, by the Kayastha Pathshala Intermidiate College, the money was put in charge of the accused who was the accountant of the Pathshala or not. Evidence for the prosecution that it was put in his charge was given by Ram Prasad and Kunjbehari Lal. Their evidence is corroborated by the evidence of Narbada Prasad, cashier of the Imperial Bank, and Mr. Gokul Chand, late principal, and also by certain cash slips. Now, it was the duty of the Judge to set out the prosecution evidence on this point to the Jury and he did so. It was his further duty to set out any evidence on the point tendered by the defence and if there was no such evidence to say so. Learned counsel admits that there is no such evidence. There is merely a denial by the accused on p. 45 that Ram Prasad and Kunjbehari Lal made over these particular amounts to him. This denial has been mentioned by the Judge at the bottom of p. 58.

The Judge therefore was right in drawing the attention of the jury to the fact that there was no evidence to contradict this evidence for the prosecution. It was further the duty of the Judge to point out that there was nothing shown in cross-examination of the witnesses for the prosecution which would discredit their evidence within the meaning of the Evidence Act. I do not consider that the Judge meant to indicate any more than these points by his expression: "There is absolutely no reason to disbelieve Ram Prasad and Kunjbehari Lal." I understand him to mean, and I think that the jury would understand him to mean, that there was no evidence by the defence to contradict their evidence on this point and further that their evidence had not been discredited in any way by cross-examination. The next passage complained of is on p. 58 dealing with the same matter and is as follows:

> In addition to the evidence referred to above a look at the cash slips Ex. MM, dated 13th April 1928 and Ex. NN, dated 3rd November 1928, leaves no doubt that Sri Kishen was the sole accountant in charge of the cash in hand, and used to keep the money in his charge.

It appears to me that the argument in regard to this is similar and that the Judge was within his rights under S. 298 (2) in expressing his opinion on this question of fact to the jury. Learned counsel suggested that the jury might have misunderstood this expression of opinion and might have thought that they were bound by the opinion of the Judge on this point of fact. I do not think it was necessary for the Judge on every occasion on which he expressed his opinion on a point of fact to tell the jury that they were sole judges of questions of fact. He did make that statement quite clearly to the jury at the end of his charge in the passage which I have already quoted. The next point is on p. 59 and is in full:

> If this was true, the accused must have noted in the cash book, the amount which remained with the principal, in the column provided for it. This plea is therefore an afterthought to shirk the liability for the amounts in question.

I think the Judge was right in giving his opinion that the omission to make a note in the cash book that a certain amount remained with the principal indicated that the plea that the principal retained certain amounts was an afterthought. The next point is on p. 62 and is as follows:

> When the prosecution proved that the amounts in question came to the hands of the accused and that he failed to account for it or deposit it in the Post Office or the Imperial Bank of India, it was not necessary for the prosecution to prove the actual mode of mis-appropriation, because it was best known to the accused only what he did with the amount, and the strong inference is that he retained the amounts entrusted to him and has failed to account for it satisfactorily. This view is supported by 8 A L J 88 (3).

I do not see anything objectionable in this exposition of the law. The next objection taken is that the Judge's charge to the jury is wholly one-sided. Under S. 297, Criminal P. C., the Judge must sum up the evidence for the prosecution and defence. There was no evidence for defence. It therefore follows that only the evidence for the prosecution remained to be summed up and of course it will appear to be a

3. Emperor v. Kadir Bux, (1911) 33 All 249=8 C 687=8 A L J 88=11 Cr L J 699.

discussion only of evidence for the prosecution. The next paragraph states:

That in view of the defence of the accused the learned Judge misdirected the jury when he told them that they were not concerned in this case with the fact that the accused could not be expected to have retained large amounts from 1st July 1927 to 28th March 1928, as remarked in the auditor's report Ex. N.

The allegation in this ground is a misquotation of the judgment. The judgment contained the passage in inverted commas at the botton of p. 60 and the top of p. 61, and proceeded to say: "But we are not concerned with all those items in this case." What the Judge meant was that in the report of the auditor there were allegations that a large number of items had been misappropriated. Two only of those items formed the subject of the trial. The Judge was correct in telling the jury that the question of the other items was not before them.

I see no reason to hold that there was any misdirection to the jury. As regards sentence this accused was found not guilty by a jury on another charge and a reference was made by the learned Sessions Judge against that verdict of the jury in Crl. Reference No. 79 of 1935, which was allowed on 24th April 1935. The Bench of this Court in that similar case of criminal breach of trust imposed a sentence of three years' rigorous imprisonment and directed that it should be concurrent with the sentence of five years' rigorous imprisonment in the present case. I agree with the view of the Bench that a sentence of three years' rigorous imprisonment for offences of this nature is sufficient and accordingly I allow this appeal to the extent that I maintain the conviction under S. 408, Penal Code, and I reduce the sentences from five years' to three years' rigorous imprisonment on each count concurrently and the sentence of fine on each count of Rs. 500, and in default of payment six months' further rigorous imprisonment will stand. The accused was granted bail by this Court, but was not released in view of the fact that a sentence of imprisonment was running against him.

Sentence reduced.

B.D.

A. I. R. 1935 Allahabad 930

BENNET, J.

Goverdhan—Appellant.

v.

Emperor—Opposite party.

Criminal Appeal No. 191 of 1935, Decided on 25th July 1935.

Penal Code (1860), S. 149—Man dying of injuries by lathi blows — Several persons attacking—Whose blow was fatal is immaterial—All are guilty.

Where a number of men make an attack with lathis on certain men and one of those men is killed, all the men making the attack are guilty under S. 149 and other sections. It is not a matter of importance whose lathi blow actually injures the deceased: 1918 *All* 420 and 1933 *All* 528, *Ref.* [P 931 C 1]

Saila Nath Mukerji and *Shri Ram*—for Appellant.

Government Pleader—for the Crown.

Judgment.—This is an appeal by one person Goverdhan who has been convicted by the learned Sessions Judge of Muttra Mr. Girish Prasad Mathur, under S. 304, Penal Code, and sentenced to four years' rigorous imprisonment. There were eight accused persons before the Sessions Court and the prosecution evidence was that these eight persons and one Genda who was absconding came to the fields of Bahori and others and stated that they would not allow Bahori and others to irrigate their fields from the canal, but that the accused would use the canal water for their own use. Abuse followed and the accused party attacked Bahori and the men with him with lathis. These men were Debi Ram, Harey and Lodhi. Injuries were caused on all these persons and Bahori fell down severely injured on his head and died three days later in hospital. His injuries were fractures of the skull. On the other persons the Civil Surgeon found injuries as follows:

Karey, 2 simple injuries.

Lodhi, 3 simple injuries.

Debi Ram, 4 simple injuries.

All these injuries were caused by lathi blows. The evidence of these persons Debi Ram, Karey and Lodhi is that the eight accused before the Sessions Court and the absconder Genda attacked them and beat them. This story also appears in the first report which was made by Debi Ram accompanied by Lakhi and others. Learned counsel dwells on a report at p. 4 made by Genda who was absconding; but as Genda is not a witness for the defence it is difficult to see how this report is evidence before the Court. It is merely a hearsay statement as it is a statement by a person not called as a witness. In the first report it was stated:

All the said persons attacked us with lathis and Goverdhan and Genda struck my father Bahori with lathis on his head and all the persons assaulted us.

This statement is also given in evidence. The lower Court considers that

only Goverdhan and Genda can be held responsible for the attack on Bahori because they were the particular persons who are stated to have struck lathi blows on his head. As a matter of law I think this is incorrect. Where a number of men make an attack with lathis on certain men and one of those men is killed all the men making the attack are guilty under S. 149, Penal Code, and other sections. It is not a matter of importance whose lathi blow actually injures the deceased. I may refer to a ruling of a Bench of this Court reported in 40 All 686 (1), overruling the law as laid down by a learned Single Judge of this Court in 40 All 103 (2). I may also refer to a more recent ruling reported in 1933 A L J 1292 (3), by a Bench of this Court where it was stated on p. 1297:

In our judgment the view that S 34 applied only where a criminal act was done by several persons, of whom the accused charged thereunder was one, and not where the act was done by persons other than the latter is not a correct view. We are of opinion that S. 34, Penal Code would be applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual.

These are cases where the number is less than five. In the present case we are dealing with more than five persons and therefore S. 149, Penal Code, would also apply. The lower Court has also given some reasons as to why it considered that it was improbable that Goverdhan should have collected such a mob to prevent Bahori from irrigating his fields. As there were four persons injured in the party of Bahori it does not appear to me at all improbable that nine persons were in the attacking party. In this view of the case I do not find that any portion of the evidence of the witnesses for the assault is discredited and accordingly no question of that nature arises. As regards the conviction of Goverdhan it appears to me that the conviction is correct and the sentence of four years' rigorous imprisonment is certainly not severe. I dismiss this appeal and direct that Goverdhan should surrender to his bail to undergo the remaining part of his sentence.

B.D. *Appeal dismissed.*

1. Emperor v. Gulab, 1918 All 420=47 I C 805=19 Cr L J 953=40 All 686=16 A L J 731.
2. Emperor v. Chandan Singh, 1918 All 209=43 I C 438=19 Cr L J 150=40 All 103=16 A L J 11.
3. Irshadulla Khan v. Emperor, 1933 All 528=1933 Cr C 863=146 I C 264=34 Cr L J 1234=55 All 607=1933 A L J 1292.

A. I. R. 1935 Allahabad 931

HARRIES AND COLLISTER, JJ.

Emperor

v.

Bhaggan and *others*—Accused.

Criminal Appeal No. 83 of 1935, Decided on 20th July 1935, from order of Addl. Sess. Judge, Ghazipur, D/- 30th October 1934.

Criminal Force—Whether can be used—Rumour that Mahomedans were killing cow—Hindus feeling enraged—Hindus are not entitled to prevent their feelings being hurt by resorting to violence.

There is no provision of law whatsoever which gives any person or body of person a right to use force and violence to prevent their feelings being wounded by an illegal act.

The mere fact that a rumour is spread to the effect that certain Mahomedans are intending to sacrifice a cow at some spot, the Hindus do not have a right to collect with lathis and take the law into their own hands. [P 933 C 2]

Govt. Advocate—for the Crown.

K. D. Malaviya, K. N. Gupta, Madan Mohan Lal and *Shri Prahlad Kumar*—for Accused.

Judgment.—Forty-seven persons were put on their trial before a Magistrate of Ghazipur on charges under Ss. 145 and 152, Penal Code. The trial Court convicted 18 of the accused under the above-named sections and sentenced each of them to undergo one year's rigorous imprisonment on each count, the sentences to be concurrent. The rest were acquitted. The 18 persons who were convicted appealed to the Sessions Judge and the latter allowed the appeals of eleven of them. As regards the remaining seven he altered the conviction to one under S. 151, Penal Code, and reduced the sentences to 3 months' rigorous imprisonment.

The Local Government have appealed against the acquittal of these 18 persons under Ss. 145 and 151, Penal Code, and have also filed an application in revision praying that in the alternative the sentences which have been inflicted upon 7 of the accused be enhanced.

Notice has not been served on respondent No. 11, Mulchand, and so his case is not before us. The facts of the case—about which there is little dispute—may be briefly stated as follows: A few months before this occurrence a Musalman weaver, by name Gharib, dreamt that a martyr was burried at a certain spot within the confines of the village of Kusmi Khurd on the southern bank of the Karari river. This dream appears to have created a sensation

in the neighbourhood and people soon began to say and believe that the spirit of the martyr had the power of performing miracles, and after a while a tomb was erected at that place and a bamboo fencing was put up round it. Thereafter, on Thursday of each week, Gharib lighted a lamp at the tomb and a crowd of people would assemble there, mostly Hindus of the lower classes and many of them women. One day a report got about that some Hindu women had been molested at the tomb by certain Mussulmans and this created resentment in the minds of many Hindus. On 25th April 1934 someone or other pulled down the bamboo fencing which was round the tomb and there can be little doubt that this was done by Hindus. There is also reason to suppose that the Hindus decided to boycott the tomb. Anyway on the following day, i. e., 26th April, a chaukidar named Qasim Shah and a man named Muhammad Faiyaz, who is said to be the nephew of a retired police officer, took steps to ensure that both Hindus and Musulmans should continue to assemble at the tomb on each Thursday of the week as heretofore. These two imaginative mischief-makers broadcast a message to the effect that only Hindus who failed to attend at the tomb on 3rd May would be deemed to have eaten beef and that any Mussulmans who likewise defaulted would be deemed to have eaten pork; and at the same time a rumour was spread to the effect that on that date a cow would be sacrificed at the tomb.

Meanwhile, on 1st May, a certain chaukidar made a report at the Nandganj police station that there was a likelihood of trouble occurring between Hindus and Mohamedans at this tomb. The Superintendent of Police was informed and he forthwith suspended Qasim Shah and initiated proceedings under S. 107, Criminal P. C., against Mohammad Faiyaz. The Superintendent of Police also had a consultation with the District Magistrate, in consequence of which Mr. Niblett, the Sub-Divisional Magistrate, was directed to be present on the spot on 3rd May. Mr. Niblett went to the Nandganj police station on the evening of 2nd May but Sub-Inspector, Muhammad Ismail Khan told him that he did not think there was likely to be any really serious trouble. However by way of precaution Mr. Niblett gave Muhammad Ismail Khan a notice under S. 144 which the latter was to utilise in case of necessity, and he then left the police station, saying that he would return at 3 p. m., the next day, which was the time at which people were in the habit of collecting at the tomb. Meanwhile the Superintendent of Police received information from a constable of Benares which seemed to lend some gravity to the situation and accordingly he sent five mounted police to Nandganj and sent word to Mohammad Ismail Khan to be present at Kusmi Khurd on the morning of 3rd May, informing him at the same time that the Sub-Divisional Magistrate would also be there. On the morning of 3rd May Abdul Karim, the Sub-Inspector in charge of the neighbouring police station of Shadiabad, came to Nandganj at the invitation of Mohammad Ismail Khan and brought two constables with him. Mohammad Ismail Khan sent his second officer Kashi Prasad and two constables to Kusmi Khurd and he deputed a third constable to try and stop people from approaching that village. At about 11 a. m., a report was received that a crowd of Hindus had collected on the north side of the river and accordingly Mohammad Ismail Khan and Abdul Karim went and collected Kashi Prasad and the three of them crossed the river—which in fact is only a stream—and reasoned with the crowd. Members of the crowd told the police officers that they had heard that a cow was to be sacrificed at the tomb; but the police officers assured them that there was no truth in the report and ultimately the crowd was induced to go back. It is alleged that this was the first occasion on which the police officials came to know that there was any rumour abroad that a cow was to be sacrificed.

At about 2 p. m., a very much larger crowd of Hindus collected in the open ground on the south of the Karari river and began to approach Kusmi Khurd. The crowd was in an angry mood and members of it were shouting "maro, jan lenge aur jan denge; loot-lo." The police tried to reason with the crowd, but they found themselves up against a much more difficult proposition than in the morning. The mob was in no mood to listen to reason or argument and Sub-Inspector, Abdul Karim, states that a man attacked him with a spear, but he was able to ward off the blow. Sub-Inspector Mohammad Ismail Khan, thereupon ordered the mob to disperse and he says that he warned them that he

would fire if his order was not obeyed. This had no effect and so Sub-Inspector, Mohammad Ismail Khan ordered some of his men to fire and he himself fired a couple of shots with his revolver, presumably in the air, since no one apparently was hit, although he says that the front rank of the crowd was only five or six yards away. Whether any other shots were fired on that occasion by the police is not clear, but probably they were not. As a result of the two shots which the Sub-Inspector fired the crowd fell back to some distance, but they took courage when some of their members said that the police had only blank cartridges. Meanwhile, Mr. Niblett arrived on the scene at about 3 p. m. He had first gone to the police station, but had hurried thence to the scene of occurrence on learning that the Sub-Inspector was already there. Sub-Inspector, Mohammad Ismail Khan, reported the situation to him and Mr. Niblett directed him to disperse the crowd again and to make arrests and if necessary to fire into the crowd. Thereupon the police advanced towards the crowd and arrested one man, but they were met with brickbats and the crowd actually stood up to the police with lathis. Seeing this, Mr. Niblett gave a definite order to fire. This was obeyed and in all twenty eight shots were fired. It does not appear that any one was hit, but anyway the firing had the desired effect and the mob dispersed many of the rioters running to the neighbouring village of Sarkatha. These were pursued by the police and a large number of persons were arrested with lathis in their hands in the village of Sarkatha.

The defence of most of the accused was in the nature of an alibi except that one or two of them alleged enmity with the police officials.

The learned Sessions Judge was of opinion that the only possible clause of S. 141, Penal Code, under which the case might fall was Cl. (5); but he was of opinion that that clause was not applicable by reason of the fact that the Mussalmans had no right to sacrifice a cow at this mob. The Judge observes:

> The Muhamedans had certainly no right to sacrifice any cow at or near a tomb at a place open to the public gaze so as to offend the religious feelings of the Hindus, and if therefore the intention of the crowd was to prevent any such sacrifice, it is very doubtful if their object would fall within the purview of any of the clauses of S. 141, I. P. C.

It is not necessary for us to record a finding as to whether if the Mohamedans had in fact intended to sacrifice a cow, such act would have been legal or illegal. We will assume for purposes of this appeal that it would have been an illegal act. After having recorded the finding to which we have referred above, the learned Judge on p. 112 of the paper book observes:

> But the fact remains that a big crowd had collected and from a threatening attitude it was clear that there was an apprehension of a breach of peace.

On this finding we are unable to comprehend how he was able to persuade himself that there was no unlawful assembly. His view apparently is that if a rumour is spread to the effect that certain Mohamedans are intending to sacrifice a cow at some spot outside the habitation of the village, the Hindus from the surrounding villages have a right to collect with lathis and take the law into their own hands. We are unable to subscribe to any such justification of mob law. There is no provision of law whatsoever which gives any person or body of persons a right to use force and violence to prevent their feelings being wounded by an illegal act. In the present case there is not even the mitigating circumstances of the existence of or near the spot of a sacrificial cow or any sign of preparation to perform such sacrifice; and even if there had been any such preparation, it could not be said in extenuation that the Hindus had no opportunity to have recourse to the authorities, for it is in evidence that no less than three Sub-Inspectors were present on the spot and later the Sub-Divisional Magistrate himself appeared. The learned Judge is of opinion that Sub-Inspector, Mohammad Ismail Khan, played a sinister part in the whole affair; but Sub-Inspector, Abdul Karim—against whom the learned Judge has nothing to say—has deposed as follows:

> There was a crowd of 3000—4000 of various groups on this side of the river. The crowd was armed with lathis and spears and some had swords. The three sub-inspectors went forward to stop the crowd and began to 'samjhao' them. The crowd however said 'loot-lo Kusmi aur maro' . . . . I again told them that there would be no qurbani and told them to go home. For about 1½ or 2 hours I tried to persuade them in this way, but they continued to advance and came nearly up to the police force.

His further evidence is corroborated by Mr. Niblett, who states:

I called out to the sowars who were some distance from me 'giriftar karo' and at the same time I said 'if these people do not run away, fire.' There were at least 300 or 400 people on the maidan besides the 100 I have already mentioned. They were all armed with lathis. Some sowars arrested one man. But the 100 who had proceeded to Sarkatha stood still about halfway between Kusmi and Sarkatha and showed no signs of dispersing. I called upon the sowars to charge them. As they approached the crowd picked up clods of earth and other brick-bats and threw them at the sowars and when the sowars came up, they turned on the sowars and checked their charge. I mean that they turned on them with their lathis. Seeing that the situation had become critical, I shouted out 'chalao sachcha, chalao goli, ek do gir jawe.' On this Ajudhia Pathak, and armed constable, took aim and fired at a man who I think was attacking Mohamed Ismail, S. I. The shot seemed to strike him. On this the other constables, sowars and sub-inspectors started firing. This checked the rioters and they turned and fled into Sarkatha village.

From the above evidence and also from the evidence of Sub-Inspector, Mohammad Ismail Khan, and Sub-Inspector, Kashi Pershad—who incidentally is a Hindu—we find it proved that a large crowd of Hindus collected with lathis in their hands and at least one of them with a spear and that they had the unlawful intention of using force and violence in order to prevent a sacrifice which they supposed was about to be performed, and it is obvious that such a crowd was an unlawful assembly within the meaning of S. 141. When ordered to disperse, the crowd opposed the police with force. If the charge had been more carefully framed, the case would have fallen within no less than three clauses of S. 141; but in any case it is manifest that the charge as framed under S. 145 and also the charge under section 152 has been fully established. We cannot accept the proposition—which however has been accepted by the learned Judge—that members of one community can be allowed with impunity to take their lathis and assemble for the purpose of using force and violence to prevent the sacrifice of a cow, by members of the opposite community who had no such intention, at a tomb which had been erected over the supposed resting place of the non-existent remains of an imaginary saint, and that such an assembly is not unlawful. The assembly would have been equally unlawful if the Mohamedans had in fact intended to perform such a sacrifice. It would be a waste of time to elaborate this matter any further.

The learned Sessions Judge has thought fit to censure Sub-Inspector, Mohammad Ismail Khan, very severely; and the counsel for the majority of the respondents has also pressed before us the alleged misconduct of the Sub-Inspector. Apparently the case against Mohammad Ismail Khan is that the latter knew that there was going to be trouble and did not disclose it to the Superintendent of Police or the Sub-Divisional Magistrate, because he wanted it to occur in order that he might have an opportunity of firing upon the Hindus. When we put it to learned counsel in this way, he said that he did not wish to go to that extent, but there can be no doubt that this is what his argument amounted to. That such a charge is unfounded is proved by the fact that apparently no one in the crowd was hit and by the fact that from among the 18 respondents Mohammad Ismail Khan has only deposed against one. The criticism which the learned Judge has levelled against this Sub-Inspector was irrelevant and in our opinion the strictures were undeserved. The Judge makes much of the fact that the Sub-Inspector—in obedience to an order from his Superintendent of Police—left his police station on the morning of 3rd May and went to Kusmi Khurd without awaiting the arrival of the Sub-Divisional Magistrate who was due at 3 p. m. The learned Judge observes:

It is true that the Sub-Inspector of Police obeyed the Superintendent of Police, but at the same time I do not think that he should completely ignore his S. D. M. I agree with what was stated by Mr. Blunden and which has been quoted above. The fact that Sub-Inspector Mahomed Ismail Khan wanted to ignore the existence of the S. D. M. shows that there was something which he did not want to bring to the notice of the S. D. M. It is expected that the S. D. M. would be in the know of things going on in his sub-division, specially if he is attached to the sub-division for some time. Therefore as the S. I. in this case tried to ignore the existence of the S. D. M., his action cannot be too severely condemned. I hope and trust that this matter will be taken notice of by the District Magistrate and that he will take such action as he deems necessary. This action of the S. I. throws a great doubt on his bona fides.

We do not know whether the District Magistrate has thought fit to take any action, but we can say that there is nothing on this record to justify the strictures of the Sessions Judge. The utmost that on the evidence before us can be said against the Sub-Inspector is that he perhaps misjudged the strength of local Hindu feeling and that he would have been better ad-

vised to send a chit to the Sub-Divisional Magistrate before leaving his police station and proceeding to the spot.

We now have to consider which, if any, of the respondents are liable to conviction under Ss. 145 and 152, Penal Code, the quantum of evidence against most of the respondents is slight but this very fact goes to indicate the bona fides of the witnesses and gives strength to the evidence. There has been no attempt at exaggeration on the part of the witnesses and no desire to implicate the rioters wholesale, and no one appears to have displayed any particular animus against anyone else. It appears to us that the witnesses have for the most part honestly named or identified those persons whom they saw in the riot and in our opinion the restrained and cautious evidence of the police officials is particularly valuable.

We will now deal with the respondents in detail. (Their Lordships then dealt with the case of each accused separately). As regards those of the respondents whom we have found to have been members of this unlawful association all pleaded alibi, but we are of opinion that the trial Court was right in rejecting their plea. They are all residents of villages other than Sarkatha and they have not satisfactorily established any good reason for their presence at Sarkatha at the time of their arrest. In face of the evidence for the prosecution it is impossible to accept their plea of alibi. In the result we dismiss the Government appeal in respect to Janki, Parshad, Sukhdeo, Ramrup, Bhaggan, Rajju, Bindeshri, Deo Narain and Sahti. We allow the Government appeal as against Sukhu, Ramai, Dubri, Sumer. Sobhit, Budhram, Guthru and Babunandan. We convict them under Ss. 145 and 152, Penal Code, and we sentence them to be rigorously imprisoned for six months under each section the sentences to be concurrent. Such of them as have already served a portion of their sentence will now serve out the remainder thereof.

As regards the application for enhancement, we acquit Bhaggan and Ramrup in the exercise of our revisional powers. As regards the other respondents to this application there is no need to pass any order in view of our judgment in the criminal appeal on behalf of the Local Government.

B.D. *Sentence varied.*

A. I. R. 1935 Allahabad 935

BENNET, J.

Samuel John and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 185 of 1935, Decided on 25th July 1935, from order of Sess. Judge, Bareilly, D/- 27th March 1935.

Criminal P. C. (1898), S. 237 — Charge framed for offence of rape—Conviction under abetment of rape — Amendment of charge unnecessary.

There are certain cases in which it is not necessary to amend the charge and conviction can be made without a charge for the offence of which there is a conviction. When a person is charged with an offence and the facts are proved which reduce it to a minor offence he may be convicted of the minor offence though he is not charged with it : 1925 *All* 448 and 1926 *All* 227, *Dist.* [P 937 C 1]

When the person charged with an offence of rape has been convicted for its abetment without amending the original charge, the conviction is valid. [P 937 C 1, 2]

G. S. Pathak and *A. Dharam Das*—for Appellants.

Government Pleader—for the Crown.

Judgment.—This is a criminal appeal on behalf of two persons and their cases have been argued separately. The trial was by a jury; so although learned counsel have each entered in their grounds of appeal that the conviction was against the weight of evidence on the record that is not a ground which can be considered by this Court. In addition to this argument it has been alleged that there was misdirection of the jury. In this file Laltu Singh has been convicted under S. 376, Penal Code, of rape of a young girl called Victoria Lazarus and Samuel John has been convicted of abetment of that rape. There was a third accused Daniel David who has been acquitted. The first argument in regard to misdirection is based on a portion of the charge to the jury on p. 88 as follows:

If you do not believe Victoria's statement, made in Court, that the accused Samuel John and Daniel David also had raped her, but, if you believe her statement, made to the police, Ex. R referred to above, you are entitled to find these accused or any of them, guilty of abetment of the offence of rape.

The argument of learned counsel is that it was a misdirection of the Court to tell the jury that they could convict on her statement to the police because a statement to the police of a prosecution witness is not evidence. If that were the meaning of the pas-

sage in question the argument would undoubtedly be correct, but I must examine the circumstances of the case to understand what the Judge meant by this passage and what the jury would understand the passage to mean. The first report set out three statements as follows: (1) Laltu raped the girl while Samuel John and Daniel David held her. (2) Samuel John raped the girl while the other two accused held her. (3) Daniel David raped the girl while the other two accused held her.

This report was made on 16th October 1934. On the same date the Sub-Inspector came to the house of the girl and took her statement at considerable length. In her statement she details the rape by Laltu with the help of Samuel John and Daniel David. She then proceeded to say "After Laltu accused did the act the accused turned me out of the house" and the statement proceeds with further details. It will be noticed that she omits to mention the rape by Samuel John and the rape by Daniel David. Her statement to the police therefore had these two omissions. Now, on p. 78 of the charge the Court had pointed out these omissions and other omissions and stated:

> It is for you to decide as to whether the discrepancies or the omissions are material or not and these would affect the prosecution case or not, or, as to whether she is worthy of being relied upon or not, and to what extent she is worthy of reliance.

The Court therefore had put very fairly before the jury the fact that her statement to the police had certain omissions and as a result of those omissions the jury could come to a decision as to whether her evidence before the Court should be relied on or not and if it were relied on to what extent they could act on it. The passage coming at the end of the charge which was a very long one was merely a brief reference to what had been said previously in detail. I do not consider that the Court meant to say or that the jury understood the Court to say that the jury could convict certain of the accused for abetment of rape on a statement made out of Court. What I think the Court meant and what I think the jury would understand was that it was open to the jury to convict on the first statement in the evidence in Court that Laltu raped the girl while Samuel John and Daniel David held her. That statement was briefly referred to by the Judge as her statement made to the Police. What the Judge meant was her statement in evidence which was also made to the police. The statement being made in Court was of course the one on which the jury would act. I think therefore the objection is merely a verbal one and that the jury could not misunderstand what was meant.

A further objection was taken that in the circumstances only two courses were open to the jury: (1) to disregard the omission and accept her evidence in full, and (2) to treat Victoria as a witness unworthy of credit. Counsel argues that this is the intention of S. 162, Criminal P. C. That section says that the statement to the police may be used to contradict such witness in the manner provided by section 145, Evidence Act. It does not lay down that the effect of the contradiction is to entirely discredit the witness. Nor is such a result stated in S. 145, Evidence Act. In my opinion not only would it be open to the jury to treat the omission as entirely discrediting the witness but it would also be open to the jury to treat the omission as discrediting only the portion of the evidence which was omitted in the statement. I do not think therefore that it can be said that there was any misdirection in this passage. There is however another defect in the argument of learned counsel. S. 145, Evidence Act, states as follows:

> A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Now in the present case learned counsel admits that there was compliance by defence only with the first part of this section. On p. 38 the girl stated in cross-examination:

> The darogha examined me on 16th October at my house . . . . I told him that John Samuel and Daniel David also had ravished me.

This shows that the first portion of S. 145 would apply and the witness was cross-examined as to the previous statement made by her and reduced to writing. But the second portion of section 145 would not apply and her attention was not called to those parts of the writing which were to be used for the purpose of contradicting her. Learned counsel omitted to put Ex. R to Victoria Lazarus. Her statement was taken on 20th February 1935. On 23rd February 1935 on p. 54 of the record the Court allowed counsel for the de-

fence to ask the Sub-Inspector Maqbul Husain in cross-examination whether the statement, Ex. R, had been made to him by witness, Victoria Lazarus, and he said "Yes." Now under section 145, Evidence Act, the Court should not have allowed the counsel for defence to ask that question. The defence should not be allowed to prove the writing before the attention of Victoria Lazarus had been drawn to those parts of the writing which were to be used for the purpose of contradicting her. In this case as defence rely on the omission of statements by her, defence should have read out the whole of Ex. R to her and pointed out to her that the statements in question were not contained in it. The intention is that the witness should be given an opportunity of explaining how it was that those portions were omitted. No such opportunity was given to the witness and therefore under section 145 defence should not be allowed to use Ex. R for the purpose of contradicting the witness. The learned Sessions Judge has acted with leniency towards the defence in allowing the defence to use Ex. R and defence cannot have any valid complaint in regard to the mention of Ex. R in the charge to the jury on p. 88.

The next point which was argued was in regard to the charge. All three accused were charged with rape. One accused has been convicted of rape and one accused has been convicted of abetment and the other has been discharged. The argument is that there should not be a conviction for abetment without the charge being amended under S. 227, Criminal P. C. Learned counsel failed to note that when a charge is amended under section 227 then under S. 231 there is the right of recalling witnesses. In general that procedure exists and where it is necessary that a charge should be amended then such a right is allowed. There are however certain cases in which it is not necessary to amend the charge and a conviction can be made without a charge for the offence of which there is a conviction. Those matters are dealt with in Ss. 237 and 238. In my opinion the present case comes under S. 238 (2), when a person is charged with an offence and the facts are proved which reduce it to a minor offence he may be convicted of the minor offence though he is not charged with it. In the present case the charge was of rape and the conviction was of the minor offence of abetment of rape. The sub-section clearly states that a charge is not necessary. Learned counsel referred to two rulings reported in 23 A L J 436 (1) and 24 A L J 168 (2). In each of these cases there was a charge under S. 34, Police Act, and a conviction under certain sections of the Indian Penal Code, S. 279 in one case and S. 290 in the other. But it appears to me that the view of the learned Judge of this Court was that these were not cases which would fall under S. 237 or S. 238, Criminal P. C., and therefore an amendment of the charge sheet was necessary. The present case however is different as the charge was of a rape and the conviction was of abetment of rape and I consider that no amendment of the charge sheet was necessary.

The next point argued is on behalf of Laltu Singh. This was that the Court should have mentioned in its charge that the Imperial Serologist found that on the duster, item No. 22, was the blood of a ruminant animal. Learned counsel argues that this showed that item 22 could not be stained with human blood. The evidence of the girl on the other hand was that the duster had been used to wipe away the stains, and if her story was correct it would have human blood on it. The chemical examiner stated that there were blood stains on this duster and that portions of the duster were sent to the Imperial Serologist. The fact that the portions sent to the Imperial Serologist contained stains of the blood of a ruminant animal does not prove that the stains on the portion not sent were all of them of the blood of a ruminant animal. No conclusion can be drawn on that point and therefore it appears to me that the Court cannot be said to have omitted to put any important point to the jury from which they could have drawn a conclusion in regard to this duster.

The next argument which was made on behalf of Laltu was in regard to the age of the girl and it was stated that the charge to the jury should have mentioned that no baptismal certificate was produced. In the first place this was not a case in which the defence pleaded consent. It was only in case consent was pleaded that the question would arise as to whether the girl was of age to give consent, in law, that

1. Dhum Singh v. Emperor, 1925 All 448 = 88 I C 1=26 Cr L J 1057=23 A L J 436.
2. Raghunath Kandu v. Emperor, 1926 All 227= 91 I C 888=27 Cr L J 152=24 A L J 168.

is of the age of 14 or over, or not. The age therefore was in my opinion not important. The next point is that it is the duty of a Court to mention in a charge a summary of the case as laid before it in Court. It is not shown by learned counsel that the defence addressed any argument to the Court that no baptismal certificate had been produced. The only point he can show is that Lazarus, the father of the girl, was asked a question in cross-examination as to whether he was in possession of the baptismal certificate of the girl and he stated that it had been lost. I do not think that it can be said that the Court omitted an important point in not mentioning this fact.

As regards the amount of sentence it is argued that Samuel John is aged 17 years. This is not correct as the age given by him to the Sessions Court was 18 years. In any case I consider that two years' imprisonment which he has received is a lenient sentence. The sentence of three years' rigorous imprisonment on Laltu is also a lenient sentence. I dismiss these appeals and direct that the accused should surrender to their bail to undergo the remainder of their sentences.

B.D. *Appeals dismissed.*

A. I. R. 1935 Allahabad 938

GANGA NATH, J.

Gajraj Sinha and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No 166 of 1935, Decided on 2nd August 1935, from order of Sess. Judge, Shahjahanpur, D/- 9th January 1935.

(a) Ejectment—Decree-holder put in possession — Information to judgment-debtor unnecessary.

In accordance with the provisions of Cl. (1), R. 35, O. 21, Civil P. C., there is no need to give any information of actual ejectment or delivery of possession to the judgment-debtors. [P 939 C 1]

(b) Criminal Trust — Complaint — Complaint by aggrieved party not essential—Any of them can make a complaint—Exceptions under Ss. 198 and 199, Criminal P. C.

A complaint need not necessarily be made by the person injured, but may be made by the person aware of the offence. The rule is that if a general law is broken, any person has a right to complain whether he himself has suffered any particular injury or not. This general rule is however subject to exceptions mentioned in Ss. 198 and 199, Criminal P. C., where certain offences are stated to be complainable only by specified persons: 18 *All* 465, *Foll.* [P 939 C 1]

Asst. Govt. Advocate—for the Crown.

Judgment.—This is a reference by the learned Sessions Judge of Shahjahanpur, recommending that the convictions and sentences of Gajraj Singh, Ram Singh, Mulaim Singh, Kandehi, Pitam, Jhamman and Arjun, under S. 447, Penal Code, be set aside. A complaint was filed against the persons named above by Jwala, a peon of the Court of Wards, under S. 447 and S. 352, Penal Code, on 5th September 1934. The complaint was that the persons named above had been ejected on 30th June 1934, but they again came to the fields and cultivated them forcibly on 25th July 1934. He also complained that he had been assaulted by these persons. The trial Magistrate found that the persons named above, that is, Gajraj Singh and others had been duly ejected and they committed criminal trespass, and convicted them under S. 447. The learned Magistrate sentenced Gajraj Singh and Ram Singh to pay a fine of Rs. 40 each and the others to pay a fine of Rs. 10 each and ordered two months' rigorous imprisonment in the case of Gajraj Singh and Ram Singh and one month's rigorous imprisonment in the case of others in default of payment of the fine. Against these convictions and sentences the persons named above, who will be referred to hereafter as applicants, filed an application in revision before the learned Sessions Judge.

There can be no doubt as regards the illegality of the sentence of imprisonment in case of default of payment of fine. As regards the legality of the convictions the learned Sessions Judge states that the trial Magistrate has not stated anywhere in his judgment that the applicants were aware of their ejectment and it had also not been proved that the Collector had sanctioned the prosecution. These are the two main grounds on which he recommended the setting aside of the convictions and the sentences.

For ejectment from land in execution of decree, it is not necessary that the applicants should have been made aware of their ejectment. S. 93, Agra Tenancy Act, provides that every decree or order for ejectment shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, relating to the execution of decrees for delivery of immovable property. R. 35, O. 21 relates to decrees for immovable property. It provides that where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to

such person as he may appoint to receive delivery on his behalf, and if necessary by removing any person bound by the decree who refuses to vacate the property. It is only in the case of a decree for joint possession that a proclamation by beat of drum is required. So in accordance with the provisions of Cl. (1), R. 35, O. 21, Civil P. C., there was no need to give any information of actual ejectment or delivery of possession to the judgment-debtors. namely, the applicants. It cannot be said that the applicants were not aware of the ejectment proceedings. All that the applicants say is that they were not present at the time of the delivery of possession, but they do not say that they did not know of the proceedings of delivery of possession to the decree-holder.

Under S. 190, Criminal P. C., a Magistrate may take cognizance of any offence: (a) upon receiving a complaint of facts which constitutes such offence, and (b) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed.

A complaint need not necessarily be made by the person injured, but may be made by any person aware of the offence. The rule is that if a general law is broken, any person has a right to complain whether he himself has suffered any particular injury or not. In 18 All 465 (1), it was held that the complaint upon which a Magistrate may take cognizance of an offence may be made by any member of the public acquainted with the facts of the case, not necessarily by the person aggrieved by the offence to which the complaint relates.

This general rule is however subject to exceptions mentioned in Ss. 198 and 199, Criminal P. C., where certain offences are stated to be complainable only by specified persons. S. 198, Criminal P. C., relates to offences of breach of contract; defamation and offences against married women (Ss. 493 to 496, Penal Code, both inclusive) and S. 199 relates to offences of adultery or enticing a married woman (Ss. 497 and 498). As regards sanction there are certain offences which have been referred to in Ss. 195, 196-A and 197, Criminal P. C., for prosecution for which sanction is necessary.

As regards the execution of the decree there is the evidence of Kedar Nath who is the Zilladar of the Court of Wards, and who was actually put in possession by the Amin and of Jwala Prasad complainant. Their evidence is fully corroborated by the dakhalnama Ex. P-1 which was executed by Kedar Nath and bears his signature and has been proved by him. There is no reason to disbelieve their evidence. Their evidence also shows that Gajraj Sinha and Ram Sinha, applicants, were present at the time of the delivery of possession. The mere fact that they are the employees of the Court of Wards is not enough to discredit their evidence, especially when their evidence is fully supported by documentary evidence. It is also inconceivable that this case should have been launched and fought by the employees of the Court of Wards, as is suggested by the learned Judge, if the Court of Wards had compromised the matter with the applicants who had been ejected or had allowed them to reoccupy the land. In any case it was for the defendants to have shown that they had re-entered the land with the permission of the Court of Wards. As regards the chief ingredient of the offence, namely, that the criminal trespass was committed with intent to intimidate or annoy the person in possession. S. 95, Cl. (1), Agra Tenancy Act, is very clear. It lays down:

> Any person against whom a decree or order of ejectment from a holding or any portion thereof has been executed under the provisions of this Act, who re-enters or attempts to re-enter into occupation of the same without the written consent of the person for the time being entitled to occupy the same, shall be presumed to have done so with intent to intimidate or annoy the person in possession, within the meaning of S. 441, I. P. C.

It also provides that it was necessary for the ejected tenants (Gajraj Sinha and Ram Sinha) to have obtained the written consent of the Court of Wards before they re-entered. In the absence of a written consent, their re-entry after the decree had been executed would raise a presumption that they have done so with intent to intimidate or annoy within the meaning of S. 441, Penal Code. So far therefore as the conviction is concerned, I see no reason to interfere with the order of the learned trying Magistrate which seems quite correct. As already stated, the sentence of imprisonment, in case of default of payment of fine, is against the provisions of S. 65, Penal Code, and it cannot stand. This order of the learned trying Magistrate is therefore

1. Farzand Ali v. Hanuman Prasad, (1896) 18 All 465=1896 A W N 149.

set aside and it is ordered that in case of default of payment of fine, the applicants shall undergo rigorous imprisonment for two weeks. Let the record be returned.

B.D. *Order accordingly.*

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* A. I. R. 1935 Allahabad 940

MULLA, J.

Kedar Nath—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 234 of 1935, Decided on 31st July 1935, from order of Sess. Judge, Banda, D/- 28th March 1935.

*** Forgery—Using forged document—Use should be voluntary—Production of document under order of Court is not voluntary use.**

The use of a document contemplated by S. 471, I. P. C., must be a voluntary one, and not the mere production of the document in compliance with an order of the Court which must be obeyed. Hence the production of a receipt alleged to be forged after the end of a case is at the instance of the Court; it cannot possibly be either a voluntary or a fraudulent or dishonest use of the document within the meaning of S. 471, I. P. C. [P 941 C 1; P 942 C 2]

K. D. Malaviya and *Shri Ram*—for Appellant.

Govt. Pleader—for the Crown.

Judgment.—This is an appeal by one Lala Kedar Nath, who has been convicted by the learned Additional Sessions Judge of Cawnpore, at Banda, of an offence under S. 471, Penal Code., and has been sentenced to undergo six months' R. I. and to pay a fine of Rs. 500. The charge against the appellant arose in the following circumstances:

On 30th May 1934, the appellant filed a suit against one Ram Nath for recovery of a certain amount on the basis of a pro-note. The pro-note in question and the receipt were however not filed along with the plaint, and it was stated that they would be produced on the next date of hearing. The pro-note in question was alleged to have been executed on 31st May 1931, so that the suit was just within time. The next date of hearing in the case was 30th July 1934. On that date a written statement was filed on behalf of the defendant, in which it was definitely alleged that the plaintiff had probably committed some forgery in the pro-note and the receipt in his possession as they had become time-barred. After that written statement was put in, the defendant's counsel applied to the Court to compel the production of the pro-note and the receipt. The Court accordingly ordered the production of those documents. Instead of producing the documents, as ordered by the Court, the appellant made an application in which he said that he had not brought the documents and had not summoned any witnesses. On this ground he wanted the case to be adjourned. The Court rejected his prayer and insisted on proceeding with the trial of the suit. The plaintiff was asked to bring the documents in question, and in the meantime the Court took up another case. After sometime the trial of the suit was resumed, and there are two different stories as to what happened thereafter. The appellant's case is that, as soon as the trial was resumed, he made a statement to the Court in which he proposed to abide by the oath of the defendant on the question as to whether he had borrowed any money on 31st May 1931, as alleged by the appellant. The defendant agreed and taking the proposed oath made a statement that he had not borrowed any money from the appellant on that date. Now it is definitely alleged on behalf of the defence that, even after the defendant's statement had been recorded, the Court insisted on the production of the pro-note and the receipt on which the suit was based.

In compliance with that order the appellant produced the receipt, but not the pro-note, which he did not have in his possession at the time. The prosecution case, on the other hand, is that after the resumption of the trial the appellant produced the receipt which was examined by the Court and was found to have been tampered with. It was then handed over to the defendant's counsel, who also expressed his opinion to the effect that the document was suspicious. It is an admitted fact that the date on this receipt had been altered from "21st May 1931" to "31st May 1931." The prosecution case is that, when the plaintiff realized that the receipt produced by him was considered to be a suspicious document by the Court, he tried to make the best of a bad bargain by making the proposal to abide by the defendant's oath. After dismissing the suit on the statement made by the defendant, the Court issued a notice to the appellant to show cause why he should not be prosecuted for an offence under S. 471, Penal Code. The matter was pursued in an enquiry under S. 478, Criminal P. C., and the learned Munsif himself

committed the appellant to the Court of Session to stand his trial on a charge under S. 471, Penal Code. He has now been convicted on that charge and sentenced as mentioned above. Hence this appeal.

The main point urged on behalf of the appellant by the learned counsel who has appeared on his behalf in this Court is that the decision of the case really turns on the question as to whether the receipt in question, which is admittedly a forged document, was voluntarilly produced by the appellant prior to his leaving the suit to be decided on the defendant's oath. It is argued that if the answer to that question is in the negative, then the appellant's conviction cannot possibly stand, because if the receipt was produced, after the suit had come to an end, in compliance with an order of the Court, there was no voluntary use of the document within the meaning of S. 471, Penal Code. I have no hesitation in holding that the use of a document contemplated by S. 471, must be a voluntary one, and not the mere production of the document in compliance with an order of the Court which must be obeyed. It has further been argued on behalf of the appellant that, if it is found that the receipt was produced sometime after the suit had come to an end as a result of the defendant taking the proposed oath and denying the loan on which the suit was based, the appellant could not possibly have had a fraudulent and dishonest intention, as required by S. 471, Penal Code. This contention is also obviously sound and must prevail. It is thus clear that the decision of the case turns on the question of fact as to whether the receipt, which is the basis of a charge against the appellant was produced before the appellant left the suit to be decided on the defendant's oath, as alleged by the prosecution, or sometime after that proceeding on the insistence of the Court itself.

In order to decide that question we have to consider the evidence of three witnesses only, viz. (1) the learned Munsif, who tried the suit and committed this case to the Court of Session, (2) the Vakil for the plaintiff, and (3) the Vakil for the defendant. Having carefully considered the evidence of these witnesses I find that it does not definitely establish the fact that the receipt in question was voluntarily produced by the appellant before he proposed to abide by the defendant's oath. So far as the evidence of the learned Munsif is concerned, it is, no doubt, true, that he seems to be almost positive in his examination-in-chief that "the plaintiff left the decision of the case on the oath of the defendant as a last resort." It appears however that at the end of his deposition the learned Sessions Judge put a definite question to him to the following effect:

Is it a fact that you asked the plaintiff to file the receipt after he had left the matter on the oath of the defendant ?

From the answer to this question given by the learned Munsif it would appear that he was not quite certain in his mind as to the sequence of the two events, and so he stated that so far as he remembered it was a fact that the plaintiff "made the statement about the oath of the defendant after he had filed the receipt." This statement is obviously not quite so positive and strong as the one to be found in his examination-in-chief, which I have referred to above. It has to be noted that these statements were made on 15th March 1935, about 8 months after the date on which the events in question took place. It is obvious therefore that the memory of the learned Munsif could not possibly have been so fresh as it was when he recorded his order of commitment on 5th December 1934, after an enquiry under S. 478, Criminal P. C. When I turn to that order of commitment, I find therein a very clear statement to the following effect:

Petition Ex. E was made on behalf of the plaintiff alleging that the plaintiff has not brought the pro-note nor the receipt today and the suit may be adjourned. The Court again insisted and only receipt Ex. A was filed by Lala Kedar Nath along with the list Ex. E-1. Lala Kedar Nath before filing of the receipt gave statement Ex. K leaving the matter on the "gangajali" oath of the defendant.

The learned Munsif has tried to explain away this clear and definite statement of fact by stating in his examination-in-chief that "the remark in the commitment order that the plaintiff before filing the receipt had left the matter on the oath of the defendant is a slip of the pen." I find it difficult to accept that explanation, because in doing so I have to rely entirely on the memory of the learned Munsif relating to certain events which had taken place 8 months before as against his own description of those events much earlier in point of time. As I have shown above, when a definite question was put to him by the Court regarding the sequence of the events in question, he had to rely entirely on his memory. Another reason

why I am not prepared to accept the learned Munsif's explanation is that the prosecution story appears to me to be inherently improbable. I shall suppose, for the purposes of argument, that the appellant had forged the receipt in question; but it is clear from his conduct as a whole that he was extremely reluctant to produce that receipt in Court and had made up his mind not to undergo the risk of a prosecution. That alone can explain why he left the suit to be decided on the defendant's oath. The fact that he did so is not denied. If he had made up his mind to abide by the defendant's oath, I see absolutely no reason why he should have gone out of his way to produce the receipt in question before leaving the suit to be decided on the defendant's oath. The production of the receipt was absolutely unnecessary and, in fact, calculated to expose him to the danger which he clearly wanted to avoid. As regards the other two witnesses for the prosecution, namely, the two vakils who appeared for the appellant and the defendant in that suit, all I need say is that none of them is prepared to make a definite statement on the point under consideration. Mr. Hari Shankar, the vakil for the appellant, clearly stated in his deposition, in answer to a pointed question on the point under consideration,

Kedar Nath did make this statement (statement proposing to abide by the defendant's oath) through me, but so far as I remember he had made this statement before he had produced Ex. A (i. e., the receipt in question).

He was further pressed on this point in his examination-in-chief, and he then stated that he could not swear whether Ex. K was made before or after the filing of the receipt Ex.A. Taken as a whole, his evidence undoubtedly favours the defence more than it does the prosecution. In any case, the prosecution cannot argue, on the basis of his evidence, that the voluntary production of the receipt in question before the proposal to abide by the defendant's oath had been established beyond all reasonable doubt. The same remark applies to the evidence of Mr. Hari Bahadur, the counsel for the defendant. He suggested in his examination-in-chief that the proposal regarding the oath was made sometime after the production of the receipt in question; but as soon as a question was put to him in cross-examination, he stated that he could not say whether the receipt was filed before or after the appellant's statement proposing to abide by the defendant's oath. In this state of the evidence I have no hesitation in holding that the prosecution has entirely failed to prove that the receipt in question was voluntarily produced by the appellant before he made the proposal to abide by the defendant's oath. Once the proposal was made and the defendant took the proposed oath and made a statement denying the appellant's claim, the case came to an end and the production of the receipt in question after that stage at the insistence of the Court could not possibly be either a voluntary or a fraudulent or dishonest use of the document within the meaning of S. 471, Penal Code. The result therefore is that I allow this appeal and set aside the conviction and the sentence. The fine, if paid, shall be refunded. The appellant need not surrender to his bail.

B.D. *Appeal allowed.*

A. I. R. 1935 Allahabad 942

SULAIMAN, C. J. AND BENNET, J.

Shiam Lal and *another* — Defendants —Appellants.

v.

Bohra Ram Chandra— Plaintiffs and *another*—Defendants—Respondents.

Letters Patent Appeal No. 12 of 1934, Decided on 27th February 1935, against judgment of Mukerji, J., D/- 23rd November 1933.

Agra Tenancy Act (1926), S. 50 — Tenant executing lease and kabuliyat —Statutory tenant becoming non-occupancy tenant with perpetual lease at enhanced rent—S. 50 held did not limit such lease and enhancement was valid.

A lease and a kabuliyat were executed by the landlord and the tenant, the deed embodying terms that the tenant was to become a non-occupancy tenant with a perpetual lease with an enhanced rent:

Held: that the lease was not limited by the provisions of S. 50, and there was nothing illegal in the enhancement of rent, as the tenant obtained a more valuable tenure. [P 943 C 1]

B. S. Darbari—for Appellants.

Ram Nama Prasad and *Kanhaiya Lal* —for Respondents.

Bennet, J.—This is a Letters Patent appeal from a judgment of the learned single Judge of this Court dismissing the appeal of the defendants, who are appellants before us under O. 41, R. 11. The facts are that a suit was brought for arrears of rent in the Revenue Court at the rate of Rs. 115 per annum for 1338-1339 F. The defence was that

the amount should be at the rate of Rs. 70 only and that the rent had been paid up. The trial Court found that the rent should be Rs. 70 per annum and that it had not been paid and decreed it on that rate. The plaintiff appealed to the lower appellate Court on the question of what was the rate of rent. The lower appellate Court had before it three pieces of evidence, first, there was in evidence a registered deed of lease by the plaintiff and a counter lease or kabuliyat by the defendants also registered; secondly, that the tenants verified the rent as Rs. 115 per annum before the Sadar Qanungo, thirdly, that the defendants admitted that since that lease on 24th February 1928. they had been paying rent at the enhanced rate of Rs. 115 per annum. On these three grounds the lower appellate Court held as a finding of fact that the rent was Rs. 115 per annum. Objections have been taken in second appeal to the legality of this lease and attention was invited to the fact that in the kabuliyat produced it was endorsed by the defendants that the kabuliyat had been taken by force. No such plea was taken in the written statement nor was an issue framed, as apparently the defendants did not persist in the plea.

As regards the legality of the lease the argument made was that under the Tenancy Act the rent of a statutory tenant to which class the defendants previously belonged could only be enhanced to a certain extent under S. 50. But the lease and kabuliyat before us are not apparently one under that section. Under that section at the enhanced rent a statutory tenant would remain a statutory tenant. In the present suit the statutory tenant has given up statutory rights and become a non-occupancy tenant under a perpetual lease. Learned counsel for respondents stated before us that his clients accepted this perpetual lease and based their claim upon it. The lease contains a provision that there should be no right of ejectment even as against heirs. The statutory tenant therefore obtained a more valuable tenure. The lease was not therefore limited by the provisions of S. 50, and there was nothing illegal in the enhancement of rent from Rs. 70 to Rs. 115 per annum. Learned counsel alluded to the provisions of the Act, but none of them was shown to us by which the lease would in any way be illegal. We think that there are no merits in the Letters Patent appeal, as the matter was concluded by the finding of fact of the lower appellate Court and we agree with the learned Single Judge in dismissing the second appeal and we dismiss this Letters Patent appeal with costs.

B.D. *Appeal dismissed.*

A. I. R. 1935 Allahabad 943

SULAIMAN, C. J. AND BENNET, J.

Partap Ahir and *another*—Defendants—Appellants.

v.

Gopi Ram and *another* — Plaintiffs—Respondents.

Letters Patent Appeal No. 62 of 1934, Decided on 4th March 1935, against decision of Kendal, J., Allahabad, D/- 8th February 1934.

(a) Landlord and Tenant — Land lying fallow — One cosharer leasing it out to a tenant—Burden of proof of showing such lease to be invalid lies on him who asserts it.

Where the land is uncultivated and is lying vacant, it is open to a cosharer to cultivate this land himself in which case it would become his khudkasht and there would be nothing illegal in his action. The burden of proof lies on the person asserting otherwise to show that under the particular custom of the mahal it is not open to a cosharer to put a tenant in possession of such vacant land and let that tenant cultivate the land : 1932 *All* 457; 1928 *All* 617 and 1933 *All* 631, *Dist*, [P 945 C 1]

(b) Mesne Profits— Selling value of crops is not a measure—Total expenditure must be deducted from selling value.

The value of a crop is the result of not only the use of the land but also of the seeds supplied by the person who cultivates and the labour of cultivation and irrigation and harvesting. The actual selling value of a crop is in no way a measure of mesne profits; they will have to take the necessary expenditure of producing the crop from the price at which they sold it. [P 945 C 2]

M. L. Aggarwala—for Appellants.

K. Verma—for Respondents.

Bennet, J.—This is a Letters Patent appeal by the defendants under the following circumstances: The plaintiffs, two co-sharers, brought a suit against the two defendants alleging that the plaintiffs were co-sharers of a share of 14 annas odd in a certain village and that the plaintiffs and other co-sharers possessed a certain No. 101 which was pond land and that the defendants had no concern with it; that in Asarh 1333F in spite of the remonstrances of the servants of the plaintiffs the defendants without any right forcibly ploughed the entire plot and did not allow it to be cultivated on behalf of the plaintiffs and since 1333F the defendants had

been sowing crops in this number. The suit was brought three years later on 17th January 1929, the possession having been taken by the defendants in July 1926. The plaint set out the area of the plot as 2 bighas 19¾ dhurs. The plaint claimed possession of this area from the defendants in favour of the plaintiffs and Rs. 205-5-6 damages as mesne profits. The suit was against the defendants as trespassers. The written statement of the defendants was that they had been all along in possession as tenants of the plot in question on payment of an annual rent of Rs. 5 to the zamindar.

A plea was also taken that the Civil Court did not have jurisdiction. The suit was filed in the Court of the Munsif. The Munsif remitted an issue to the Revenue Court for determination as to whether the defendants were tenants of the plots in suit. The Revenue Court found that the defendants were not tenants of the plot in suit. The Munsif therefore granted a decree for possession and for the amount of damages claimed Rs. 205 odd. The defendants appealed and the lower appellate Court found that the village is divided into two mahals, one called Mahal Sadho Saran Singh and the other called Mahal Tewa Singh; that the land in question No. 101 lies as regards one biswa area No. 101/1 in Mahal Sadho Saran Singh in which the plaintiffs have a 14 annas odd share, but that the defendants were not in possession of this one biswa; that the remainder of the number was No. 101/2, which has the area given in the plaint of 2 bighas 19¾ dhurs. and it was in the possession of the defendants and lies in Mahal Tewa Singh, and in this mahal the plaintiffs have only a very small share of 7 pies 13 kant 3 jao. Further the Court found that the plea of the defendants was correct that they had been put in possession in July 1926 by Bhagwan Singh, who was a co-sharer in Mahal Tewa Singh, and that they had been paying rent to Bhagwan Singh since that date. The lower appellate Court therefore found that the defendants were tenants and not trespassers and dismissed the suit against them. The learned Single Judge of this Court who heard the second appeal has allowed the appeal of the plaintiffs and has restored the decree of the trial Court.

A considerable amount of argument has been made in regard to various rulings where one co-sharer puts a tenant in possession and other co-sharers sue. In 1932 A L J 477 (1), it was held by a Bench of this Court that where all the co-sharers bring a suit in the Civil Court against a tenant who has been put in possession by one co-sharer that person has not become a statutory tenant as he has not been admitted to tenancy by all the three co-sharers. and that the mere fact that one of the co-sharers had granted a lease to the defendant did not prevent the other co-sharers from ejecting him. That case differed in material points from the present case. In the first place the plaintiffs did not make the other co-sharers parties to this suit. We consider that in a suit of this nature Bhagwan Singh, who is found to have put the defendants in possession of this plot, is a person who should have been made a party. If the plaintiffs were not aware that Bhagwan Singh had put the defendants in possession then when the written statement contained the plea that the defendants had been all along in possession as tenants of the zamindars, the plaintiffs should have asked the Court to ascertain under O. 10, R. 1 or R. 2 from the defendants which zamindar had put them in possession, and the plaintiffs should have asked for leave to amend their plaint by making that zamindar a party. In the second place the plaintiffs brought their plaint on the assumption that the land in suit lay in the mahal in which they had a 14 annas share. That assumption has misled the Revenue Court and the defendants have been prejudiced in the matter.

Moreover the plaintiffs came to Court on the allegation that the defendants had forcibly ploughed the plot in question and had prevented the plaintiffs from cultivating it. The lower appellate Court has not come to a finding on this point in favour of the plaintiffs. On the contrary the finding is that the defendants were put in possession by Bhagwan Singh, a co-sharer. Moreover the plaint admits that the land in question was pond land. The patwari who is a witness for the plaintiffs states that the land became cultivated for the first time in 1333F, i. e., when the defendants cultivated it at the instance of Bhagwan Singh. The case therefore differs from other cases in which one co-sharer has put a tenant in possession of land which was previously held by a tenant who was the tenant of all the co-sharers. In the present case

1. Panchanan Banerji v. Anant Prasad Pande, 1932 All 457=140 I C 204=54 All 738=1932 A L J 477.

the land was uncultivated and was lying vacant. It was open to Bhagwan Singh as a co-sharer to cultivate this land himself in which case it would become his khudkasht and there would be nothing illegal in his action. The burden of proof lay on the plaintiffs to show that under the particular customs of this mahal it was not open to Bhagwan Singh to put a tenant in possession of this vacant land and let that tenant cultivate the land. The plaintiffs have failed to show that the possession of the defendants was in any way illegal. The defendants appear to be tenants as the lower appellate Court has found them, and not to be trespassers.

We may note that certain rulings to which reference has been made, 51 All 285 (2) and 1933 All 631 (3), are cases where the manager of a joint Hindu family put a person in possession as a tenant and it was held that other members of the family could not sue to eject the defendant in the Civil Court. These cases in our opinion have no bearing on the present case. In 1894 A W N 127 (4) a Bench of this Court consisting of the learned Sir John Edge, C. J., and the late Bannerji, J., held that one co-sharer could not sue for possession and for mesne profits against the lessee of another co-sharer and that the said lessee was not a trespasser. This view was followed in 3 A L J 767 (5). It is no doubt a fact that under S. 194 of Act 2 of 1901, where there are two or more co-sharers in any right, title or interest, all things required or permitted to be done by the possessor of the same shall be done by them conjointly, unless they have appointed an agent to act on behalf of them all. But in the present case by misleading the Revenue Court into considering that the suit was in regard to a plot in the mahal Sadho Saran Singh the Revenue Court was prevented from going into the question as to whether Bhagwan Singh, who was a co-sharer in the other Mahal Tewa Singh had any such authorization as required by this section.

Under the circumstances of this case we consider that the plaintiffs have failed to make out their case. In regard to the decree for Rs. 205 mesne profits we would point out that even if any mesne profits were due it would be absurd to give the plaintiffs, who are co-sharers of the minute share of 7 pies odd in the mahal of 16 annas, the whole total of the value of the crop. The value of a crop is the result of not only the use of the land, but also of the seeds supplied by the person who cultivates and the labour of cultivation and irrigation and harvesting. The actual selling value of a crop is in no way a measure of mesne profits. Nor if the plaintiffs had cultivated could their profits be measured in such a manner. They will have to take the necessary expenditure of producing the crop from the price at which they sold it. The actual rent of the holding in question is merely Rs. 5 per annum, and for three years the amount is Rs. 15 and the infinitesimally small share of the plaintiffs would be a few annas. For these reasons we allow this Letters Patent appeal with costs and we restore the decree of the lower appellate Court dismissing the suit of the plaintiffs and we grant costs to the defendants throughout.

B.D. *Appeal allowed.*

2. Basdeo Narain v Muhammad Yusuf, 1928 All 617=116 I C 491=51 All 285=26 A L J 1313.
3. Tapesar Singh v. Chhabi Ahir, 1933 All 631=146 I C 870.
4. Bholanath v. M. Buskin, (1894) A W N 127.
5. Aminullah v. Hajira, (1906) 3 A L J 767=1906 A W N 222.

A. I. R. 1935 Allahabad 945

GANGA NATH, J.

Kr. Girwar Singh — Defendant — Appellant.

v.

Ram Sarup and *others* — Plaintiffs and Defendants—Respondents.

Second Appeal No. 700 of 1934, Decided on 6th August 1935, from decision of Sub-Judge, Muttra, D/- 5th May 1934.

Limitation Act (1908), Art. 116—Suit on registered agreement—Claim for village profits for six years held in time.

The suit had been brought by the plaintiff claiming village profits for a period of six years. The plaintiffs had been given a right under registered agreement executed by defendants to sue them for their shares of profits which would be collected by defendants if the plaintiffs' share be not paid to them:

Held: that the suit was on the basis of a registered agreement and therefore it was not time-barred. [P 946 C 2]

Panna Lal—for Appellant.

K. N. Agarwala—for Respondents.

Judgment.—This is a defendant's appeal and arises out of a suit brought against him and other defendants by the plaintiffs-respondents for rendition of accounts of the income derived from the market in Mauza Pachawar and for their share out of the income of the market held in the plots in Thok Dhyan. The plaintiff's case was that

the parties are lambardars of Mauza Pachawar. Mauza Pachawar is divided into three Thoks: Thok Billo, Thok Dhyan and a Shamlat Thok. A market is held on some plots in these thoks. The lambardars of the village used to make collections and divide the income among the co-sharers. About 8 or 9 years ago a dispute arose between the lambardars. The Collector of Muttra took over the management of the market. He began to make collections and deposit the income in the Savings Bank. Subsequently a compromise was arrived at between the lambardars and it was decided that in future the lambardars will arrange for management and they appointed defendants 1 to 3 to take up the management and realise the income. Defendants 1 to 3 executed a registered agreement under which the co-sharers were given a right to sue them to recover their shares. The plaintiffs further alleged that defendants 1 to 3 have made collections and have not paid the plaintiffs' share. The defendants contended that the plaintiffs had no right of suit and the suit did not lie in the civil Court. The trial Court found against them and gave a decree to the plaintiffs. In appeal the judgment of the trial Court was confirmed.

Out of the three defendants only one has appealed. It has been urged on behalf of the appellant that the suit did not lie in the civil Court. A suit for profits which falls under Ss. 226 and 227, Tenancy Act, cannot lie in a civil Court. Under S. 226, Tenancy Act, a co-sharer may sue the lambardar for a settlement of accounts, and for his share of the profits of a mahal, or of any part thereof. Under S. 227, Tenancy Act, a co-sharer may sue another co-sharer for a settlement of accounts, and for his share of the profits of a mahal, or of any part thereof. In this case the suit is brought by the plaintiffs for their share of income of the market which is held in Thok Dhyan in which defendants 1 to 3 have no share. Defendants 1 to 3 are also not the lambardars of Thok Dhyan. Consequently no suit of the plaintiffs for their shares of profits of the market held in their Thok could lie against defendants 1 to 3 in the revenue Court under S. 226 or under S. 227, Tenancy Act. It being so, the present suit which does not fall under S. 226 or under S. 227, Tenancy Act, lies in the civil Court.

The next point urged by the learned counsel for the appellant is that the suit being for a period of more than 3 years is time-barred. The suit has been brought for a period of six years. The plaintiffs have been given a right under the registered agreement referred to above executed by defendants 1 to 3 to sue them for their shares of profits which is collected by defendants 1 to 3 if the plaintiffs' share is not paid to them. The suit is on the basis of a registered agreement and therefore it is not time-barred. The third point was that the plaintiffs had no right of suit. As already stated, the plaintiffs have been given a right under the agreement to sue the executants (defendants 1 to 3) for their shares of profits. Consequently the plaintiffs have a right of suit. There is no force in the appeal. It is therefore ordered that it be dismissed with costs. Permission to file a Letters Patent appeal is granted.

B.D. *Appeal dismissed.*

** A. I. R. 1935 Allahabad 946

(Full Bench)

SULAIMAN, C. J., THOM, NIAMATULLAH, RACHHPAL SINGH AND BAJPAI, JJ.

B. Udeypal Singh — Plaintiff—Applicant.

v.

Lakshmi Chand—Defendant — Opposite Party.

Civil Case No. 408 of 1934, Decided on 9th May 1935.

(a) Pleadings—Admission in—If accepted, should be accepted in its entirety.

It is permissible for a tribunal to accept part and reject the rest of any witnesses testimony. But an admission in pleading cannot be so dissected: 39 *Bom* 399, *Foll.* [P 948 C 2]

(b) Limitation—Court is bound to apply law of limitation whether pleaded or not.

Courts are bound to apply the law of limitation in suits whether it is pleaded or not and to dismiss a suit which is apparently beyond time. Conversely they are bound not to dismiss, as barred, a suit which, on the face of it, is not barred. [P 948 C 2; P 949 C 1]

**** (c) Limitation — Practice — Plaintiffs bringing suit beyond limitation but showing grounds of exemption in plaint—Plaintiff can prove different grounds to get over bar of limitation other than those stated in plaint—Practice, Relief.**

If the plaint shows the ground of exemption, the requirement of the Code is satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground. Justice should not be allowed to be defeated simply because a party has not been able to prove the case which he attempted to prove, but has proved certain other facts which nevertheless entitled him to a decree, provided the aggrieved party is not taken by surprise: 13 *C L J* 139; 1922 *Lah* 230; 25 *All* 256 (*F B*) and 25 *All* 498 (*F B*), *Foll.* [P 949 C 1]

(d) Limitation Act (as amended in 1927), S. 20—Effect of amendment—Payment of interest in order to save limitation must also be in handwriting of or in writing signed by debtor.

The only change that has been made by the amendment of 1927 is that after the amendment, payment of interest in order to save limitation must also be in the handwriting of or in the writing signed by the person making the payment. Before the amendment, only part-payment of the principal in order to give fresh start of limitation had to be in the handwriting of the debtor. Now the same rule is made applicable in cases of payment of interest also. [P 960 C 1]

**** (e) Limitation Act (as amended in 1927), S. 20—Interest paid 'as such' and part payment of principal are on different footing—Payment made towards interest 'as such' alone saves limitation** (Per *F. B.*; *Thom* and *Bajpai, JJ.*, Contra.)

(Per *Full Bench*)—It is noteworthy that two separate paragraphs have been allotted to payments of interest and part payment of principal respectively in S. 20, and the words employed also are different. There is prima facie therefore no reason to suppose that the legislature has intended that they should be exactly on the same footing. A mere payment of interest is useless to save limitation unless the interest has been paid: (a) before the expiration of the period; (b) paid as such; and (c) by the person liable to pay the debt or by his duly authorized agent. [P 956 C 1]

(Per *Thom* and *Bajpai, JJ.*)—By the amendment of S. 20 in 1927, the intention of the legislature was perfectly plain, viz. to put payment towards interest and part payment of capital on exactly the same footing. If the creditor could prove by an endorsement in the handwriting of the debtor a payment either towards capital or interest then from the date of that payment a fresh period of limitation should run. [P 952 C 1]

**** (f) Limitation Act (as amended in 1927), S. 20—Payment made by creditor without specification—Creditor appropriating it towards interest—Payment is neither payment of interest as such nor as part payment:** 52 *All* 459=127 *IC* 581=1930 *All* 392, *Overruled* (Per *F.B.*; *Thom* and *Bajpai, JJ.*, Contra.)

(Per *Full Bench*)—Where money is paid by a debtor without specifying whether payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of principal within the meaning of S. 20: 52 *All* 459=127 *I C* 581=1930 *All* 392, **Overruled**; 14 *I C* 580, *Diss from*; *Case law discussed.* [P 964 C 2]

(Per *Thom* and *Bajpai, JJ.*)—Where an endorsement appears on the back of a bond in the handwriting of a debtor or his agent of the payment of a certain sum which is less than the amount of interest due, and less than the capital amount of the bond, a fresh period of limitation would run from the date of payment inasmuch as clearly the payment must be either towards interest or in part payment of principal, or partly towards interest and partly towards capital. [P 952 C 1]

***(g) Interpretation of Statutes—Each word of statutory enactment should be given importance—Intention of statute should not be defeated by adhesion to the letter of statute—Court can ignore certain words to give effect to the intention of legislature.**

(Per *Thom* and *Bajpai, JJ.*)—The manifest intention of a statute must not be defeated by too literal an adhesion to its precise language. No doubt generally full justice must be done to the words of a statutory enactment, but if the result of that is to do less than justice to the intelligence of the legislature it is the duty of the Court to ignore the words which have the effect of making the enactment an absurd one: *King* v. *Vasey and Lally*, (1905) 2 *K B* 748; *King* v. *Ettridge*, (1909) 2 *K B* 24 and *Salmon* v. *Duncombe*, 11 *A C* 627, *Foll.* [P 952 C 2; P 953 C 1]

(h) Limitation Act (as amended in 1927), S. 20—Payment of interest 'as such'—Words 'as such' are still important and are purposely retained by legislature with a view to maintain their formal importance (*Thom* and *Bajpai, JJ.*, Contra.)

(Per *Full Bench*)—The legislature must be deemed to have been aware of the importance attached to the words "paid as such" in para. 1, S. 20 and its deliberate act in not deleting those words should naturally be interpreted as implying that the interpretation put upon those words has been accepted by the legislature. [P 958 C 1]

(Per *Thom* and *Bajpai JJ.*, Contra.)—There can be no doubt whatever that S. 20 as amended in 1927 is a typical example of sloppy draftmanship and the words "as such" are clearly redundant and the Court ought to attach no significance to them. The Court ought to ignore them entirely in order not only to avoid an absurdity but to give effect to the plain intention of the legislature. [P 953 C 1, 2]

G. S. Pathak and *Panna Lal*—for Applicant.

Kamta Prasad—for Opposite Party.

Bajpai, J.—This case has been referred to a Full Bench, because there is some conflict of opinion as to the true meaning and scope of S. 20, Limitation Act, more specifically after the amendment in the proviso by Act 1 of 1927. The facts may be briefly stated. The plaintiff brought a suit for the recovery of a sum of Rs. 250 on the allegation that defendant 1, Ewaz and Nanhe deceased borrowed Rs. 100 from the plaintiff and executed a bond which provided for payment of interest at the rate of Rs. 3-2-0 per cent per mensem, the interest to be compounded every six months. The bond was payable on demand. Defendant 1 and Nanhe deceased paid Rs. 50 on 17th August 1930, towards interest and both of them put their thumb marks on an endorsement of payment at the back of the bond. The endorsement runs as follows: "Deposited Rs. 50 to-day on 17th August 1930." There is then an account at the foot of the plaint which says:

Principal was Rs. 100 and interest from 7th October 1927 to 16th August 1933 at the rate of 2 per cent per mensem compoundable six monthly was Rs. 250 out of which Rs. 50 were paid and endorsed at the back of the bond and Rs. 40 were remitted. The interest therefore due was Rs. 150 and this with principal amounted to Rs. 250.

Ewaz, defendant 1, did not file any written statement, but the heirs of the deceased Nanhe pleaded that the bond was without consideration and that its execution was not admitted. Nanhe, the deceased, had no necessity to borrow nor did he as a matter of fact borrow anything on the bond in suit. All the allegations of the plaintiff were wrong and the interest was exorbitant. The learned Small Cause Court Judge referred to the evidence of the plaintiff and his witness Radha Ballabh and observed that they had said that Rs.50 were paid towards the bond, but neither of them said as to whether this payment was made towards the principle amount or towards interest. Relying on the authority of 1933 A L J 930 (1), the Court below held that the suit was barred by time. It also held that the execution of the bond by defendant 1 and Nanhe deceased for consideration was proved. On the question of interest the learned Judge held that the interest claimed was not excessive in view of the fact that the plaintiff did not claim at the contractual rate, but at the lower rate of 2 per cent per mensem and had further remitted a sum of Rs. 40. In the event the suit was dismissed, and in revision before us it is contended that the view of the Court below that the plaintiff's suit was barred by time is not sound.

It is to be noticed that the plaintiff in his plaint distinctly said that the executants of the bond made the payment of Rs. 50 on the head of interest as such. One may say that the plaint might be read as meaning that the plaintiff also credited it as such, but it is not possible to argue that the plaintiff appropriated it as interest irrespective of the volition of the debtors. Para. 2 specifically says that defendant 1 and Nanhe deceased paid Rs. 50 as interest; it does not say that they paid Rs. 50 on account and the plaintiff in pursuance of the right conferred on him by law appropriated it towards interest. The admission made by the plaintiff can be construed only in one light and as a single admission, namely, that the sum of Rs. 50 was paid by the debtors towards interest as such and it was therefore appropriated as such hence the account in the plaint was calculated in the way in which it was done. It is possible to reject the entire admission and to say that the amount was not paid towards interest as such, but it is not permissible to hold that the plaintiff's case that the debtors paid the amount towards interest as such is wrong and to pin down the plaintiff to the implied admission in the plaint that he appropriated the amount towards interest. In 39 Bom 399 (2), at p. 409, their Lordships of the Privy Council say:

It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all.

The learned Judge of the Small Cause Court while considering this aspect of the case says:

It means that Rs. 50 were paid by the debtors and they did not care to specify that the sum is to be appropriated towards the interest or principal.

And then following Ram Prasad's case held that the suit was barred by time. I can only interpret this observation of the learned Judge as meaning that he accepts the fact that Rs. 50 were paid, but he rejects the case put forward by the plaintiff, viz., that the amount was paid towards interest as such and that being so, the question arises as to the nature of this payment. I have said already that it cannot be payment of interest as such. A debt consists of two portions, namely, interest and principal, and this amount must therefore be taken as part payment of principal. It might be contended that such a finding would be opposed to the case put forward by the plaintiff, because the exemption from limitation was sought on the ground that a portion of interest was paid as such and the plaintiff should not be permitted to say that the suit is saved from limitation by reason of a part payment of principal. Under O. 7, R. 6 where a suit is instituted after the expiration of the period prescribed by the law of limitation the plaint shall show the ground upon which exemption from such law is claimed. Upon a liberal construction of the plaint it must be deemed that the exemption was sought generally under S. 20, Limitation Act. Courts are bound to apply the law of limitation in suits

1. Ram Prasad v. Binaek Shukul, 1933 All 453=144 I C 899=55 All 632=1933 A L J 930.

2. Motabhoy Mulla Eassabhoy v. Mulji Haridas, 1915 P C 2=29 I C 223=42 I A 103=39 Bom 399 (PC).

whether it is pleaded or not and to dismiss a suit which is apparently beyond time. Conversely they are bound not to dismiss, as barred, a suit which, on the face of it, is not barred. In 13 C L J 139 (3), at p. 147, Mukerji, J., went further and said:

If the plaint shows the ground of exemption, the requirement of the Code is satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground. Consequently in the case before us the plaintiff-respondent is entitled to urge that the suit is not barred by limitation for a reason different from the one assigned in the plaint.

In 2 Lah 13 (4), it was held that:

the plaintiff having mentioned one ground of exemption in the plaint was not debarred by the provisions of O. 7, R. 6, Civil P. C., from taking another and an inconsistent ground to get over the bar of limitation and could consequently rely upon the acknowledgment made in the plea of the previous case.

In the present case the plaint does state the ground upon which exemption from the law of limitation was sought and as such the requirements of O. 7, R. 6 were satisfied, but if the case set up in the plaint is not proved, but certain other facts are established then the plaintiff is entitled to exemption on those other proved facts. In the cases of 25 All 256 (5) and 25 All 498 (6), the plaintiff was allowed to succeed on a case different from the one which he had set up, when the proved facts entitled him to a decree. The test to my mind is that justice should not be allowed to be defeated simply because a party has not been able to prove the case which he attempted to prove, but has proved certain other facts which nevertheless entitle him to a decree, provided the aggrieved party is not taken by surprise, and I cannot see any prejudice to the defendant in this case by allowing the plaintiff to allege that the payment of Rs. 50 should be considered as payment of a part of the principal.

It is not the defendants' case that the sum of Rs. 50 represented the entire liability of the executants which was wiped off by the payment of Rs. 50; they in fact deny the taking of the debt. The debtors endorsed the payment on the back of the bond and allowed the bond to remain in the possession of the creditors thus showing that the liability was not completely wiped off. The debtors might be illiterate, but this amount of intelligence must be attributed to them that a document evidencing liability should not be allowed to remain in the possession of the creditor when the liability was extinguished, and there was no point in making any endorsement at the back of the bond. The payment must therefore be taken as the payment of a part of the principal.

As the acknowledgment of payment appears in a writing signed by the person making the payment the suit would be within time. Under S. 3 (52), General Clauses Act, "sign" with its grammatical variations and cognate expressions shall, with reference to a person who is unable to write his name, include "mark" with its grammatical variations and cognate expressions. I might mention that before the Amendment Act of 1927 the proviso in S. 20, Limitation Act, ran as follows:

In the case of part payment of the principal of a debt the fact of the payment appears in the handwriting of the person making the same,

and it was held in some cases that where the endorsement of a part payment of principal was in the handwriting of a person other than the debtor, but it was signed by the debtor there was not a sufficient compliance with the proviso, but after the passing of the Amendment Act of 1927 where the language has been slightly altered and the words are "in the hand-writing of, or in a writing signed by, the person making payment" it will be sufficient if the writing is merely signed by the debtor although it is written by another person.

I now propose to consider the importance of the words "as such" in the first paragraph of S. 20 and of the proviso added by the Amendment Act of 1927. It is said that the words "as such" must be given some meaning and the meaning that was given to them by almost all the High Courts in India was that where payment is not expressed to be made on account of interest or on account of principal and interest, but is simply made on account of the debt it cannot be said that there is a payment on account of interest as such and limitation will not be saved on that footing. The words "as such" mean that there must be at the time of the payment some mention that the payment is wholly or partly for interest. It may be possible to infer that the payment was made by the debtor towards interest as such by the surrounding circumstances, for instance,

3. Hingu Miah v. Heramba Chandra, (1911) 13 C L J 139=8 I C 81.
4. Parmeshri Das v. Fakira, 1922 Lah 230=60 I C 772=2 Lah 13.
5. Abdul Ghani v. Mt. Babni, (1903) 25 All 256=1903 A W N 18 (FB).
6. Balmakund v. Dalu, (1903) 25 All 498 (FB).

where the amount that is paid represents the interest up to the date of payment or where there is an express provision in the bond that any money paid was to be applied first towards payment of interest and next towards payment of principal and money was paid by the debtor from time to time. The question is whether the words have the same meaning as they had before the Amendment. My learned brother Thom, J., has discussed that in interpreting a statute the intention must not be defeated by too literal an adhesion to its precise language and where this will lead to a manifest contradiction of the apparent purpose of the enactment, a condition may be put on it which modifies the meaning of the words, and sometimes some words may be rejected altogether. But even if it be assumed, and indeed we must assume that the Legislature was aware of the view taken by the High Courts and the argument be that if it still allowed the words to remain in the amended section the same meaning should be given to them. I am of the opinion that those words have now lost much of their importance.

Before the amendment it was not necessary that the acknowledgment of the payment of interest should be in the handwriting of, or in a writing signed by the person making a payment. This led to a number of frivolous suits long after the period of limitation prescribed, for it was easy for the plaintiff to say that within the time fixed the defendant paid him a small amount as interest and then the plaintiff attempted to prove such payment by adducing oral evidence which wasted much valuable time but ultimately the suit was in most cases dismissed. There is also no reason why the payment of interest should stand on a different footing from the part of the principal. These seem to be the reasons why the Legislature made it essential that the acknowledgment of the payment of interest should also be in the handwriting of, or in a writing signed by, the debtor. It is however important to note that where the part of a principal of a debt is paid by the debtor the words "as such" do not appear and therefore it is not necessary that the creditor must prove that the debtor at the time of the payment made some mention that the payment was towards part of the principal as such nor is it essential that this fact should necessarily he inferred from the surrounding circumstances.

When construing S. 20, Limitation Act, it is the attitude or the volition of the debtor which has got to be considered and the action of the creditor is not important. The way in which the creditor appropriates the payment is of no significance except as an admission and I have already discussed in an earlier portion of my judgment that an admission must be accepted as a whole or rejected as a whole. The words in both the paragraphs are "paid by the person liable to pay the debt or paid by the debtor" and not received or appropriated by the creditor. If therefore a plaintiff has failed to prove that the debtor expressly specified that he was making the payment towards interest as such or if such an intention on the part of the debtor cannot be inferred from the surrounding circumstances, it is obvious that the payment was made towards part of the principal (it is assumed that the payment cannot be inferred as a complete discharge of the liability and in this case from what I have said above it cannot be so inferred). Further it is not necessary that the payment should either by express words or by implication be towards part of the principal, because the words "as such" do not appear in the second paragraph, and the finding that the payment was towards part of the principal becomes inevitable on the principle of elimination; a debt as I said before consists of two portions, namely, interest and principal.

I agree with the learned Chief Justice for the reasons given by him, that the writing on the back of the bond does not operate as an acknowledgment under S. 19, Limitation Act. This is my answer in the case referred to us and I am of the opinion that the suit is not barred by limitation.

Thom, J.—This application in revision arises out of a suit for recovery of a sum of Rs. 250 on the basis of a bond dated 7th October 1927. The suit has been dismissed on the ground that it is barred by time. The applicant however contends that the claim is not barred by time as the date from which the period of limitation should be held to begin to run is 17th August 1930. On that date a sum of Rs. 50 was paid and the bond bears an endorsement within the meaning of S. 20, Limitation Act, by the debtor that this sum was paid. In the endorsement however there is no indication as to whether this sum is paid towards interest which was due or in part re-payment of principal.

The sum of Rs. 50 is less than the amount of interest that was due upon the bond on 17th August 1930 and it is less than the capital sum lent upon the bond. In these circumstances, in my judgment, the payment of Rs. 50 should be regarded as a payment towards interest. When a debtor makes a payment without specifying whether the payment is towards interest or towards capital then, in my view, it is only reasonable to infer that he intends the payment to be made towards interest. It is difficult to imagine a case where a debtor will make a payment and intend it to be appropriated towards the redemption of the capital sum when interest is due. The Court in such circumstances, in my opinion, in the absence of any evidence to the contrary, is entitled to hold that the payment is a payment towards interest. This view however is not in accord with the interpretation of S. 20, Limitation Act, as that section was interpreted by the Courts in India prior to the amendment of the Limitation statute in 1927. S. 20 as amended is as follows:

> Where interest on a debt or a legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made, provided that, save in the case of a payment of interest made before 1st January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by the person making the same.

The amendment of the section took the form of the addition of the proviso which now appears at the end of the section quoted. The view taken by the Court in India prior to the amendment of the statute was that by the words "as such" in the section the ligislature intended to place the burden upon the creditor claiming on the footing of a bond of proving that when a payment of interest was alleged the debtor specifically appropriated the payment towards interest at the date of payment. No doubt this was not an unreasonable interpretation to place upon the words "as such", but it is permissible to doubt if such a construction was a correct one.

The opposite party contends that the words "as such" in the amended section should be given the same meaning as they were given by the Courts in India prior to the amendment and he contends that, inasmuch as the claimant had failed to prove that the payment of Rs. 50 was a payment towards the redemption of capital or was specifically appropriated to interest by the debtor, it cannot have the effect, in view of the terms of S. 20, of starting a fresh period of limitation. In my view this argument is unsound.

It is true that the endorsement does not appropriate the payment of the Rs. 50 either towards principal or interest, but it is a fact that the sum of Rs. 50 is less than the amount of interest due or the amount of the principal sum. It clearly follows therefore that the payment must have been either towards interest or towards part payment of capital or towards both. I have already expressed my view that the payment should be regarded by the Court as a payment towards interest. Be that as it may, there can be no disputing the fact that the payment was either towards interest or was part payment of capital, or partly towards interest and partly towards capital, and which ever be the case, a fresh period of limitation will begin to run from the date of payment. The opposite party contends, however, that as the claimant has failed to prove that when making the payment the debtor specifically appropriated the same towards interest even though it has been appropriated towards interest by the creditor, it is not a payment of interest "as such" within the meaning of S. 20, Limitation Act, and therefore a fresh period of limitation does not run from the date of payment.

The difficulty has arisen because of the expression "interest paid as such" in the section. The words "as such" appear to me to be redundant. A payment of interest is a payment of interest and it is no more a payment of interest if the words "as such" are added. A payment of interest cannot be payment of anything else and it is no more clear that it is a payment of interest if the words "as such" are added. Prior to the amendment of the statute as already observed however a certain meaning was given to the words "as such" by the Courts in India. I can see no reason however for giving the same meaning to these words, which are clearly redundant, in the amended section. If the contention of the opposite party be accepted then the following will be the position: (1) If a payment were made and specifically appropriated towards repayment of capital a fresh period of limitation will run

from the date of payment. (2) If a payment were made and specifically appropriated towards interest a fresh period of limitation will run from the date of payment. (3) If a payment were made and no specific appropriation appears in the endorsement then, though the payment must either be towards interest or towards capital, a fresh period of limitation will not begin to run from the date of payment.

In my view an interpretation which leads to so absurd a result should not be accepted by the Court. It should not be assumed that the legislature intended to pass an enactment which would lead to such an absurd result. In my view the intention of the Legislature was perfectly plain, viz., to put payment towards interest and part payment of capital on exactly the same footing. If the creditor could prove by an endorsement in the hand-writing of the debtor a payment either towards capital or interest then from the date of that payment, the intention of the Legislature was, a fresh period of limitation should run. It follows therefore if this view be sound, that where an endorsement appears on the back of a bond in the handwriting of a debtor or his agent of the payment of a certain sum which is less than the amount of interest due, and less than the capital amount of the bond, a fresh period of limitation would run from the date of payment inasmuch as clearly the payment must be either towards interest or in part payment of principal, or partly towards interest and partly towards capital.

It is contended, on the other hand however that this interpretation would have the effect of reading out of the section the words "as such." This may be so, but it is permissible to read out words which are redundant or which lead to an absurd result and to refuse to give them an interpretation which would have the result of defeating the plain intention of the statute. Clearly in the present case if the words "as such" are given the meaning which was attributed to them by the Courts prior to the amendment of the Limitation Act then the plain intention of the section is defeated and, as already observed, an absurd position results. It may have been necessary, prior to the amendment of the section, to give the words "as such" a certain meaning in order to make the section intelligible. That in my view however is no reason for giving the same meaning to the words in the amended section if thereby the intention of the Legislature is defeated or a palpable absurdity results.

The opposite party relies strongly upon the general principle with regard to the interpretation of the statute; the full meaning must be given to every word of the statute. True it is that it is the duty of the Court to do full justice to each and every word appearing in a statutory enactment. The Court however should not shut its eyes to the facts. It is common knowledge that draftsmen are sometimes careless and slovenly and that their draftmanship results in an enactment which is unintelligible or, if intelligible, is absurd. Where this is so, there is no reason why the Court should diligently endeavour to spell out a meaning where there is no meaning or to solemnly affirm that the Legislature deliberately placed imprimature on an absurd enactment. No doubt, generally, full justice must be done to the words of a statutory enactment, but if the result of that is to do less than justice to the intelligence of the Legislature it is the duty of the Court to ignore the words which have the effect of making the enactment an absurd one. This view of the law is well founded on authority. Maxwell on Statutes, seventh edition, deals with the question of the modification of the language of a statute to meet the intention of the Legislature. The learned author states at p. 198:

> **Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere correction of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity or the absolute intractability of the language used.**

In (1905) 2 K B 748 (7), the question of modification of the words of a statute was considered. In the course

7. King v. Vasey and Lally, (1905) 2 K B 748=75 L J K B 19=93 L T 671=54 W R 213=69 J P 455=21 Cox C C 49=22 T L R 1.

of his judgment Lord Alverstone, C. J., approves of the passage from Maxwell's Interpretation of Statutes quoted above and proceeds with regard to the special circumstances of that particular case:

> This case is a good instance of the principle that the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language. The object of the amendment is plain and I think it is a case in which we must apply the principle I have cited, and so construe the section as to make it carry out that undoubted object.

In that case the Court decided to ignore certain words which appeared in the section under consideration and Wills, J., in the course of his judgment states:

> Nobody I think who considers the enactment in question as a whole, can doubt that such was the intention of the amending section, and, if so, something must be cast aside in order to make sense of the earlier section as amended. It matters little which words go, so long as the obvious meaning is preserved.

A similar question was considered in (1909) 2 K B 24 (8). The judgment of the Court which consisted of Darling, Walton and Pickford, JJ., was delivered by Darling, J., and in the course of his judgment the principle that to give sense to an enactment it is the duty of the Court to ignore certain words of the enactment is specifically approved. At p. 28 of the report the learned Judge states:

> We are of opinion that we may in reading this statute reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the Legislature; and this is to be ascertained from a careful consideration of the entire statute.

In 11 A C 627 (9), the principle was approved that where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of law, except in a case of necessity, or the absolute intractability of the language used. Now, there can be no doubt whatever that S. 20, Limitation Act, as amended is a typical example of sloppy draftmanship, and applying the principle approved in the decisions referred to above it is in my judgment permissible to attach no meaning whatever to the words "as such." In my view, in any case, the words "as such" are clearly redundant. Be that as it may, in the circumstances the Court ought to attach no significance to them. The Court ought to ignore them entirely in order not only to avoid an absurdity, but to give effect to the plain intention of the Legislature.

It may be observed that apart altogether from the absurdity of the position which would result from interpreting the words "as such", as these words were interpreted prior to the amendment of S. 20, such an interpretation would, for all practical purposes, render the section nugatory. In ninety-nine cases out of a hundred when a debtor makes a payment and endorses the same on the back of the bond he does not appropriate the payment either to interest or to principal. But if he makes no appropriation then according to the contention of the opposite party, a fresh period of limitation will not run from the date of payment. Such a result it is clear was not intended by the Legislature.

It was contended by the applicant that the endorsement of the payment on the bond by the debtor amounted to an acknowledgment of liability within the meaning of S. 19, Limitation Act. For the reasons given by the learned Chief Justice, I agree, that this contention is unsound. In the result I would hold that since the endorsement of the payment of Rs. 50 on the back of the bond in suit indicates a payment made on 17th August 1930 either towards interest or in part repayment of principal or partly towards interest and partly towards capital a fresh period of limitation began to run from that date and the suit is not barred by limitation.

Niamatullah, J.—I adhere to the view expressed by me in 1933 A L J 930 (1) and in 4 A W R 1346 (10), and concur with the Hon'ble Chief Justice in the answer which he proposes to give to the question referred to the Full Bench.

Sulaiman, C. J.—This is an application in revision from a decree of the Court of Small Causes dismissing a suit on the basis of a simple mortgage bond. The bond was executed on 7th October 1927, and was for Rs. 100 bearing interest at Rs. 3-2-0 per cent per mensem compounded every six months. On 17th August 1930 there was an endorsement made on the back of this bond stating that Rs. 50 were deposited on that date. Under this endorsement appeared the thumb-marks of the two executants. There was no specification in the endorsement as to whether the amount was paid towards interest or towards part of the princi-

8. King v. Ettridge, (1909) 2 K B 24=78 L J K B 479=100 L T 624=73 J P 253=53 S J 401=25 T L R 391.
9. Salmon v. Duncombe, (1887) 11 A C 627=55 L J P C 69=55 L T 446.
10. Kirpa Ram v. Balak Ram, 1935 All 47=15 I C 1007=1935 A L J 23=4 A W R 1346.

pal or partly towards interest and partly towards principal. The plaintiff filed his suit on 17th August 1933, on the allegation that the defendants had paid the amount of Rs. 50 towards interest and credited the same in his account towards interest and claimed the principal sum together with the balance of the interest giving up a small portion of interest. The Court below has dismissed the suit holding that it was barred by time. The matter came up before a learned Judge of this Court who referred the case to a larger Banch which has referred it to this Bench.

The reason for the constitution of a large Bench is that there has been some conflict of opinion in this Court on the proper interpretation of S. 20, Limitation Act. In the plaint there was no mention as required by O.7, R.6, that exemption from limitation was claimed on account of any acknowledgment in writing of the liability to pay, but exemption was sought on the ground that the amount had been paid towards interest. Other subsidiary questions have also been argued before us, but we think that this Bench should dispose of only the main question of law on which there is a conflict of opinion leaving other matters to be decided by the Bench concerned. Under S. 3, Limitation Act, it is the duty of the Court to dismiss a claim as time-barred if it is brought beyond the period prescribed in the schedule; but limitation may be saved if the plaintiff can bring himself within one of the exceptions. The burden therefore lies on the plaintiff to show that his case falls strictly within the scope of any such exception.

Now, the substantive S. 20, as distinct from the proviso thereto has remained unaltered ever since 1877. S. 20 of Act 15 of 1877, consisted of five paragraphs, the first three of which were as follows:

> When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf,
>
> or when part of the principal of a debt, is before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,
>
> a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made.

The Legislature had considered it necessary to have two separate paragraphs dealing with the payment of interest and part payment of principal with separate marginal notes. The words used were different and the provisions in respect of them were distinct. While that Act was in force, Courts in India attached special importance to the words "paid as such" in respect of payment of interest, and did not regard them as in any way superfluous. For instance, in 24 Bom 493 (11) at p. 499, it was pointed out that:

> The important words are at the commencement 'interest paid, as such by the person liable to pay' and further that while the forms of payment may differ, the section provides that it must be payment as interest by the debtor to the creditor. Mere crediting of interest by the creditor in his own account books is not enough to satisfy the statute. It must be interest paid as interest and distinctly stated to be so at the time of payment, or there must be evidence from which payment as interest may be distinctly inferred.

Similarly, in 31 All 495 (12), a Bench of this Court held that under S. 20 the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention: the mere appropriation by the creditor of these payments to interest is not such an indication. That was a case where the debtor in making the payments had on no occasion specified how they were to be appropriated and there was no other indication whatsoever to show that he had made the payments towards interest as such. The Bench accordingly held that the claim of the plaintiff was not saved from the operation of limitation by the payments so made.

And yet the Legislature when enacting Act 9 of 1908, did not think it at all necessary to alter the language of the substantive section, and the first three paragraphs were reproduced verbatim. The necessary inference to be drawn from their reproduction is that the Legislature accepted the importance attached to the use of the words "paid as such" which had occurred in the earlier Act. Had those words been in any way superfluous or redundant, Courts would not have emphasized their significance, and the Legislature would certainly have deleted them. Accordingly in 14 A L J 949 (13), it was held by another Bench that sums paid by the debtor on various dates and credited to the account and set off

11. Kariyappa v. Rachapa, (1900) 24 Bom 493=2 Bom L R 378.
12. Muhammad Abdullah Khan v. Bank Instalment Co. Ltd., (1909) 31 All 495=2 I C 379=6 A L J 611.
13. Bank of Multan Ltd. v. Kamta Prasad, 1917 All 465=35 I C 199=39 All 33=14 A L J 949.

against the pre-existing debts in the absence of any specification cannot be treated as payments made on account of interest as such nor would they save limitation as part payment of principal when there was no hand-writing of the debtor. See also 1929 Oudh 479 (14) and 7 Rang 522 (15).

In 1927 the Legislature amended the proviso to S. 20 which shall be considered hereafter, but again did not think it advisable to change the substantive section itself. It therefore follows that unless the old interpretation of this substantive section has become impossible, or there is anything else repugnant to maintaining its old interpretation, the words which are still retained must be given their full and natural meaning. All the words used in this section ought to be given their proper meaning and no words should be considered to be superfluous unless there is no other possible option.

In 1930 A L J 590 (16), it was laid down that a part payment of principal, appearing in the hand-writing of the person making it, is not required by S. 20, Limitation Act, to be expressly stated as being such; it is sufficient if it evidences a payment. It is not quite clear from the judgment, but probably the substantial sums of money paid under three cheques amounted to more than the interest due, in which case when the creditor had failed to show that at the time the amount was paid as interest, the Bench found it possible to treat the payment as having been made towards the principal. On the other hand, in 1933 A L J 930 (1), it was laid down by another Bench that where a debtor pays a certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal and the creditor appropriates such payments towards interest, the payment cannot be considered to be the payment of interest as such and will not save limitation on that footing, and further that the payment having been lawfully appropriated towards interest, it cannot be considered to be payment in part satisfaction of the principal and limitation cannot be saved on the supposition that a part of the principal was paid and the fact of payment appears in the hand-writing of the debtor. In the course of the judgment it was emphasized that where a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid; but it cannot be said that the remaining liability, by evidence aliunde, should be deemed to have also been acknowledged. This case was later followed by a member of the same Bench sitting singly in 1935 A L J 23 (10), but a Single Judge in 1934 A W R 1342 (17), may be considered to express a somewhat contrary view.

Now, the law of limitation imposes certain arbitrary time limits on suits. There may not be any clear principle of equity underlying such restrictions, which are entirely a matter of policy, aiming at expedition and intended to prevent stale claims from being litigated. The interpretation of sections in such an enactment has to be made strictly according to the language employed, and not on a consideration of what ought to be the law. Of course, where the language is ambiguous and capable of two interpretations, the section should preferably be interpreted so as to mitigate the rigour of the bar.

It seems to me that the main principle is that there is a fresh start for purposes of limitation with a fresh cause of action. Innovation of contract always gives rise to a new cause of action with a fresh starting point of limitation. In England, acknowledgment of a debt is considered to imply a promise to pay. And as a past debt can form a valid consideration for a contract, an acknowledgment of the liability to pay a debt, with the implied promise to pay it, may be treated as a new contract so as to give a fresh start for limitation. But in India section 19 is rather restricted and the acknowledgment must be made before the expiry of the period of limitation, and appears to be distinct from a definite promise to pay. Where there is an acknowledgment of liability to pay within the meaning of S. 19, the time is computed afresh from such acknowledgment.

It seems to me that the principle underlying S. 20 is also similar, but the Legislature has laid down that in certain specified classes of cases, there should be a conclusive presumption of an acknowledgment of liability to pay,

14. Narain Das v. Chandrawati, Kuar, 1929 Oudh 479=120 I C 825=6 O W N 776.
15. U Ba Gyi v U Than Kyank, 1929 Rang 339=120 I C 897=7 Rang 522.
16. M. B. Singh & Co., v. Sircar & Co., 1930 All 392=127 I C 581=52 All 459=1930 A L J 590.
17. Rambohar Misir v. Chaturghun Rai, 1935 All 58=154 I C 1070=1935 A L J 304=1934 A W R 1342.

with a consequent fresh start for limitation. S. 20, no doubt, is not professedly based on any such principle, but when its provisions are examined, this, to my mind, appears to be a legitimate inference.

Now, it is noteworthy that two separate paragraphs have been allotted to payments of interest and part payment of principal respectively, and the words employed also are different. There is prima facie therefore no reason to suppose that the Legislature has intended that they should be exactly on the same footing. A mere payment of interest is useless to save limitation unless the interest has been paid: (a) before the expiration of the period; (b) paid as such, and (c) by the person liable to pay the debt or by his duly authorised agent. The words "paid as such" necessarily imply that the interest must have been paid "as interest", which in its turn implies that it must have been paid as interest at the time of its payment. It is equally necessary that it must have been paid by the person liable to pay or his authorised agent. Thus something which is much more than a mere payment of money is required. It should be payment of interest professedly as interest which means that at the time of making the payment, the debtor should distinctly appropriate it towards interest and inform the creditor that he is doing so, so that the creditor thereafter may not have the option of appropriating it towards the principal. It is significant that the Legislature is so particular. As a general rule all payments made by debtors go in the first instance towards the discharge of the interest, but the Legislature has thought it fit that this general practice should not be enough, but in order to save limitation, the creditor must prove that the interest was paid as interest.

Before 1927 it was not necessary that the payment of interest as interest should be evidenced by any writing. It was accordingly open to the creditor to prove aliunde that interest was paid as such although such payment did not appear in the hand-writing of the person making the same. It consequently frequently led to disputes between the creditor and the debtor, the former in order to save limitation alleging that interest had been paid as such and the latter in order to claim protection pleading that no such payment had in fact been made. But as regards the part payment of principal, the section was specific and the proviso as it then stood insisted upon the fact of the part payment of the principal appearing in the hand-writing of the person making the same.

Now, if one examines the implications of these two provisions, it becomes at once obvious that they in a way implied an acknowledgment of a liability to pay a further amount that may be due. When interest is paid as interest that is professedly as interest and not towards principal; then there is an indirect admission that there is some principal sum due on which the interest has accrued and that principal is not being paid, but only interest thereon is being paid. The Legislature has therefore provided that where interest is paid as interest there should be a fresh start for limitation.

Similarly, where a part payment of the principal sum is made, there is a necessary admission that the other part is still outstanding, which implies an acknowledgment of a liability to pay the outstanding balance and so such part payment also gives a fresh start. But in order to prevent disputes as to whether the payment of the principal was in part or whole, it was thought necessary that the fact of the payment should appear in the debtor's hand-writing.

It is equally obvious that where a payment is made without any specification and the debtor does not signify whether he is making the payment of interest as such or of part payment of the principal, there is really no admission on his part that any further sum is still due from him, and there is therefore no acknowledgment of liability on his part. He merely pays a lump sum of money and by no means admits that the debt is not fully discharged. There is an admission no doubt that there was a liability on him to the extent of the amount so paid, but there is no acknowledgment of any further liability. Similarly where the debtor offers a sum of money distinctly on the condition that he is making the payment in full discharge of his liability, it would be impossible to hold that there is an implied acknowledgment on his part of a liability to pay the balance if it is found due. In the first two classes of cases the Legislature has allowed exemption from limitation, but has not considered it fit to make exemptions in the remaining classes of cases.

It seems to me that when a payment is made by a debtor, it may fall under any one of the following cate-

gories: (1) payment of interest as such by the debtor. In such an event the case would come under para. 1 of section 20. (2) Payment of interest by the debtor, but not payment as interest. For instance, a payment may be made by the debtor without specification, which entitles the creditor to appropriate the amount towards interest under S. 61, Contract Act. In such an event the amount if so appropriated would become a payment of interest, but it would not be interest paid as interest by the debtor. (3) Payment of interest as such, but not by the debtor. For instance, a co-judgment-debtor may make a payment on behalf of all the judgment-debtors, although he is not their agent and is not authorised to act on their behalf. In such a case so far as the other judgment-debtors are concerned, it would not be a payment by them, though the payment may well be of interest as interest: see 27 All 575 (18). (4) It may be a part payment of the principal, in which case it would fall under the second paragraph of S. 20. For instance, where the debtor professedly pays the amount in partial discharge of the principal sum. (5) It may professedly be the payment of the whole of the principal, when the offer is made by the debtor with the distinct condition that it is being paid in full discharge of the entire amount of the principal. In such a case, it would be difficult to hold that it was a part payment only, and there was an implied acknowledgment of the liability on the part of the debtor to pay the balance. (6) Or it may be paid without any specification whatsoever leaving the matter entirely at the option of the creditor to appropriate it either towards interest or towards principal.

Accordingly: (a) the creditor may appropriate the amount towards the principal when it becomes a payment of interest, though not paid by the debtor as such, or (b) the creditor may appropriate it towards the principal, in which case it would become a part payment of the principal and not a payment of interest. The second paragraph does not use the words "as such" and therefore it does not seem necessary for part payment of principal that the payment should have been made by the debtor at the time of payment professedly as part payment of principal. In my judgment S. 20 refers to the payments in categories Nos. (1), (4) and (6) (b) only, and not to the rest. These three categories, though mutually exclusive, are not between them absolutely exhaustive, for there are cases which may fall under the other four categories and not fall under either of these three. I am therefore unable to hold that where a payment is made without any specification, it must either be a payment of interest as such by the debtor or it must be a part payment of the principal by the debtor. In my opinion, there are additional possibilities as well.

As an illustration I may cite the instance of a tenant sending an amount by money order to his landlord without mentioning that the amount is being paid towards the principal part of the rent due from him or towards the interest on such rent, while in point of fact both the amount of the principal and the amount of interest as claimed by the landlord are separately in excess of the amount sent by money order. Can it be seriously suggested that the tenant in sending this sum of money without any further admission was acknowledging his liability to pay a further balance which may be claimed by the landlord. The tenant indeed might well dispute that anything more than the amount sent is due, in which case it can hardly be said that he had made an admission against himself. So far therefore as the substantive section stands, I see no difficulty whatsoever in interpreting it and I see no superfluity, inconsistency, anomaly or absurdity in its language. Payment of interest as such by the debtor and part payment of principal by the debtor are dealt with in the two separate paragraphs in a distinct manner and there is no ground for imagining that in spite of their being dealt with separately and in spite of the fact that different languages are employed in respect of them, they stand exactly on the same footing, and there is no distinction whatsoever between them.

I now come to a consideration of the effect of the amendment of 1927. The proviso in S. 20 of the Acts of 1877 and 1908, was in the following terms:

Provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

In place thereof the following proviso has been substituted:

Provided that, save in the case of payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

18. Ahsan-ul-ullah v. Dakhkhini, (1905) 27 All 575=1905 A W N 108=2 A L J 287.

As I read the substituted proviso, the only difference which it has made is that the hand-writing of the person making the payment is now necessary for both the payments mentioned in S. 20, and not only for part payment of the principal as before. The Legislature has apparently thought it fit to put a stop to the controversy between creditors and debtors as to whether any amount has in fact been paid or not. Without an acknowledgment in the hand-writing of the debtor, the payment would not save limitation. Thus it is no longer open to a dishonest creditor falsely to admit payment of interest in order to save his claim from limitation. But this extension of the necessity to have a writing in case of both the payments does not, in any way, imply any radical change in the substantive section itself, which the Legislature has left untouched. That section had stood in its original form for 50 years and had been interpreted in a certain way by the Courts in India.

There is absolutely no reason to alter the interpretation of that section merely because a written acknowledgment is now made necessary for payment of interest also. The Legislature must be deemed to have been aware of the importance attached to the words "paid as such" in the first paragraph and its deliberate act in not deleting those words should naturally be interpreted as implying that the interpretation put upon those words has been accepted by the Legislature and adhered to. I am altogether unable to see how this interpretation would make the section in any way absurd. As pointed out above, there are several categories of payment of money and only three of these come under S. 20. It was therefore necessary to retain both the paragraphs in this section so that the particular categories which are considered to give exemption should be identified and not confused with the other categories which are independent of them. Had the Legislature intended to make all payments of money, no matter of what kind and in what manner made, quite sufficient to save limitation, only if there was the hand-writing, it would have been very easy to redraft the section and have one short paragraph to express such an intention. This course has not been adopted. The section has been retained as it stood before, and only the proviso has been amended. I am, therefore, unable to hold that the entire effect of the use of the words "paid as such" which pre-eminently occur in the opening paragraph is altogether null and void, that the words have become redundant and superfluous and that it is only due to a clumsy drafting that those words have been retained. I am bound to attribute to the Legislature a clear appreciation of the interpretation of the law, as it stood at the time of the amendment and its retention of those important words as a deliberate act in order to give effect to its real intention, which must be gathered from the language used and not by a mere speculation as to what the true intention ought to be.

Where there is no specification made by the debtor, the creditor is entitled under S. 61, Contract Act, to make the appropriation in any way he likes; and if the creditor chooses to appropriate the amount towards the payment of interest due, the payment cannot be considered to have been a payment of interest as such by the debtor. It would no doubt become a payment of interest after the appropriation, but not a payment of interest as interest by the debtor. It would certainly not be a part payment of the principal by the debtor as such; but if afterwards appropriated by the creditor towards the principal, it would become a part payment of the principal. As already pointed out the section does not require that part payment of the principal should be made by the debtor professedly as part payment of principal at the time. It follows that where the amount was paid without any specification and the creditor has, in fact appropriated it towards principal, it would become a part payment of the principal.

I have therefore come to the conclusion that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20, but there is a mere unspecified payment of money, which has subsequently by the act of the creditor become a payment of interest. This is my interpretation of S. 20, Limitation Act.

Rachhpal Singh, J.—The question for determination in these two cases is whether on the proved facts of the two

cases the plaintiffs are entitled to the benefit of the provisions of S. 20, Limitation Act. In revision No. 219 of 1934 the facts were these: The plaintiff instituted a suit against the defendant to recover a sum of money on foot of a bond dated 7th October 1927. The suit was instituted on 17th August 1933. In the plaint it was stated that on 7th October 1930, the defendant had paid a sum of Rs. 50 towards interest, and therefore the plaintiff alleged that his suit was within limitation. It may here be stated that the payment was noted on the reverse of the bond and bore the thumb impression of the defendant. The trial Court held that it was proved that on 17th August 1930, the defendant had paid a sum of Rs. 50. No evidence was produced to show whether this payment had been made towards interest or principal. It appears that it was a general payment made by the defendant without specifying whether it was made towards interest or principal.

In revision No. 408 of 1934 the facts were very similar.

In both the cases the trial Court dismissed the claim as barred by limitation. In both the cases the plea of limitation was successful because the trial Courts felt compelled to decide the issue of limitation against the plaintiffs in view of the ruling of this Court in 1933 A L J 930 (1). It may here be stated that in revision No. 219 of 1934, on behalf of the defendant, the argument was that as the sum of Rs. 50 was a general payment and was not proved to have been paid as interest, the plaintiff was not entitled to a fresh period of limitation under the provisions of S. 20, Limitation Act. The plaintiff finding himself in this difficulty made an attempt to amend his plaint and to say that the payment of Rs. 50 had been made towards part payment of the principal sum secured under the bond. This amendment however was not allowed by the trial Court. Before Act No. 1 of 1927, was passed S. 20, Limitation Act, ran as follows:

> Where interest on a debt or legacy is before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made, provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the hand-writting of the person making the same . . . .

The position was this: If a debtor paid interest as such then a fresh period of limitation was available to the creditor from the date on which interest was paid. It was not necessary that there should be an acknowledgment in writing by the debtor. The debtor could make a payment without transaction being reduced to writing and it was open to the creditor to prove that as a sum of money had been paid towards interest a fresh period of limitation should be computed from the date of that payment. On the other hand if a payment was made towards part payment of the principal then before it could be taken advantage of by the creditor it was necessary that there should be an acknowledgment in the hand-writing of the debtor.

Some curious results followed. It was always open to a dishonest creditor whose suit had become barred by limitation to set up a false payment of interest in order to bring his case within limitation. All that was necessary for him to do was to produce some evidence to show that a small sum had been paid by the debtor as interest. Then there were cases in which the debtor had made a general payment without specifying whether the payment was made towards interest or principal. In view of the provisions of S. 20, as it stood before the passing of Act 1 of 1927, the creditor in case of a general payment could not say, where the payment was not noted down in writing that it had been made towards principal. The proviso to S. 20 that:

> In the case of part payment of principal of debt, the fact of the payment appears in the hand writing of the person making the same

stood in his way. So it was always to his interest in case of a general payment to plead that it had been made towards interest. The Courts insisted that whenever a payment was pleaded by the creditor for the purpose of bringing his claim within limitation, he had to prove not only that a sum was paid to him, but he was further required to establish that the amount paid was paid towards interest as such. If he failed to prove that the payment was made towards interest as such then the Court held that the limitation was not saved. In cases of payment made on general account constant disputes arose between the creditors and the debtors. The creditors always wished to prove that the payment which had been made was towards interest as such. By doing so they could get a

fresh start of limitation. On the other hand the debtors who wanted to defeat the claims of the creditors by pleading the bar of limitation always wished to prove that the payment had been made towards principal, but nevertheless the suit was not within limitation because no acknowledgment in writing had been made. It was in order to set at rest this fruitful source to litigation that the Legislature intervened and Act 1 of 1927, amending S. 20, Limitation Act, was enacted and came into force from 1st January 1928. The amended S. 20, Limitation Act, runs as follows:

Where interest on a debt or legacy is before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: Provided that, save in the case of a payment of interest made before 1st January 1928, an acknowledgment appears in the handwriting of or in the writing signed by the person making it . . . . .

The question which has to be considered, is what change has been made in the provisions of S. 20, Limitation Act, after the passing of the Amending Act 1 of 1927. In my opinion the only change that has been made is that after the amendment, payment of interest in order to save limitation must also be in the hand-writing of, or in the writing signed by the person making the payment. Before the amendment only part payment of the principal in order to give fresh start of limitation had to be in the hand-writing of the debtor. Now the same rule is made applicable in cases of payment of interest also. That is the only result of the amendment. In other respects the position is in no way altered.

The first part of S. 20 after the Amending Act 1 of 1927 stands exactly word for word, as it stood before the amendment. As already explained the only change made is that under the old section it was not necessary that payment of interest should be in the hand-writing of, or in a writing signed by the person making it, while now it is necessary.

The first point for consideration is whether how a general payment without any specification by the debtor would save limitation if the creditor makes an appropriation of payment towards the payment of interest. Before the amending Act 1 of 1927 was passed the view taken in a large number of ruling cases was that a payment towards general account made by a debtor without specifying whether such payment was to be appropriated in satisfaction of interest due from him was no payment of interest as such. It is not necessary to cite all the rulings in which this view was expressed, but I may be permitted to mention a few of them. In 6 A L J 611 (12), a Bench of two learned Judges of this Court held that under S. 20, Limitation Act, the payment of interest will save limitation when the payment is made as such, that is to say, that the debtor has paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention and the mere appropriation by the creditor of these payments to interest is not such an indication. I am aware of no case of this Court in which a contrary view may have been expressed.

3 Bom 198 (19) was a case in which a debtor had at different times made payments to the plaintiff in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt. The Bombay High Court held that there had been no payment of interest "as such" by the defendant so as to bring the case within Cl. 1, S. 21, Limitation Act (9 of 1871), and that the claim was barred. 4 Bom L R 231 (20) was a case in which at the time of making the payment the debtor had made an endorsement saying that he was paying Rs. 4 out of the entire amount payable on account of principal and interest in respect of this bond. The Court therefore held that there was a payment of interest as such which saved limitation. That case is not applicable to the case before us, for the simple reason that here there is no indication that the debtor expressed an intention that he was paying money in payment of interest. The next Bombay case is 5 Bom L R 350 (21). The learned Judge who decided this case held that where payments were made towards the satisfaction of a debt and there was nothing to show whether they were made in respect of principal, or interest, or both, or indefinitely on general account, they could not serve to extend the time, under S. 20, Limita-

19. Hanmant Motichand v. Ramba Bai, (1878) 3 Bom 198.
20. Suhraya Kamati v. Pakaya (1902) 4 Bom L R 231.
21. Damodar Ramchander v. Jankibai, (1903) 5 Bom L R 350.

tion Act, unless it was established clearly in some way that payments were made on account of interest as such. The ruling reported in 4 Bom L R 231 (20), referred to above was distinguished on the ground that in that case the Court below had found as a matter of fact that the payment was for principal and interest. The next Bombay case on the point is 9 Bom L R 1329 (22). It was remarked that:

> Principal must always be paid as principal, but the fact of the payment must appear in the hand-writing of the person making the same, i. e., of the debtor or his duly authorized agent; consequently, if a lump some be paid by a debtor to his creditor, and no intimation be given as to how it is to be appropriated, and no memorandum be made by the payer of its payment, it cannot be treated as part payment of principal, because of the want both of appropriation and of a memorandum, and it cannot be treated as part payment of interest because it was not paid as such.

The Calcutta High Court in 20 I C 857 (23), held a creditor cannot claim the benefit of S. 20, Limitation Act, unless he can show that the payment was made on account of interest as such: there must be either some express declaration by the debtor, or there must be circumstances from which such an intention on the part of the debtor may be inferred. Another Calcutta case on the point is 43 I C 812 (24). It was held that the expression "as such" in S. 20, Limitation Act, implies that something more than mere payment of interest must be established to entitle the creditor to the benefit of that section. At p. 814 the following observations were approved:

> This section requires something more than the English law does, namely, that interest must be paid as interest, that is, it must be distinctly stated at the time of payment that it is paid on account of interest, or else there must be evidence from which the payment as interest may be distinctly inferred, and if so, the mere proof of payment is sufficient.

In 31 I C 782 (25), Shadi Lal and Leslie Jones, JJ., held in a Punjab case that:

> Payments made by the debtor in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, do not amount to a payment of interest as such to save the bar of limitation.

The same view was taken in a Nagpur case 59 I C 709 (26); in an Oudh case 1930 Oudh 287 (27); and in Burma case 31 I C 101 (28). A contrary view appears to have been expressed in 14 I C 580 (29), by a Bench of Madras High Court.

It appears to me that the preponderance of authority is in favour of the view which has prevailed in this Court and which is expressed in 6 A L J 611 (12). It will thus be seen that there is ample authority in favour of the proposition that before the amending Act 1 of 1927, a general payment without specifying that it was made on account of interest as such did not save limitation. The amending Act 1 of 1927, has made no change in the first part of S. 20. When a creditor wants to bring his case within the provisions of S. 20 he has to show not only that a payment was made, but has further to establish that the payment was made of interest as such. Before the amending Act he could prove the payment of interest as such without showing any writing signed by his debtor whereas now he is required to show that the payment was signed by his debtor. In the cases before us all that the creditors have been able to establish is that payments which are endorsed by the debtors on their bonds have been made. In other words the creditors have proved general payments. In my opinion they cannot be deemed to be payments of interest as such which would save limitation.

It was argued before us that as the debtors had not made appropriation and as the creditors appropriated the payments towards interest it should be deemed that they were made towards payment of interest. I do not think that a general payment without specification by the debtor that it was being made towards interest as such would attract consequences of S. 20, Limitation Act. The ruling of this Court in 6 A L J 611 (12), is against the contention of the applicant. In that case it was held that the mere appropriation by the creditor of payments to interest is not an indication that the payment was made towards interest as such. The same view was expressed in 87 I C 746 (30), by the two learned

22. Ranchordas Trib Howandas v. Pestonji Jehangir, (1907) 9 Bom L R 1329.
23. Bitari Ram v. Kunjf Singh, (1913) 20 I C 857.
24. Charu Chandra v. Karam Buxa, 1918 Cal 477=43 I C 812=27 C L J 141.
25. Muinuddin v Muhammad Ahmad, 1915 Lah 275=31 I C 782.
26. Jago v. Mahadeo. 1921 Nag 94=59 I C 709.
27. Lalji v. Ghasi Ram, 1930 Oudh 287=128 I C 276=7 O W N 420.
28. Nga Twe v. Nga Ba, 1915 U B 11=31 I C 101=2 U B R 80.
29. Narayana Iyengar v. Alagiriswamy Iyengar, (1912) 14 I C 580.
30. Mahommad Kamen v. Ahmad Ali, 1925 Cal 1030=87 I C 746.

Judges of the Calcutta High Court. It was held that under S. 20, Limitation Act, payment towards interest must be deemed as such, that is, it must expressly be towards interest, and that it has nothing to do with the general right of the creditor of appropriation of money either towards interest or towards principal. The question of appropriation has nothing to do with the question of the rule of limitation enacted by S. 20, Limitation Act. Where a debtor makes the general payment without specifying whether he is making it towards interest or principal, it is the absolute right of the creditor to make an appropriation. All that this means is that it is open to him to accept the payment either towards part payment of interest or towards part payment of prinicpal. But that has nothing to do with the question of limitation. By crediting the payment towards the part payment of interest the creditor would not be entitled to claim a fresh period of limitation because the payment has not been made towards interest as such and therefore would not come within the terms of S. 20, Limitation Act.

The next question which has to be considered is whether in the case of a general payment without any specification by the debtor a creditor can say that the payment should be treated as having been made towards part payment of the principal which would entitle him to claim a fresh period of limitation from the date of payment in view of Cl. 2, S. 20, Limitation Act, as it stands now. In my opinion the applicants cannot be permitted to do so. In 44 Mad 570 (31), their Lordships of the Privy Council made the following observations which are to be found at p. 573 of the report:

> The question then remains as to how, apart from any specific appropriation, these sums ought to be dealt with. There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Rigby, L J., in (1898) 2 QB 460 (32) at p.466 in these words: "The defendant's counsel relied on the old rule that does no doubt apply to many cases, namely that where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid would be depriving the creditor of the benefit to which he is entitled under his contract."

In the case before us large sums of money were due at the time of the payments on account of interest so it cannot be said that the debtors could possibly have intended that the payments should go towards the part payment of principal. There can be no doubt that the payments were made towards the reduction of interest and not towards payment of principal. The question whether such payments of interest would attract the benefit of S. 20, Limitation Act, however, stands on a different footing. Mere payment towards interest does not attract the provisions of S. 20. If a man goes and makes a payment to his creditor and says that he is making it towards interest the creditor would not on account of such payment be entitled to claim the benefit of S. 20. The reason is that before any advantage can be claimed under S. 20 certain formalities have to be observed. One is that the payment of interest should bear the signature of the debtor or his agent and the other is there must be something to indicate that payment was made on account of interest as such. If these formalities are not observed then the first part of S. 20 cannot come to the aid of the creditor. Nor can the creditor ask the Court that on failure of his proving that the payment was made towards interest as such, it should be treated as having been made towards part payment of the principal. The case might have stood on a different footing altogether if at the time of payment the entire sum paid could not possibly have gone towards the payment of interest only. Take the following case as an instance: On the date of payment Rs. 50 are due on a bond on account of principal and Rs. 2 on account of interest. The debtor makes the payment of Rs. 20. In that case the creditor would be right in saying that only Rs. 2 had been paid towards interest and the balance must be deemed to have been paid towards part payment of the principal. To such a case the provisions of the second part of S. 20 would be clearly applicable. The payment of interest might not enlarge the period of limitation because it was not paid as such, but the payment of the balance would certainly be one towards part payment of the principal and if the endorsement about it is

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31. Venkatadri Appa Rao v. Parthasarathi Appa Rao, 1922 P C 233=61 I C 31=48 I A 150 = 44 Mad 570 (PC).
32. Parr's Banking Co. v. Yates, (1898) 2 Q B 460=67 L J Q B 851=47 W R 42.

signed by the debtor or his agent then it will certainly enlarge the period of limitation. But where the sum due on acount of interest is much larger than the amount paid then in my opinion it will be wrong to say that as the payment cannot be treated as having been paid in payment of interest as such, it might be treated as having been made towards part payment of the principal.

43 All 216 (33). was cited on behalf of the applicants. What was laid down in that ruling was that it was not necessary that writing referred to in S. 20, Limitation Act, 1908, must itself show that the payment made was made as part payment of the principal sum due as it may be obvious from the fact that no interest was due at the time of making the payment that it could only have been made in part payment of the principal. This ruling would be applicable to those cases where it appears that on the date of payment the whole sum which was paid could not possibly have been intended to be paid only towards interest. I have given an instance of a case of that description above. But the rule laid down in that case would have no application to cases where it appears that on the date of the payment a larger sum than the amount paid was due on account of the interest. Another ruling relied upon by the applicant was 1930 All 392 (16). In that case the learned Judges held that if the payment could not be proved to have been made towards interest as such then it must be treated as a payment towards principal. With great respect to the learned Judges who decided this case I find myself unable to agree with this view. It does not appear that the ruling of their Lordships of the Privy Council reported in 44 Mad 570 (31), referred to above was brought to the notice of the learned Judges. Nor does the case show whether at the time of the payment the interest due was more or less than the amount paid. If at the time of each payment the entire interest due then was wiped off and there remained a balance, then certainly it can be said that the balance went in part payment of the principal and thus limitation was saved. On the other hand if interest due on the date of each payment was more than the amount actually paid then it cannot possibly be argued that any portion of the payment made went towards the part payment of the principal. In 44 Cal 567 (34), there are certainly observations which support the contention of the applicants before us. At p. 571 the learned Judges made the following observations:

> **The learned Judge said. "If I am wrong in the conclusion that I have arrived at as to the payment being a payment of interest as such, then the payment being proved and there being admittedly a document in the handwriting of the defendant from which the fact of the payment appears, the payment must be taken to be a payment on account of principal." That view I think is right. In none of the cases where a different view has been taken, was there a document in writing to satisfy part 2, S. 20, Lim. Act. In this case there is a distinct finding by both the Courts below as regards the payment. If the Judge was right that the evidence did not establish that the payment was made on account of interest as such, still there was evidence establishing the payment plus the document in writing proving the fact of payment. On that evidence the learned Judge was entitled to come to the conclusion that the payment was a part payment on acccunt of principal.**

With utmost respect I find myself unable to agree with the view expressed in these observations. A perusal of the case shows that the learned Judges held that there was a finding of fact by both the Courts below that the payment has been made towards the part payment of principal and was in the hand-writing of the debtor and therefore they held that S. 20 was applicable. As I have already remarked, I fail to see how it can be possibly argued that a part payment towards principal was made when a much larger amount than the sum paid was due on account of interest.

For the reasons given above I am clearly of opinion that where a general payment without any specification is made by a debtor and at the time of payment a larger sum with the amount paid is due on account of interest then the creditor cannot be heard to say that it was a payment towards the part payment of the principal, which would give him a fresh period of limitation under S. 20, Limitation Act. On the other hand if in a case it is found that at the time of general payment without specification the entire interest was wiped off and there remained a balance then in that case a creditor would be entitled to a fresh period of limitation under S. 20, because a part of the payment undoubtedly went towards the part of the principal.

33. A. Curlendar v. Abdul Hamid, 1921 All 335=59 I C 941=43 All 216.

34. Hem Chandra Biswas v. Purna Chandra Mukerji, 1918 Cal 891=35 I C 638=44 Cal 567=22 C W N 190.

In 1933 A L J 930 (1), which was a case decided by my learned brother Niamatullah, J., and myself, the view taken was that where a debtor pays a certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal, and the creditor appropriates such payment towards interest, the payment cannot be considered to be the payment of interest as such and will not save limitation. It was also held that the payment having been lawfully appropriated towards interest it cannot be considered to be payment in part satisfaction of the principal, and limitation cannot be saved on the supposition that a part of principal was paid and the fact of payment appears in the hand-writing of the debtor. I adhere to the view taken in this case. I may be permitted to point out that the same view was taken by Niamatullah, J., in 4 A W R 1346 (10).

It has been suggested that after the passing of Act 1 of 1927, the words "as such" have lost their importance. I find myself unable to agree with this contention. These words are there, and there appears to be no justification for holding that they have ceased to be of any importance. I find myself unable to share the view that there is any absurdity in this section as it stands now. The law of limitation is always arbitrary and the question as to whether or not the rule of limitation laid down in a particular section is inequitable is a point with which the Courts have no concern whatsoever. The duty of the Court is to interpret the section as it stands. If there is any inequity then the remedy lies in the hands of the Legislature. If the Legislature had intended to enact a rule that a general payment without specification would save limitation then it could have easily expressed its intention by enacting a rule to this effect. All that the Legislature had to say was that payment made by a debtor would give a fresh period of limitation to the creditor from the date of the payment. Before Act 1 of 1927, was passed the Legislature were aware that Courts had held, in a large number of ruling cases, that so far as payment towards interest was concerned limitation could only be saved if it was proved that the debtor made payment of interest as such. But we find that the Legislature did not consider it fit to change the wording of this section. We would therefore be justified in holding that the intention of the Legislature was that the distinction between general payments and payments of interest as such should continue. As I have already mentioned, the only change made was that when a payment was made towards interest then like part payment of principal it had to be in writing bearing the signature of the debtor or his agent.

For the reasons given above I hold that in the two cases before us there was no payment of interest as such. Nor was there any payment of a part of the principal. A creditor who has appropriated a payment towards interest cannot get a fresh period of limitation by saying that the general payment without specification may be treated as part payment of principal, when on the date on which the payment was made a larger sum than the amount paid was due to him on account of interest. I would therefore hold that the plaintiff-applicants are not entitled to claim a fresh period of limitation from the dates on which general payments without specification were made to them.

Order by the Court.

Where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20. The case should go back to the referring Bench for disposal.

B.D. *Reference answered.*

A. I. R. 1935 Allahabad 964

SULAIMAN, C. J. AND BENNET, J.

Gurcharan Prasad and *another* — Plaintiffs—Appellants.

v.

Jai Narain Singh and *others*—Defendants—Respondents.

Second Appeal No. 682 of 1931, Decided on 30th January 1935, from decision of Second Addl. Sub-Judge, Jaunpur, D/- 22nd January 1931.

Limitation Act (1908), Art. 142—Suit for possession of land by removal of trees on it —Tenant, user of land, amounting to user by license—Tenants not having legal right to use the land—Art. 142 applied and not Art. 32.

The landlords brought a suit against the tenant for possession of certain plots by removal of trees planted by the tenants on that land. The land belonged to the landlord and the user of the land by tenants was a mere use by license and not as of a legal right.

Held: that for a suit for possession of the land Art. 142 applied and not Art. 32, as Art. 32 dealt with person having legal right to use the property: 10 *All* 634 and 1924 *All* 443, *Ref*; 1926 *Oudh* 341, *Dist*. [P 965 C 2; P 966 C 1]

K. Verma—for Appellants.

Lakshmi Saran—for Respondents.

Bennet, J.—This is a second appeal by the plaintiff a portion of whose suit has been dismissed. The plaintiff sued as the zamindar of a certain village in Jaunpur District, stating that the defendants were tenants and that in certain plots with which the defendants had no concern the defendants had planted a large number of Mahua and mango trees and bamboo clumps. The two plots in question Nos. 437/2/2 and 424/1 comprise about 9½ acres. The plaint asked that the plaintiff might be put in possession of these plots by removal of the trees planted by the defendants. The defendants set up various pleas admitting that the trees existed on the land in dispute against the will of the plaintiff and claiming that the defendants were former zamindars and that the land in question was not sold when their zamindari was sold and that they had rights in the land in question and that the land constituted a grove. An issue was referred to the Revenue Court which found that the defendants were not grove-holders in the land in question, and this finding of the Revenue Court was upheld by the lower appellate Court. The Court of first instance applied Art. 32, Limitation Act, to the case and granted the plaintiff a decree directing defendants 1 to 5 to remove the trees which were under two years old and restraining these defendants by an injunction from planting any new trees. The claim was dismissed in regard to trees which were more than two years old. The plaintiff appealed and the defendants filed cross-objections. The lower appellate Court dismissed the appeal of the plaintiff agreeing that the proper article to apply was Art. 32.

The chief point argued in second appeal is that Art. 32 which prescribes a period of two years limitation does not apply. That article is stated to deal with a suit "against one who, having a right to use property for specific purposes perverts it to other purposes." The defence is based largely on an admission by the pleader for the plaintiff in the present suit which is translated at p. 19 of the paper book. This statement sets out that the defendants and other residents of the village can graze their cattle on kot land (that is one of the numbers) during the rainy season and their cattle can lie on it and can walk on it and defendants and residents of other villages can use it to attend to the call of nature and as threshing floor and for preparation of cowdung cakes, for sugar mills and cattle troughs, etc. All these rights (haquq) have been allowed by the zamindar to the tenants and to the defendants by way of favour. It was further stated that the defendants had no right to plant any new trees without the permission of the zamindar.

For the defendants it is argued that the use of the word haquq implies that the defendants had rights in this land and therefore a right to use the property for specific purposes within the meaning of Art 32, Sch. 1, Limitation Act. We do not consider that by the mere use of the word "haquq" counsel for the plaintiff meant to make any such admission and even if this were considered an admission the case must be decided on the evidence. The Court below has not found that there was any right to use the property within the meaning of the use of the word right in Art. 32. The way in which the Court finds that the defendants could use the property in our opinion amounts to a mere user by way of license in common with persons from other villages. Art. 32 in our opinion deals with the case of a person having legal right to use certain property. Two cases have come before this Court dealing with similar matters. The first ruling is reported in 10 All 634 (1). In that case a zamindar brought a suit for injunction to have certain trees removed from waste land on which the defendants had planted them. It was held that such a suit was governed by Art. 120 and not by Art. 32. In 46 All 52 (2), there was a case under similar circumstances where the difference lay that the plaintiff sued for possession as in the present case. As the plaintiff sued for possession it was held that the period of limitation in a suit for possession under these circumstances was 12 years. Presumably Art. 142, Limitation Act, was applied. Learned counsel has relied on a ruling of the Oudh Chief Court, 93 I C 89 (3), where a plaintiff zamindar brought a suit to

1. Musharraf Ali v Iftekhar Husain, (1888) 10 All 634=1888 A W N 257.
2. Muhammad Shafi v. Bindeshri Saran Singh, 1924 All 443=75 I C 266=46 All 52.
3. Ismail v. Thakur Lal, 1926 Oudh 341=93 I C 89.

restrain the defendant from burying his dead in a portion of a ground used as a public grave-yard and for removal of trees eight years after they were planted and for possession of the site. It was held that the claim for removal of the trees was governed by Art. 32 and was barred by time. We consider that this case was different because the land being a grave-yard the plaintiff was not entitled to sue for possession which was refused.

Some further argument was made that an inference drawn by the first Court that trees had been planted with the tacit permission of the zamindar so far as the trees over two years of age were concerned has not been set aside by the lower appellate Court. As regards this permission there was no pleading of consent; on the contrary, in para. 5 of the written statement the defendants definitely admitted that the trees had been planted and maintained against the will of the plaintiff. We consider therefore that no such inference could be drawn in this case contrary to the pleadings.

We consider that the case is governed by Art. 142, Limitation Act. The finding of the lower appellate Court is that the trees are of a less age than 12 years. We accordingly allow this appeal and grant the plaintiff a decree for possession of the plots with the removal of all the trees with costs throughout.

B.D. *Appeal allowed.*

A. I. R. 1935 Allahabad 966

SULAIMAN, C. J. AND BENNET, J.

Naubat Tewari—Plaintiff—Appellant.

v.

Jangli Tewari and *others*—Defendants and Plaintiff—Respondents.

Letters Patent Appeal No. 41 of 1934, Decided on 21st February 1935, against decree of Young, J., D/- 7th March 1934.

(a) Agra Tenancy Act (1926), Ss. 230, 121—Jurisdiction—Claim for grove-land and trees—Civil Courts jurisdiction is barred.

The jurisdiction is determined by the allegations in the plaint. Where therefore the claim in the plaint is for a declaration not only in regard to the trees in the groves but in regard to the grove-land also, the suit is barred from the cognizance of a civil Court by S. 230. S. 121 of the Act provides an ample remedy for the plaintiffs. [P 966 C 2]

(b) Agra Tenancy Act (1926), S. 99—Claim with regard to declaration of title to trees in grove—Civil Courts jurisdiction is barred.

Even a suit for the trees in the groves lies in the revenue Court as the trees are a matter for which compensation can be given by the revenue Court if there is wrongful ejectment under the provisions of S. 99. [P 967 C 1]

Janaki Prasad—for Appellant.

K. Verma—for Respondents.

Bennet, J.—This is a Letters Patent appeal by a plaintiff against a judgment of a learned Single Judge of this Court holding that the suit of the plaintiff lies in the Revenue Court and directing that the plaint should be returned for presentation to the proper Court. The suit was filed in the Court of the Munsif and the two lower Courts granted a decree in favour of the plaintiff.

The suit relates to groves and the question is whether such a suit should lie in the Civil Court or in the Revenue Court. The plaint sets out the relief as follows:

> That a decree may be passed declaring the title of the plaintiffs to the groves bearing the numbers and boundaries given below, and that it may be declared that the defendants have no right or concern with the same.

The numbers of the groves are given according to the khasra. In para. 11 of the plaint it is set out that the plaintiffs came to know that for some years past the defendants have been wrongly entered in the revenue papers by the patwari for the entire grove in dispute. The plaint set out that in an auction-purchase on 21st August 1857, the groves in which the plaintiffs claim the right of a tenant were sold to the ancestors of the defendants and that subsequently the plaintiffs returned the entire sale proceeds to the auction-purchaser and the groves were re-transferred to the ancestor of the plaintiffs, but that in spite of this fact the defendants had at various times made disputes and claimed that they owned a certain share in the groves; that they were now entered for the whole grove. The jurisdiction is determined by the allegations in the plaint. In the present plaint it is clear that the suit is in regard to the four plots bearing certain khasra numbers and we cannot accept the contention of learned counsel for the plaintiffs that the suit is in regard to the trees on those plots. There is therefore a claim in the plaint for a declaration not only in regard to the trees in the groves, but in regard to the grove-land also. There exists no doubt in our minds that such a suit is barred from the cognizance of a Civil Court by S. 230, Agra Tenancy Act, and S. 121 of this Act, provides an ample remedy for the plaintiffs. Ac-

cordingly we dismiss this Letters Patent appeal with costs.

As regards a suit for the trees in the groves, we are also of opinion that such a suit would lie in the Revenue Court as the trees are a matter for which compensation can be given by the Revenue Court if there is wrongful ejectment under the provisions of S. 99, Agra Tenancy Act.

B.D. *Appeal dismissed.*

A. I. R. 1935 Allahabad 967

BENNET, J.

Inderjit Rai and *others*—Appellants.

v.

Gajadhar Raj and *another*—Respdts.

Second Appeal No. 212 of 1933, Decided on 5th March 1935, from decision of Sub-Judge, Ghazipur, D/- 17th November 1932.

Co-sharer—Lease by him of his sir and khudkast for non-agricultural purpose—Building erected on such land—Other co-sharer can sue for demolition of such building.

A cosharer in possession of land as his sir or khudkast which is agricultural land and not abadi is not entitled to alter the nature of that land by turning it into building land (as distinct from building appurtenant to an agricultural holding). If he turns it into building land either by building on it himself or by letting it to a tenant for the purpose of building, he is using the land in a way which is contrary to the interest of the other co-sharers in the mahal. By doing so he gives the other co-sharers a right to sue for joint possession and a right to have the building demolished : 1894 *A W N* 127 and 1935 *All* 943, *Dist.* [P 968 C 1]

Gopalji Mehrotra—for Appellants.

Gopi Nath Kunzru—for Respondents.

Judgment.—This is a second appeal by defendants first and second parties against a decree in favour of the plaintiffs by the lower appellate Court. The facts of this case are not in dispute. The plaintiffs and defendants second party are co-sharers in a mahal. On 27th June 1930, the defendants second party executed a permanent lease in favour of defendants first party of four bighas odd of agricultural land, not land in the village abadi, for the purpose of building at a single premium of Rs. 1,651. The plaintiffs brought a suit without delay on 1st August 1931. In the plaint and written statement it is common ground that the land was agricultural ground previous to the lease. The plaint alleged that the land had been formerly occupied by tenants who were joint tenants of the parties, and the written statements allege that the lands had been the exclusive sir or khudkasht of defendants second party. On both these allegations the land was agricultural land. The lower appellate Court found that the land was entered for the first time as khudkasht by an order of 7th January 1930, and that the defence had failed to prove that the land had been entered as khudkasht in the year prior to Act 3 of 1926, coming into force, i. e., 1333 F., and therefore the land could not be regarded as the exclusive sir of defendants second party.

The lower appellate Court also held that the evidence of estoppel and acquiescence could not be accepted and that neither estoppel nor acquiescence were proved. Learned counsel for appellants argued that as the defendants first party had been put in possession by defendants second party who were co-sharers and the land was recorded as the khudkasht of defendants second party at the time of the lease therefore the plaintiffs could not eject the defendants first party and could not get a decree for the demolition of the constructions made by them. He based his argument on a ruling reported in 1894 A W N 127 (1), where it was held that one co-sharer could not sue for possession against the lessee of other co-sharers and that such a lessee was not a trespasser. This ruling was followed in a Letters Patent Appeal No. 62 of 1934 [1935 All 943 (2)], in which judgment was delivered yesterday on 4th March 1935, by a Bench of which I was a member, and in that case there was a suit against certain defendants who had been put in possession of a certain plot by co-sharers of the plaintiffs. It was held that the possession of the defendants was not that of trespassers and that the plaintiffs could not get a decree for possession against them. Now, in both these rulings the land had been let for agricultural purposes by a co-sharer who was in possession of it. A co-sharer is entitled to hold possession of land in a mahal as his sir or khudkasht. But such possession is for agricultural purposes. This is shown by the definition of "sir" in S. 4, U. P. Act 3 of 1926, which refers in all its clauses to land, and khudkasht similarly refers to land. Land is defined in S. 3 (2) as

land which is let or held for agricultural purposes or as grove-land or for pasturage .... It does not include land for the time being occupied by dwelling houses or manufactories or appurtenant thereto.

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1. Bholanath v. M. Buskin, (1894) A W N 127.
2. Partap Ahir v. Gopi Ram, 1935 All 943.

In the present case when the lease was granted and the buildings were erected the land ceased to be land within the definition of S. 3 (2), Agra Tenancy Act. One result of the land ceasing to be agricultural land is that the profits of that land can no longer be taken into account in suits under S. 226 or S. 227 of that Act. As long as the land remains agricultural land in the possession of a co-sharer a rate of rent is assessed on it in a suit for profits and the other co-sharers get the benefit in such a suit. But when the land ceases to be agricultural land the other co-sharers are deprived of that benefit. In other words, the land in the mahal taken into account in a suit for profits has become less by the area of 4 bighas which has now been turned into building land. There is no provision in the Act by which the profits from a building lease even if an annual rent had been reserved could be taken into account in a suit for profits. "Sayar" which is defined in S. 3 (4) is not defined in a way which would include the annual rent from a building lease. I consider that a co-sharer in possession of land as his sir or khudkasht which is agricultural land and not abadi is not entitled to alter the nature of that land by turning it into building land (as distinct from building appurtenant to an agricultural holding). If he turns it into building land either by building on it himself or by letting it to a tenant for the purpose of building, he is using the land in a way which is contrary to the interest of the other co-sharers in the mahal. By doing so he gives the other co-sharers a right to sue for joint possession and a right to have the building demolished. In the present case the question of sir does not arise as the Court below has held that the land is not sir. Some argument was made that the plaintiffs could obtain some relief by suing for partition and asking that this particular 4 bighas should be placed in the share of the defendants' second set. The existence of such a remedy does not in my opinion bar the plaintiffs from coming to a Civil Court in the present suit. I consider that the decree of the lower Court was a decree which was perfectly legal on the facts found and I accordingly dismiss this second appeal with costs. As the question is of some complexity permission is given for a Letters Patent appeal.

B.D. *Appeal dismissed.*

A. I. R. 1935 Allahabad 968

BENNET, J.

Chandrabhan Lal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 233 of 1935, Decided on 29th July 1935, from order of Sess. Judge, Mirzapur, D/. 25th March 1935.

Penal Code (1860), S. 218—Patwari making false entry in khasra—Criminal intention proved—Patwari is guilty under S. 218.

A patwari is responsible for the accuracy of all entries in the khasra and must satisfy himself of the facts by inquiries from the persons concerned as well as by the field inspections. Where a patwari knows that a particular person was in possession and he fails to enter his name in the khasra, he is making an entry which he knows to be false, and if such false entry is made with a criminal intention of causing loss to the person, an offence under S. 218 is committed. [P 969 C 1, 2]

K. D. Malaviya—for Appellant.

Govt. Pleader—for the Crown.

Judgment.—This is a criminal appeal on behalf of one Chandrabhan Lal, a patwari, who has been sentenced to one year's R. I. and Rs. 50 fine or in default three months' further R. I. under S. 218, Penal Code, on the following charge:

That you in 1341-F being a public servant as a patwari of Kanak Sarai and as such charged with the preparation of khasra of that village framed the khasra of 1341-F in respect of plots Nos. 396, 397 and 398 in a manner which you knew to be incorrect; i. e. in Col. 8 you did not show the possession of Baijnath which was actually delivered to him by the civil Court Amin on 20th July 1933 in your presence and instead put in cross marks in Col. 8 showing no change with intention of causing loss to Baijnath.

The facts alleged for the prosecution are that two brothers Raghunath and Baijnath were members of a joint Hindu family and they made a usufructuary mortgage of 16 fixed rate tenancy plots to Ramdas, Bhagwan Das and Ramsarup for Rs. 3,000 on 28th June 1926. The mortgagees gave a lease of these plots to the mortgagors who executed a qabuliat. Rent fell into arrears and the mortgagees obtained a decree for arrears of rent and on 29th May 1933, they got ejectment of the mortgagors from these plots and actual possession was given to the mortgagees by order of the revenue Court. Learned counsel alleges that there was delay in the order of the revenue Court reaching the patwari and it did not reach him until 13th March 1934. That however was a different order and was

an order for recording the name of the mortgagees.

In addition to the delivery of possession by the revenue Court there was a proceeding in the Civil Courts in which the Munsif's Court granted a decree for some other money to the mortgagors and in execution of that decree the equity of redemption of the mortgagors in these fixed rate plots was attached and sold in auction and purchased by the decree-holders and on 20th July 1933, the mortgagees obtained actual possession of the plots purchased by them in this auction sale with the exception of three plots which were in the possession of some prior mortgagees. Actual possession was obtained by the mortgagees of the three plots 396, 397 and 398 which formed the subject of the present charge. Possession was made over by the civil Court amin on 20th July 1933. Now the accused patwari was present at the time this possession was made over and he signed the dakhalnama and also a compensation statement by which the amin arranged an amount of compensation for the value of the crop which had been sown by the mortgagors. The patwari alleges that he only came at the end of this proceeding and did not understand what it was about. It is also to be noted that even after the order was received by the patwari on 13th March 1934, to record the name of the mortgagees over these plots the patwari did not comply with that order. The point which learned counsel argues in regard to this is that the patwari thought that because under R. 98 of the Land Records Manual the rabi partal which began on the 1st January had terminated on 15th February 1934, after that date he was not entitled to make the alteration. This view is quite wrong. Under R. 98, the khasra is completed by the 30th April. The order was received by the patwari on the 13th March and therefore it was his duty to have made the alteration.

But the main point against the patwari is that in that rabi partal he made a wrong entry, that is he made certain crosses which indicated that the mortgagors continued their possession and were the cultivators of the crop which was standing on the ground at the time of his partal. Under R. 98, a patwari is responsible for the accuracy of all entries in the khasra and must satisfy himself of the facts by inquiries from the persons concerned as well as by the field inspections. Now in making this entry the patwari must have known that there had been this transfer of the crop by the civil Court amin on 20th July 1933. He was therefore making an entry which he knew to be false. Considerable argument has been made in regard to some remarks in the judgment about the patwari neglecting to report the change of cultivator to the supervisor Qanungo. Such a report would be made under R. 22, sub-R. (3). But it does not appear to me that the Court below regarded this matter as the ground for a conviction as this matter is no part of the charge against the patwari. I consider that the patwari made a wrong entry knowing at the time that the entry he was making was wrong.

The question is whether he had the criminal intent which would bring the case under S. 218, Penal Code. Learned counsel suggested that the patwari may have forgotten or may have made a mistake. The circumstances are that in the month of Asarh 1933, when the mortgagee wanted to cultivate these plots he was resisted and a report was made by Baijnath in the thana. The Sub-Inspector apprehending that there might be a breach of the peace came to the spot and in his presence Raghunath and Baijnath, the mortgagees, got these plots in question ploughed and sown. I consider that such a proceeding must have been well within the knowledge of the patwari and that when the subsequent dakhalnama was made on 20th July 1933, he must have been well aware that all actual possession and legal title had passed from the mortgagors. The result of the patwari making this wrong entry for the mortgagors was that when the mortgagees went to cut the crop on these numbers on 1st March 1934, there was a riot and the mortgagors were convicted of riot and of causing hurt to the mortgagees. I consider that in view of this circumstance the Court cannot take a lenient view of the conduct of this patwari. By making a false entry he has induced the former tenants to commit a riot; and if such a false entry had not existed they would probably not have endeavoured to resist the mortgagees by force. Under these circumstances the sentence imposed by the lower Court cannot be considered excessive.

Accordingly I dismiss this appeal. The accused must surrender to his bail and undergo the rest of his sentence.

B.D. *Appeal dismissed.*

A. I. R. 1935 Allahabad 970

HARRIES AND RACHHPAL SINGH, JJ.

Emperor

v.

Sri Kishan (or Sri Krishna)

Criminal Ref. No. 79 of 1935, Decided on 24th April 1935, made by Sess. Judge, Allahabad, D/- 23rd January 1935.

Criminal P. C. (1898), S. 307 (3)—Verdict of jury perverse—High Court can disregard such verdict.

High Court has undoubted jurisdiction to disregard the verdict of the jury and to convict the opposite party if it is of opinion that the verdict of the jury was perverse. [P 970 C 1]

Where it is conclusively proved on evidence that the accused as an accountant in the service of an institution, was entrusted with certain moneys and that he misappropriated the money, if the verdict of the jury is not guilty such verdict is perverse and the High Court can disregard such verdict on a reference to it. [P 973 C 2; P 974 C 1]

Kumuda Prasad—for Applicant.

K. D. Malaviya—for Opposite Party.

Asst. Govt. Advocate—for the Crown.

Order.—The opposite party to this reference was tried before the Temporary Sessions Judge of the Allahabad District sitting with a Jury for an offence under S. 408, Penal Code, the allegation being that he had committed criminal breach of trust in respect of certain moneys entrusted to him in his capacity as a clerk or servant of the Kayestha Pathshala Intermediate College. He was found not guilty by the Jury, but the Sessions Judge refused to accept the verdict. He was of opinion that the case against the opposite party had been established beyond all shadow of doubt and that it was necessary in the interests of justice to refer the matter to this Court for such orders as this Court might deem proper in the circumstances.

This High Court has undoubted jurisdiction to disregard the verdict of the jury and to convict the opposite party if it is of opinion that the verdict of the Jury was perverse and it is the case for the Crown in this reference that the verdict returned by the Jury was wholly against the weight of evidence and such that a body of men acting reasonably and honestly could not possibly have returned. In other words it is boldly contended by the Crown that the verdict returned in this case was clearly perverse. The charge against the opposite party was that being a clerk or servant of the Kayestha Pathshala Intermediate College he committed criminal breach of trust in respect of three sums of money entrusted to him, viz. Rs. 100, on 12th July 1932, Rs. 100 on 22nd September 1932 and Rs. 50 on 22nd October 1932.

The case for the prosecution was that the opposite party had been employed as an accountant by the Kayestha Pathshala Intermediate College for some considerable time before these alleged defalcations. It was said that as such accountant it was part of his duty to receive tuition fees and account for the same. It is alleged that the students of classes 11 and 12 paid their tuition fees direct to the opposite party who gave signed receipts to each student for such payment. On the other hand the students of classes 7 to 10 paid their tuition fees to their respective teachers who later handed the amounts collected daily to the opposite party who acknowledged the receipt of the same by signing in the appropriate place on the daily attendance register kept by the various teachers. For the purposes of accountancy it was the duty of the opposite party to keep two books, viz. the income register in which the daily income received by him from different sources was entered and a cash book in which both the daily income and expenditure was entered. It is said that it was the opposite party's duty to pay the income received daily as stated in the Cash Book into the account of the College at the Imperial Bank of India.

It is alleged that on 12th July 1932, the opposite party received tuition fees to the amount of Rs. 224 and entered such an amount in the income register kept by him. He also entered up the Cash Book on that date, but the entry relating to tuition fees received by him for that date is an entry of Rs. 124 only i. e. Rs. 100 less than the sum entered in the income register. Further it is said by the prosecution that receipts for tuition fees given by the opposite party on 12th July 1932, clearly establish that he did actually receive the sum of Rs. 224 on that date. As the income from tuition fees shown in the Cash Book was Rs. 100 less than the sum actually received by him, the amount paid into the bank that day consequently was Rs. 100 less than the amount which should have been paid in. On 20th September 1932, it is alleged by the prosecution that tuition fees amounting to Rs. 430-9-0 were actually received by the opposite party and that receipts were given either

from the receipt book or on the attendance registers for such an amount. This amount is shown to have been received in the income register kept by the opposite party, but the amount of tuition fees shown in the Cash Book as having been received is Rupees 330-9-0, i. e. Rs. 100 less than the amount actually received and therefore Rs. 100 less was paid into the Bank that day than it should have been.

On 22nd October 1932, the prosecution alleged that tuition fees amounting to Rs. 389 were received by the opposite party and receipts from the receipt book or on the attendance registers for such an amount were actually given by the opposite party. The sum of Rs. 389 is shown to have been received as tuition fees on this day in the income register kept by the opposite party, but the entry in the Cash Book kept by the opposite party shows that the amount of tuition fees received on this day was Rs. 339 viz: Rs. 50 less than the amount actually received. Consequently it is said by the prosecution that the amount paid into the Bank on this day was Rs. 50 less than it should have been.

It is the allegation of the prosecution that the opposite party received these three sums in his capacity as accountant of the Kayestha Pathshala Intermediate College and misappropriated them or converted them to his own use. In April 1933, suspicion fell upon the opposite party and he was ordered to hand over the books kept by him. He handed over all the books except two pass books which were however later found in a locked almirah. No inference can be drawn one way or another from his failure to hand over the two pass books. The opposite party however did not wait to face any possible charge or charges which might arise from an investigation of the books. He absconded and was not arrested until 12th May 1934, when he was discovered in Hathpipla in Central India living under an assumed name of Ram Narain Varma.

To this charge of criminal breach of trust in respect of these three sums the opposite party pleaded not guilty. He admitted that he was an accountant employed by the Kayestha Pathshala Intermediate College, but denied that he had misappropriated any sums whatsoever. He boldly alleged that it was not his duty to receive any tuition fees and that he in fact never did receive such fees. He further denied that it was his duty to keep the income register or that he had ever kept it and denied specifically that the entries in that register were in his hand-writing. He admitted that it was his duty to keep Cash Book and that he had so kept it, but he alleged that he merely entered it up from a daily slip sent to him by the head clerk who presumably received the moneys and accounted for them. In short his case was that he was an accountant only in name and that he did none of the work which an accountant usually does. His case briefly put was that he did not in the course of his duty receive any sums whatsoever as tuition fees and therefore could not have misappropriated the three sums mentioned in the charge. It would appear from the opposite party's defence that the person mainly responsible for the receipt of moneys was the head clerk and that if any moneys were misappropriated they must have been misappropriated either by him or by the Principal of the College whose duty it was to supervise the servants under his charge.

The case put forward by the defence in the Sessions Court was an absurd one and manifestly false as will be seen hereafter. Mr. Malaviya who has argued the case on behalf of the opposite party very fully and ably has virtually abandoned this defence and in our view quite rightly. The case put forward on behalf of the opposite party now is that such grave irregularities were daily committed in this Institution, that it is impossible to rely upon the books and consequently it would be unsafe to hold that moneys stated in the income register to have been received on various dates were in fact actually received by the opposite party. That being so, it is said that no Court could safely hold that any part of the sums shown as having been received by the opposite party on the dates in question had ever been received and misappropriated. This is an entirely new case and the prosecution witnesses had no real opportunity of dealing with it.

It must be remembered however that if there were any irregularities, such were in the main committed by the opposite party himself whose duty it was, according to the prosecution, to keep the books and to receive moneys on behalf of the Institution. It is indeed a bold and strange defence for a person alleged to be guilty of misappropriation to plead that his own default raises grave doubts as to his guilt. In our view this line of defence,

clever as it is, is an afterthought and we cannot attach any serious weight to it. In our view the result of this reference must stand or fall upon the strength of the evidence tendered by the prosecution. To establish the offence under S. 408, Penal Code, the prosecution had to prove:

1. That the opposite party was a clerk or servant of the Kayestha Pathshala Intermediate College. This was abundantly established by the evidence of Mr. Gokal Chand, the evidence of Mr. Harnandan Prasad and a number of school teachers and clerks called on behalf of the prosecution. His employment as an accountant is admitted by the opposite party though he denies that he performed the duties usually attaching to such an office.

2. That in such capacity of clerk or servant he was entrusted with tuition fees paid by the students. The opposite party denied that he was ever entrusted with such money, but it was abundantly proved by pupils, school teachers and the Principal that the students of classes 11 and 12, paid their tuition fees direct to the opposite party and that the tuition fees of the students of classes 7 to 10 were paid over by the school teachers of those classes daily to the opposite party. The evidence upon this point is overwhelming and there is only the opposite party's denial to the contrary.

3. That the opposite party misappropriated or converted to his own use the three sums alleged from moneys entrusted to him. The income register was put in evidence and this book showed that tuition fees amounting to Rs. 224 were received by the opposite party on 12th July 1932, tuition fees amounting to Rs. 430-9-0 on 22nd September 1932, and tuition fees amounting to Rs. 389 on 22nd October 1932. The Cash Book kept by the opposite party was put in evidence and this book showed that tuition fees amounting to Rs. 124 only were received by the opposite party on 12th July 1932 and Rs. 330-9-0 only on 22nd September 1932, and Rs. 339 only on 22nd October 1932. In short the amount shown by the opposite party in the Cash Book as having been received by him on these three dates is Rs. 250 less than the amount shown to have been received on the same dates in the income register.

As we have stated previously the opposite party admitted that he entered up the Cash Book, but denied that he was in any way concerned with the entries made in the income register. We have had an opportunity of scrutinising both these books and the handwriting in both of them is obviously the same and as such must have been obvious to the Jury if they had examined these books with any care. Further, there was the evidence of Babu Gur Prasad and Tribeni Shankar who knew the opposite party's handwriting well and each of these witnesses swore that the handwriting in the income register was the handwriting of the opposite party. Mr. Gokal Chand, the Principal, was not prepared to swear that the entries in the income register were in the handwriting of the opposite party, but he did give evidence to the effect that it was the opposite party's duty to collect tuition fees and enter the amounts in the income register. Upon the evidence it was in our view established beyond all doubt that it was the duty of the opposite party to keep the income register and further that he did keep it and make the entries dated 12th July 1932, 22nd September 1932 and 22nd October 1932.

It was further in our view proved that the opposite party had actually received the amounts shown on these three dates in the income register. The opposite party denied that he had ever received any tuition fees, but the evidence of Mr. Gokal Chand and that of the students and school teachers previously referred to is overwhelming and is to the effect that he did actually receive tuition fees either directly from the students or from the school teachers. Further the receipt books which were proved to be in the opposite party's handwriting and indeed admitted to be so by the opposite party himself and the attendance registers show that on 12th July 1932, 22nd September 1932 and 22nd October 1932 he did receive the sums which are shown to have been received by him in the income register. These documents were put in evidence, but it does not appear that the learned Judge laid any great stress upon them. We have however had the receipts and attendance registers for these particular days carefully checked and it is abundantly clear that on the days in question the opposite party did give receipts for the amounts shown to have been received by him in the income register.

An attendance register was put in evidence which the opposite party used to sign to show that he was on duty.

He did not however sign this register on the 22nd of September and this shows that he was either not at the College on that day or that he somehow or other omitted to sign it. He did however make an entry in the income register for 22nd September 1932, which strongly suggests that he was at the College on that day.

It may be of course that he was not at the College on 22nd September 1932 and that he entered up the income register on the following day or some days later, but the entry which he made for 22nd September 1932, does clearly show that in respect of that day he did receive Rs. 430-9-0 as tuition fees and further the attendance registers and receipt books show that in respect of tuition fees paid on that day he actually gave receipts amounting to Rs. 430-9-0. The fact that his signature does not appear on the attendance register on 22nd September 1932, does not cast any doubt upon the fact that he received the sum alleged by way of tuition fees in respect of that particular day.

The Cash Book was proved to be in the handwriting of the opposite party by the witnesses previously referred to and indeed the opposite party himself admits that he kept this book. This book shows that the total tuition fees received on these three particular days is Rs. 250 less than the amounts shown to have been received in the income register and consequently the amount paid into the Bank was Rs. 250 less than it should have been. The evidence of the accountant makes it abundantly clear that the payments into the Bank corresponded with the entries in the Cash Book and not with the entries in the income register. It follows therefore that if the opposite party received the sum shown in the income register he did not pay the whole amount into the Bank and that in respect of these three particular days he paid into the Bank Rs. 250 less than he actually received. The opposite party's version was that it was not his duty to pay the moneys into the bank and that he merely entered up the Cash Book from a daily slip given to him by the head clerk. This is obviously an absurd statement because the head clerk could have entered up the Cash Book himself quite as easily and quickly as making out a daily memorandum or slip from which the opposite party had to enter up the Cash Book. The evidence of Mr. Gokal Chand and the other witnesses proves beyond all doubt that the opposite party did handle the moneys, that he did keep the Cash Book and that he did pay moneys into the Bank.

It was therefore in our judgment, proved beyond any possible doubt that the opposite party was responsible for moneys received from students as tuition fees. It was his duty to receive the money and to enter up such receipts in the income register and in the Cash Book and to pay the moneys shown in the Cash Book into the account of the College at the Imperial Bank. It was further proved that on the days in question he had received sums of money as tuition fees and had correctly entered such sums in the income register. It was further proved that he had made false entries in the Cash Book and had paid lesser sums into the Bank. In short the evidence abundantly establishes that on 12th July 1932, he accounted for only Rs. 124 as tuition fees, whereas he in fact received Rs. 224 and that on 22nd September 1932, he accounted for only Rs. 330-9-0 as tuition fees, whereas in fact he received Rs. 430-9-0 and that on 22nd October 1932, he accounted for only Rs. 339 as tuition fees, whereas in fact he received Rs. 389. It follows therefore that on these three days he failed to account for a total sum of Rs. 250 which he had received on behalf of his employers in his capacity as an accountant of the College. It was of course quite impossible for the prosecution to show what the opposite party had done with this sum, but the only inference that can possibly be drawn from the facts is that he, in some way or another, misappropriated the money or converted it to his own use. There can in our judgment be no other possible explanation for the differences in the amounts appearing in the income register and in the Cash Book and in the amounts paid into the Bank.

The opposite party's subsequent conduct in absconding and using the name of Ram Narain Varma which was clearly proved is entirely consistent with his guilt and is, in our judgment, wholly inconsistent with his innocence. These were the facts which were placed by the prosecution before the Jury and in our judgment their verdict of not guilty in the circumstances was clearly perverse. In the absence of some reasonable explanation for the differences between the amounts proved to have been received by the opposite party and the amounts paid into the Bank, a

Jury acting honestly and reasonably were bound to hold that the opposite party had misappropriated such sums. In our judgment upon the evidence in this case the verdict of the Jury was clearly perverse and the learned Judge acted properly in refusing to accept it and in referring the matter to this Court.

In the result therefore we accept this reference and convict the opposite party of an offence under S. 408, Penal Code, and sentence him to a term of three years' rigorous imprisonment. The sentence will run concurrently with a sentence of five years which we understand has been imposed by the Temporary Sessions Judge of the Allahabad District for some other offence (Sessions Trial No. 47 of 1934). The accused must surrender to his bail.

B.D. *Reference accepted.*

A. I. R. 1935 Allahabad 974

SULAIMAN, C. J. AND BENNET, J.

Amba Datt Satti and *another*—Defendants—Appellants.

v.

Secy. of State—Plaintiff—Respondent.

Second Appeal No. 1121 of 1931, Decided on 21st February 1935, from decision of Dist. Judge, Kumaon, D/- 8th July 1931.

Deed—Construction—Grant of village by the Government to tenants before the Tenancy Act—Deed embodying terms "pacca asami" and "abad karo"—Tenants held not tenants-at-will and could not be ejected.

Where long before the Tenancy Act was enacted the Government granted the tenants a certain village and executed a lease in their favour, embodying terms that the tenants were "pacca asami." and calling upon them that they were to settle all the lands in the village, as "abad karo:"

Held: that tenants were not mere tenants-at-will and could not be ejected. [P 975 C 1]

P. L. Banerji and *B. L. Dave* — for Appellants.

Judgment.—This is a defendants' appeal arising out of a suit brought by the Secretary of State through the Notified Area Committee, Ramnagar, against the defendants for ordering the latter to execute a lease for a period of 30 years, and in default to be ordered to be ejected. The plaintiff's case was that the land belonged to the Government as proprietor and that the defendants were tenants-at-will liable to be ejected at any time; that they were paying Rs. 124-5-8 per annum to the plaintiff as rent, and that they promised to execute the lease, but failed to carry out their promise which gave rise to the present action.

The defendants denied that they were tenants-at-will and pleaded that the land had been given to their ancestors permanently on 7th November 1862, and that acting upon the grant they have spent about Rs. 30,000 in improving the land, constructing boundary walls and building houses and planting groves, etc., and that the plaintiffs were estopped from maintaining the claim. They further pleaded that the defendants were not tenants-at-will, but were at least occupancy tenants of the land in question and were not liable to execute a lease for 30 years. The first Court dismissed the suit on certain other grounds, but on appeal issues were remitted for determination. Ultimately the lower appellate Court decreed the claim holding that although the defendants held what was called a deed of tasallinama, dated 7th November 1862, apparently executed either by the Deputy Commissioner or some other person who was managing the Government estate at the time. Under that document the defendants' ancestors acquired only a monopoly of cultivation in the village provided that they cultivated the whole land available, and that the grant of rights of pukka asami under the document did not amount to anything more than that the grantee was to be a direct tenant of the Government, and that his rights were merely those of a tenant-at-will liable to ejectment at any time, and therefore bound to execute a lease if called upon. The learned Judge further found that the defendants and their predecessors had been in possession of this village for over 70 years and had colonised it and constructed houses of considerable value on the lands. The exact value of the constructions was in dispute and has not been found.

In appeal it is urged before us that the defendants have acquired rights of occupancy which are at least heritable. In the Courts below it does not appear to have been disputed that the officer who signed the tasallinama had authority on behalf of Government to make the grant. It is also clear that no question arose as to whether the Government had not the right to get the rent enhanced. The only question was whether under the terms of this deed the defendants were merely tenants-at-will or whether they had rights of occupancy in the lands.

We are of the opinion that on a proper construction of this document, the defendants cannot be treated merely as tenants-at-will liable to ejectment at any time. The document authorised the grantee to settle or "abad karo" all the lands that fell within certain specified boundaries and provided that the settling cultivator who brought the entire land under cultivation would be considered a full or permanent tenant, and that if he failed to settle all lands and it remained uncultivated or waste, the Government would have power to make over the village to somebody else for purposes of settlement; but that if he settled the whole, he would be entitled to it. The power to revoke the grant was reserved in case the grantee failed to bring the entire village under cultivation. There was no mention of a right of ejectment in any other contingency. Obviously the land was barred and uncultivated at the time and the idea was that it should be reclaimed and brought under cultivation by the grantee who would have to spend money on it and if he was successful in that way, he would be entitled to retain the land as pukka asami. The original grantee is dead and his successors have remained in possession without any objection and have been paying rent continuously. No rent was mentioned in the document itself, but the rent was assessed under some separate proceeding. As pointed out above, the defendants' liability to pay an enhanced rent has not been considered by the Court below and does not arise in this suit. The only question is whether the defendants are liable to ejectment. On a proper construction of the document which has been translated and placed before us, we are of the opinion that the defendants have heritable rights as tenants liable to pay rent, but not liable to ejectment at will. As the grant was given in 1862 long before the Tenancy Acts, came into existence, the defendants do not come under any of the categories of tenants mentioned there, and furthermore, the case would be governed by the Crown Grants Act (Act 15 of 1895), which is retrospective. We accordingly leave the question open whether the rent payable by the defendants can or cannot be enhanced, but we allow the appeal and setting aside the decree of the lower appellate Court restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

B.D.

A. I. R. 1935 Allahabad 975

GANGA NATH, J.

Sumaru Chamar — Defendant — Appellant.

v.

Puddan Chamar—Plaintiff —Respondent.

Second Appeal No. 1302 of 1932, Decided on 5th February 1935, from decision of Second Addl. Sub-Judge, Jaunpur, D/- 21st May 1932.

Agra Tenancy Act (3 of 1926), S. 26—Co-tenant dying leaving no heir -- Estate passes by survivorship — Rule is that representative of deceased takes the place of deceased—On failure of representative however rule of survivorship applies.

Under the provision of S. 26 the interest of a co-tenant who dies leaving no heir will pass by survivorship to his co-tenant. The rule of survivorship among joint tenants is modified in India by Ss. 42 and 45, Contract Act, which put the representative of the deceased joint tenants in his place, so long as there is such a representative. On failure of such representative, the rule of survivorship among joint tenants applies. This rule has been adopted in S. 26, Agra Tenancy Act, in case of widows and tenants. [P 976 C 1]

Harnandan Prasad and *Kedar Nath Sinha*—for Appellant.

Haribans Sahai and *Gopalji Mehrotra* —for Respondent.

Judgment.—This is a defendant's appeal and arises out of a suit brought against him by the plaintiff to recover possession over the occupancy holding described in the plaint. Gulzar and Hulas were two brothers, and the occupancy tenancy in dispute belonged to them. The plaintiff Puddan is the grandson of Gulzar and succeeded to half of the tenancy through his grandfather. The plaintiff claimed the other half as the nearest reversioner of Hulas. Hulas had two sons Gopal and Khedan. The defendant is Khedan's daughter's son. The plaintiff's case was that, on the death of Mt. Jarao, widow of Sheopal, who was the son of Gopal, the plaintiff succeeded to the remaining half of the tenancy. On the death of Khedan, Khedan's one-fourth share also came to Sheopal. On Sheopal's death, Sheopal's own share and Khedan's share, that is, half of the disputed tenancy was succeeded to by his widow Mt. Jarao. Mt. Jarao died about two years ago and, on her death, the plaintiff succeeded to the half as already stated. The defendant's case was that he, as Khedan's daughter's son, had succeeded to Khedan's share.

The finding of the Courts below which was based on evidence was that

Khedan's share was succeeded to by Sheopal on his (Khedan's) death, and after Sheopal, by his widow Mt. Jarao. The lower Court found that the appellant was not joint in cultivation with Khedan in Khedan's lifetime and that therefore he did not succeed to Khedan's share. This is a finding of fact based on evidence and is binding. There can be no doubt that, if the defendant did not share in cultivation with Khedan in Khedan's lifetime, the defendant could not succeed to Khedan's tenancy. As regards the question whether the plaintiff would succeed to the remaining half of the tenancy, which belonged to Hulas's branch, the lower Court has given a decree to the plaintiff on the ground that the plaintiff though separate from Sheopal, would be legally presumed to have shared in cultivation with him. This presumption is entirely wrong. There can be no such legal presumption of jointness in the face of the finding of the two persons being separate. But as already stated, the whole of the tenancy in dispute belonged to Baswan the common ancestor of Gulzar and Hulas. The plaintiff is the survivor of the heirs of Baswan. S. 26, Agra Tenancy Act (Act 3 of 1926) lays down:

> And except in the case of widows or of a co-tenant, who dies leaving no heir entitled to succeed under S. 24, no interest in any 'exproprietary, occupancy, statutory, or non-occupancy tenancy shall pass by survivorship.

Under this provision, the interest of a co-tenant who dies leaving no heir will pass by survivorship to his co-tenant. As held in 1930 A L J 811 (1), the rule of survivorship among joint tenants is modified in India by Ss. 42 and 45, Contract Act, which put the representative of the deceased joint tenant in his place, so long as there is such a representative. On failure of such a representative, the rule of survivorship among joint tenants applies. This rule has been adopted in S. 26, Agra Tenancy Act, in case of widows and co-tenants. The plaintiff therefore would succeed to the half share of the other branch. There is no reason for any interference with the decree of the lower Court. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed. Permission to file a Letters Patent appeal is rejected.

B.D. *Appeal dismissed.*

1. Rasulan v. Babu, 1930 All 350=122 I C 404=52 All 548=1930 A L J 811.

A. I. R. 1935 Allahabad 976

NIAMATULLAH, J.

Yudhisthir Singh—Defendant—Appellant.

v.

Angan Lal and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1111 of 1932, Decided on 16th January 1935, from decision of Dist. Judge, Aligarh, D/- 23rd June 1932.

Co-sharer—Suit for village profits—Lambardar claiming lambardari haq and collection charges in second appeal - Lambardar's right being statutory held could be pressed at the stage of second appeal.

A cosharer brought a suit for village profits against the lambardar who collected the rents. At the stage of the second appeal arising in that suit lambardar claimed that he should be entitled to claim his lambardari haq and collection charges:

Held: that as the rights of the lambardar were statutory ones, they could be pressed at the stage of the second appeal and allowance should be made for such right in suits for village profits. [P 977 C 1]

K. Verma and *K. N. Gupta*—for Appellant.

Harnandan Prasad and *Kamta Prasad*—for Respondents.

Judgment.—This appeal has arisen from a suit for profits brought by the plaintiff-respondents against the lambardar, the appellant before me. The plaintiffs impleaded another co-sharer, Hazuri Singh, alleging that he also made collections during the years in suit (1333-35 Fasli). The plaintiffs subsequently discharged Hazuri Singh. Later on the plaintiffs' suit was dismissed on the ground that they had failed to implead all the necessary parties. On appeal by the plaintiffs the District Judge remanded the case and directed the lower Court to re-implead Hazuri Singh. This was done. The trial Court passed a decree in favour of the plaintiffs calculating the amount of profits on the basis of gross rental minus actual collections made by Hazuri Singh. The lambardar appealed to the District Judge, who modified the decree of the trial Court to some extent. The plaintiffs had also filed cross-objections, but they were dismissed.

In the present second appeal by the lambardar appellant several questions were argued. It was contended that the lower-appellate Court has decreed to the plaintiffs not only their share of the profits for the years 1333 to 1335 Fasli., but also profits payable in previous

years but left outstanding during the years in suit and presumably collected in those years. After carefully examining the judgment of the lower appellate Court, I am satisfied that no decree has been passed in favour of the plaintiffs in respect of rents collected for the years preceding 1333 Fasli.

The next question argued was that the lower appellate Court was not justified in upholding the decree of the first Court so far as it proceeded on gross rental. The trial Court definitely found that the lambardar did not produce any account of his own, and the patwari's "siyaha", on which alone an account for profits could be based, had been incorrectly dictated to the patwari. The trial Court also presumed that the appellant collected the entire rental. The lower appellate Court upheld the findings of the trial Court, and the only variation which it made was in respect of the year 1335 Fasli, for which it allowed a deduction of 15 per cent on the gross rental of that year. If the facts found by the lower appellate Court be accepted, there can be no question of the discretionary power of that Court in decreeing the plaintiffs' claim on gross rental. In second appeal I cannot question the findings of the lower appellate Court so far as they are of fact. This being so, the exercise of discretion by the lower appellate Court in awarding profits to the plaintiffs on gross rental cannot be questioned.

Lastly, it was pointed out by the learned advocate for the appellant that in making up the account of profits the lower-appellate Court did not make any allowance for the lambardari "Haq" and collection charges. I have examined the judgment of the lower appellate Court and heard the learned advocate who appears in support of the decree appealed from, and am satisfied that this grievance is well-founded. The learned advocate for the respondents points out that no specific ground of appeal has clearly been taken and that apparently no question as regards lambardari "Haq" and collection charges was raised in the lower appellate Court. The right of the lambardar to receive 5 per cent as "lambardari Haq" is a statutory one, and should in my opinion be entertained even at this stage. Similarly in making collections the lambardar should be deemed to have incurred expenses, particularly when full profits are being allowed to the plaintiffs. I think it is not unreasonable to hold that collection charges incurred by the lambardar amounted to 10 per cent on gross rental, which is assumed in this case to have been collected in full. The 7th ground of appeal taken by the appellant is sufficiently comprehensive to include these two items.

The result is that the appeal is partly allowed. The decree of the lower appellate Court is so far modified that the amount decreed to the plaintiffs shall be reduced by Rs. 39, which is the plaintiffs share of "lambardari Haq" and collection charges at the rate of 10 per cent. In other respects the appeal is dismissed. The parties shall receive and pay costs in proportion to success and failure in this Court. Defendant 1, who has been impleaded in this Court, should bear his own costs.

B.D. *Order accordingly.*

A. I. R. 1935 Allahabad 977

GANGA NATH, J.

Pearey Lal—Applicant.

v.

Mt. Naraini—Opposite Party.

Criminal Revn. No. 595 of 1935, Decided on 30th August 1935.

(a) Maintenance — Order passed — Wife living with husband for some time after order but again separating —Order of maintenance is not cancelled but only suspended during stay of wife with her husband.

The mere fact that a woman goes to live with her husband for some time, is not sufficient to make an order of maintenance obtain by her ineffectual though it may have the effect of suspending the order for the period the woman lives with her husband: 1927 *Mad* 376 and 1923 *Cal* 456, *Foll*; 1888 *A W N* 217, *Dist.* [P 978 C 1]

(b) Criminal P. C. (1898), S. 488 (5)—Reasons for cancellation are not exhaustive.

Section 488 (5), Criminal P. C, provides for the cancellation of the order. The reasons given therein for cancellation are not exhaustive. [P 978 C 1]

E. V. David—for Applicant.

Asst Govt. Advocate—for the Crown.

Order.—This is an application in revision by Pearey Lal against the order of Mr. Abdul Waheed Khan Khalil, Magistrate, First Class, Meerut, under S. 488, Criminal P. C. This order was confirmed by the learned Sessions Judge of Meerut in revision. The opposite party Mt. Naraini, wife of the applicant, obtained an order under S. 488, Criminal P. C., for maintenance on 11th March 1932, against the applicant. The applicant made an application stating that he was willing to take his wife back, but it was rejected. Mt. Naraini lived for sometime thereafter with her husband and when she was turned out again by her husband she went to live with her sister. In 1935 she made an

application to recover the maintenance (Rs. 4 a month) which had been allowed to her under the order of 11th March 1932. The applicant contested this application on the mere ground that Mt. Naraini had been living in adultery and therefore was not entitled to any maintenance. Both the parties produced evidence on this point and it was found by the learned Magistrate that the applicant's objection was false and that Mt. Naraini had not been living in adultery and was entitled to maintenance and passed an order for the payment of the arrears due. Against this order a revision was filed which was rejected by the learned Sessions Judge, Meerut, as stated above. The only point that is pressed by the learned counsel for the applicant here is that the order of 11th March 1932, became ineffectual and unenforcible on account of Mt. Naraini having gone to and lived with her husband after the order. The learned counsel for the applicant relies on 1888 A W N 217 (1). There a reference was made by the learned Sessions Judge as follows:

> I think the woman should have instituted formal proceedings under Ch. 36, Criminal P. C., that the Joint Magistrate should have heard what the husband had to say as to his willingness to keep the woman with him and should have considered any evidence produced by either party, and then should have decided whether the wife was entitled to receive any allowance from her husband. I think the Joint Magistrate was wrong in simply directing payment of arrears under the order of June, 1881. I recommend that his order be set aside.

On this Justice Straight ordered:

> I entirely agree with the learned Judge in the view which he takes of the Joint Magistrate's order, and concur in all that he has said upon the subject. The learned Joint Magistrate's order must be and is quashed.

It appears that all that was done in that case was that the joint Magistrate's order, which had been passed without giving any opportunity to the husband to show cause as to why he should not pay arrears, was set aside. In this case, a notice was issued to the husband and he was given full opportunity to show cause as to why he should not pay the maintenance which had been ordered against him. There is nothing in the order of Justice Straight referred to above to show if the order of maintenance was held to have become inoperative; if so on what grounds ? The mere fact, that a woman goes to live with her husband for sometime, is not sufficient to make the order ineffectual though it may have the effect of suspending the order for the period the woman lives with her husband.

The general principle of law that an order, whose term is not fixed, and whose currency is not made expressly dependant upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled, is, prima facie, applicable to maintenance orders passed under S. 488, Criminal P. C. The husband may, on proof of circumstances specified in S. 488 (5) or S. 499, Criminal P. C., obtain the cancellation or modification of the original order, as the case may be, and until he does that, the original order must be deemed to be still in force. The mere fact, that a wife has returned to live with her husband, will not bring the order to an end automatically, and on her separating from him again, she can enforce it. S. 488 (5), Criminal P. C., provides for the cancellation of the order. The reasons given therein for cancellation are not exhaustive. S. 489, Criminal P. C., provides for variation of the order as well as for its cancellation in consequence of any decision of a competent Civil Court. S. 499, Criminal P. C., which relates to the enforcement of the order lays down:

> A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

The only conditions laid down in respect of the enforcement of the order under S. 490, Criminal P. C., are: (1) the identity of the parties and the non-payment of the allowance due. If any such thing occurs as may be fit to vacate the order, the proper procedure for the husband is to apply to the Court and get the order cancelled. So long as the order stands, it is capable of being enforced though in the case of the woman living with her husband, it would remain suspended for the period during which she lives with her husband. This view is supported by 50 Mad 663 (2) and 75 I C 529 (3). There is no force in the application. It is therefore ordered that

1. Phul Kali v. Harnam, 1888 A W N 217.

2. Kanagammal v. Pandara Nadar, 1927 Mad 376=100 I C 239=28 Cr L J 271=50 Mad 663=52 M L J 176.

3. Parul Bala Debi v. Satish Chandra Bhattacharjee, 1923 Cal 456=75 I C 529=24 Cr L J 945=37 C L J 180.

it be rejected. The stay order is discharged.

B.D. *Application rejected.*

* A. I. R. 1935 Allahabad 979

ALLSOP AND BAJPAI, JJ.

Mt. Basanti Devi—Applicant.

v.

Mt. Sahodra and *others* — Opposite Parties.

Civil Revn. No. 150 of 1935, Decided on 2nd August 1935.

(a) Civil P. C. (1908), S. 22 — Transfer—Application for transfer of case under S. 22, Preponderance of balance of convenience should be considered—Convenience of parties alone is not sufficient ground for transfer.

In an application for transfer under S. 22, Civil P. C., the convenience of the parties alone should not be considered, but the totality of circumstances should indicate that a suit should proceed in a Court different from the Court chosen by the plaintiff. Where there is a preponderance of balance of convenience in the suit being proceeded with at a different Court than that in which it is instituted, the suit should be transferred to such different Court. [P 980 C 1]

Where a will has been executed at *L*, and the testator resided at *L* the bulk of the property was situate at *L*, the witnesses obviously would come from *L*, the Court at *L* would be in a better position to enforce its orders with regards to a suit challenging the will and regarding the property. [P 980 C 1]

*** (b) Civil P. C. (1908), S. 22—Application for transfer of case—Notice to other party should be given before making such application but notice given even after making transfer application is sufficient.**

Although S. 22, Civil P. C., contemplates the giving of a notice prior to the application and such a notice should as a rule be given yet there is no indication that the failure to give such notice is fatal to the application. The failure at an earlier stage can be cured by the issue of a notice on the application itself. The object seems to be that an order for transfer should not be passed without hearing the other side and that the other side should not in any way be prejudiced: 1916 *Lah* 95 and 1928 *Lah* 183, *Diss from.* [P 980 C 2]

(c) Civil P. C. (1908), S. 22 — Application for transfer maintainable when jurisdiction of Court is not challenged.

Where an application for transfer of a case under S. 22 does not challenge the jurisdiction of the Court in which the suit is pending, such application is maintainable: 1914 *All* 351 and 1918 *Oudh* 441, *Dist.* [P 980 C 2; P 981 C 1]

K. N. Katju and *Vishwa Mitra* —for Applicant.

S. N. Sen and *G. S. Pathak* —for Opposite Parties.

Bajpai, J.—This is an application by Mt. Basanti, a defendant in civil suit No. 16 of 1935, pending in the Court of the Subordinate Judge of Agra, and the prayer in the application is that the said suit be transferred to the Hon'ble Chief Court at Lucknow. The application is headed under S. 22, Civil P. C., and it is obvious that the intention of the applicant is that we should come to a determination under the provisions of that section.

The facts on which the application is based are that the suit relates to certain property which was owned by one Lala Murlidhar and to a certain will which was executed by the aforesaid person. It is said that Murlidhar executed a will in 1931 and died in 1934 and that he possessed considerable moveable and immovable property, the bulk of which lies in the Districts of Lucknow and Partabgarh. The suit brought by the opposite parties was for a declaration that the alleged will was a forged will and that the estate of Lala Murlidhar in the hands of Mt. Basanti Devi and Anand Behari Lal and in whosesoever name be reduced in possession by appointment of receiver for the life-time of Mt. Basanti Devi.

The suit itself was based on the allegations that the will was not a genuine will and that Mt. Basanti Devi the widow of Murlidhar who was entitled only to a Hindu widow's estate had come under the influence of one Anand Behari Lal and was wasting the property. The case of the defendant, Mt. Basanti Devi who is the applicant before us is that although the Agra Court has jurisdiction, inasmuch as a portion of the property is situate within the jurisdiction of the Subordinate Judge of Agra, yet a strong case of balance of convenience exists for the case being tried at Lucknow. It is pointed out that the bulk of the property is in Oudh, that Murlidhar resided in Lucknow, that the will was executed at Lucknow and that therefore the witnesses who would be produced by the parties in connexion with the suit instituted by the opposite parties will be from Oudh. It is further stated that the receiver who is to be, according to the plaint allegations, a permanent receiver for the lifetime of the Hindu widow should naturally come from Lucknow, and the Courts at Lucknow would be in a better position to nominate such a person and to see that their directions are properly carried out.

In reply it is contended that it is to the convenience of the plaintiff that the suit should be instituted at Agra inasmuch as the plaintiff is a pardahnashin

lady who, although she resides with her husband at Delhi, has her father living permanently at Agra. It is also said that the plaintiff is the dominus litis and has a right to choose the forum, and the Courts ought to be very reluctant in depriving the plaintiff of that right and a transfer should not be made unless exceptional circumstances exist and a strong case has been made out on the question of balance of convenience. The argument is that the convenience of the parties alone should not be considered, but the totality of circumstances should indicate that a suit should proceed in a Court different from the Court chosen by the plaintiff. We have heard learned counsel at great length on this point, and although we agree with the above proposition of law submitted by Dr. Sen which is supported by several authorities, we have come to the conclusion that in the present case there is a preponderance of balance of convenience in the suit being proceeded with at Lucknow.

As pointed out before, the will was executed at Lucknow and the testator resided at Lucknow. The bulk of the property is situate at Lucknow, the witnesses obviously would come from Lucknow and the Court at Lucknow would be in a better position to enforce its orders. We might mention that the plaintiff after having instituted her suit asked for the appointment of a Commissioner in order to prepare an inventory of certain moveable property and the Subordinate Judge of Agra appointed such a Commissioner. It is stated in the affidavit of the opposite parties that when this Commissioner went to make the inventory of certain properties at Lucknow he was met with resistance and the commission could not be executed. Such a thing, we are of the opinion, would not have happened if the commission had been issued from a Lucknow Court. On the merits therefore we are of the opinion that the case should be tried at Lucknow and not at Agra, and we make a declaration under S. 22, Civil P. C., that the suit shall proceed in the Chief Court at Lucknow.

Two questions of law were argued before us and we think it necessary to notice them in the course of our judgment. It was said that no notice of the application was given to the opposite parties before making the application, and the contention is that this failure is fatal to the application. It is true that S. 22, Civil P. C., says that

Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may . . . . apply to have the suit transferred to another Court.

It is conceded that no notice was given to the opposite parties before the application for transfer, but the submission is that this does not entail the dismissal of the application when as a matter of fact notice has issued to the opposite parties on the application itself. Reliance is placed by the plaintiff opposite parties on the case reported in 35 I C 616 (1), where it was said that the words in the section clearly indicate that the notice must be given prior to the making of the application, but the learned Judge immediately after says that the point is to some extent a minor point. A case of the Lahore High Court, 1928 Lah 183 (2), was also brought to our notice and there it appears that a learned Judge of the Lahore High Court had dismissed an application for transfer on this preliminary objection, but there is no discussion of the point in the case. We are of the opinion that although the section contemplates the giving of a notice prior to the application and such a notice should as a rule be given yet there is no indication that the failure to give such a notice is fatal to the application. In our view the failure at an earlier stage was cured by the issue of a notice on the application itself. The object seems to be that an order for transfer should not be passed without hearing the other side and that the other side should not in any way be prejudiced. We are satisfied that in the present case the proceedings in the Court below were not in any way obstructed or delayed by the failure to give notice prior to the making of the transfer.

The second question of law that was argued was that the applicant before us having questioned the jurisdiction of the Agra Court could not maintain an application under S. 22, Civil P. C., and in this connexion reliance was placed on the case reported in 12 A L J 896 (3) and on the case reported in 21 O C 217 (4). It appears that in the present case the defendant had questioned the jurisdiction of the Sub-

1. Gulab Chand v. Sher Singh, 1916 Lah 95=35 I C 616=11 P R 1917=16 P L R 1917.
2. Edulji Dinshaw v. Dhanpat Mal Bhagwan Das, 1928 Lah 183.
3. Purna Chandra Mukerji v. Dhone Kristo Biswas, 1914 All 351=24 I C 318=12 A L J 896.
4. Askaran Baid v. Bhola Nath, 1918 Oudh 441=48 I C 105=21 O C 217.

ordinate Judge of Agra in a miscellaneous application, but the learned Subordinate Judge repelled the contention. In the application before us the jurisdiction of the Court below has not been questioned and the application proceeds on the assumption that the Court at Agra had jurisdiction to try the suit. In the two cases on which reliance has been placed the applicant while making the application for transfer questioned the jurisdiction on the Court, and it was pointed out that under such circumstances it was not open to the party to invoke the provisions of S. 22, Civil P. C., which contemplate the existence of jurisdiction in the Court where the suit is pending. We think the two cases are clearly distinguishable, and there is nothing in the conduct of the applicant which disentitles him from the relief which he claims.

For the reasons given above, we determine that the suit shall proceed in the Chief Court at Lucknow and the proceedings at Agra will naturally come to an end. We make no order as to costs.

B.D. *Order accordingly.*

A. I. R. 1935 Allahabad 981

IQBAL AHMAD, J.

Rogi—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 460 of 1935, Decided on 7th August 1935, from order of Sess. Judge, Gorakhpur, D/- 5th June 1935.

Criminal Trial—Evidence—Opinion of investigating officer.

The opinion of the investigating officer is not legal evidence and cannot be made the basis of a finding. [P 981 C 2]

K. D. Malaviya—for Applicant.

Asst. Government Advocate — for the Crown.

Iqbal Ahmad, J. — This application must be allowed and the applicant must be acquitted. The learned Magistrate, who tried the case summarily, allowed his judgment to be influenced by the opinion of the investigating officer. The learned Magistrate ought to have realized that the opinion of the investigating officer was not legal evidence and could not be made the basis of a finding that the report made by the applicant was false.

The applicant is a Bania and has a shop in village Amwakhas where he resides. The shop is in a house some walls of which are made of fencing (tattar) with mud on either side of the same. He made a report in the police station on 15th October 1934. The report was of burglary and six persons were named in the report as being the persons whom the applicant suspected of having committed the theft. In the report it was stated that the burglary was committed by means of a hole in the ground below the wall. Out of the six persons named in the report two were Dhunias residing in the village who had previous convictions about theft to their credit. One other man named Raghubir was previously in the service of the applicant and had been dismissed a few months before the date of the alleged incident. The investigating officer came to the conclusion that the report was false and accordingly the applicant was tried for an offence punishable under S. 182, Penal Code. As already observed the learned Judge has based the conviction of the applicant solely on the reasons assigned by the investigating officer. Those reasons as summarized in the judgment of the learned Magistrate are as follows:

(1) That the opening appeared to have been dug both from inside the house as well as outside.

(2) If (the opening) was too small to admit a man getting through it.

(3) In the Kothari in which the hole had been opened there was much more valuable property in the shape of cloth and blankets than the cut pieces of cloth that were alleged to have been removed by the thieves.

So far as the third ground noted above is concerned it cannot be made the basis of the conclusion that the report was false. The burglars may have removed some of the articles in the kothari and may not have taken the rest. It may very well be that the burglars had not time enough to make a clean sweep of the room. As regards the first ground noted above all that is necessary to observe is that it is difficult for one to say whether a hole in the ground was dug from inside the house or from outside. In any case the opinion of the investigating officer on the point could not be treated as legal evidence of the fact.

On the question whether the opening was big enough to allow a man to pass through the same there was evidence on both sides. One of the prosecution witnesses stated that he at the request of the investigating officer tried to pass through the hole, but could not. There is nothing on the record to show as to whether the suspects named in the report were as fat

as the man who was selected by the investigating officer to pass through the hole. If the applicant had fabricated a false case I am not prepared to believe that he would have not made a hole big enough to admit of a man to pass through the same. In my judgment there was no legal proof on the record of the fact that the report made by the applicant was false. Accordingly I allow this application, set aside the conviction and sentence passed on the applicant and acquit him. He need not surrender to his bail. The bail bond is discharged. The fine if paid will be refunded.

B.D. *Revision allowed.*

A. I. R. 1935 Allahabad 982

HARRIES, J.

O. M. Chiene—Appellant.

v.

Kishun Prasad —Objector — Respondent.

Second Appeal No. 6 of 1934, Decided on 6th August 1935, from order of Dist. Judge, Allahabad, D/- 16th January 1934.

(a) Insolvency — Property purchased by insolvent before applying for insolvency—Purchase benami and fraudulent—Sale deed could be set aside.

Where the insolvent just before applying for insolvency purchased some property in the name of another and on evidence it was established that the sale was fraudulent and the real purchaser was the insolvent:

Held: a sale-deed evidencing such sale could be set aside though not covered by S. 53, Provincial Insolvency Act. [P 984 C 1]

(b) Practice—High Court—Second appeal.

Where the evidence upon the record is complete, it is open to the High Court to find a fact where the lower appellate Court has not done so. [P 984 C 1]

Basudeva Mukerji—for Appellant.

S. Z. Alam—for Respondent.

Judgment.—This is a second appeal from an order of the learned District Judge of Allahabad, setting aside an order of the Insolvency Court declaring a certain sale-deed, dated 1st November 1929, standing in the name of the respondent, Kishen Prasad null and void.

The facts of the case can be shortly stated as follows: One Badri Prasad applied on 18th November 1929, to be adjudged an insolvent, and was so adjudged on 16th May 1930. Many years before this insolvency Badri Prasad had transferred certain of his property to his relations. On 22nd September 1924 he had mortgaged part of his property in favour of Sundar Lal, and on 11th May 1925, he had ostensibly sold some of his property to Kunj Behari Lal. It is to be observed that after this insolvency the Official Receiver moved to set aside both these transfers as being fraudulent, and the Insolvency Court has set them aside, and that decision has been confirmed by the learned District Judge.

These two transactions show that long before the actual insolvency Badri Prasad was disposing of his property amongst his relations with a view to defeating his creditors. It appears that sometime before October 1929, Badri Prasad had entered into an agreement with one Babu Lal to purchase certain property. Babu Lal, for some reason or another, refused to transfer his property; and in consequence a suit was instituted by Badri Prasad, in the Court of the Munsif of Kunda, Partabgarh, claiming specific performance of the contract. On 1st October 1929, a compromise was effected between Badri Prasad and Babu Lal, and this compromise was in due course decreed. As a result of the compromise, a sale-deed of this property was executed on 1st November 1929, by Babu Lal in favour not of Badri Prasad, but of his son-in-law, Kishen Prasad. It is the allegation of the Official Receiver that the real purchaser of the property was Badri Prasad, and that the name of Kishen Prasad was merely inserted in the sale-deed in order to defeat creditors. It is clear that at the date of the compromise and the date of the sale-deed Badri Prasad must have been contemplating insolvency, because within 17 days of the date of the sale-deed he actually made an application to be adjudged an insolvent. It is impossible for me to believe that the causes of this insolvency occurred within a few days of his application. Two earlier transactions, which have been set aside as being fraudulent, show that Badri Prasad had been preparing for this insolvency for some years.

The matter does not rest there, because on 21st January 1931, part of the property, the subject-matter of the sale-deed of 1st November 1929, is again dealt with by Badri Prasad. On this latter date a sale-deed was executed by Badri Prasad in favour of Tulshi Ram, but in that sale-deed Badri Prasad describes himself as the general attorney of Kishan Prasad. However it appears that in this sale-deed he gives a personal covenant rendering him liable in certain event. Upon

an application to the Insolvency Court to declare that the sale-deed, dated 1st November 1929, was void and that the real owner of the property was Badri Prasad, the Insolvency Court made such a declaration. On appeal however the learned District Judge reversed the decision of the Insolvency Court, and this apparently upon two grounds.

It is first pointed out by the learned District Judge that the sale-deed in question was not filed, and therefore the Court could not make an order setting it aside. It is quite clear that the Official Receiver was not in a position to file the original sale-deed, because it would naturally be in the possession of Kishen Prasad. Notice was given to the latter to produce this document; but apparently this was not done. An affidavit, sworn by the Official Receiver, setting out all the facts relating to this transaction was before the Court; and as the existence of this deed was never challenged, it was quite open to the Court to set it aside in the circumstances. The learned District Judge did not decide the case upon this point, and in my view the fact that a sale-deed was not filed cannot affect the ultimate decision of the case.

In the second place, the learned Judge was of opinion that, as this case did not fall within the purview of S. 53, Provincial Insolvency Act, the order of the Insolvency Court was wrong and would have to be set aside. Quite clearly this is not a case within the purview of S. 53, Provincial Insolvency Act, because the allegation here is not that the insolvent has transferred property, but that the insolvent acquired certain property before his insolvency, but acquired it in the name of somebody else. In my view, S. 53, Provincial Insolvency Act, does not affect this case at all.

The unrebutted evidence led by the Official Receiver establishes that Badri Prasad had entered into a contract with Babu Lal to purchase the property in question. It further establishes that, upon a suit being instituted by Badri Prasad, a compromise was entered into and that, as a result of this compromise, the property was transferred to Kishen Prasad, who was Badri Prasad's son-in-law. Before the Insolvency Court, Babu Lal's general agent was called, who made it abundantly clear that the original contract was between Babu Lal and Badri Prasad and that it was Badri Prasad who brought proceedings to enforce his contract. He further stated on oath that it was Badri Prasad who provided the consideration for this sale-deed. In these circumstances, the Insolvency Court held and was indeed bound to hold in the absence of any evidence to the contrary that the transaction relating to this property did really and in fact take place between Babu Lal and Badri Prasad and that Kishen Prasad's name was merely introduced into the transaction for convenience or for reasons best known to Badri Prasad himself. This general agent did suggest that Kishen Prasad's name was being used, because Badri Prasad was then in a difficulty. Badri Prasad must have been in financial difficulty at the date of this transaction, because, as I have said previously, 17 days later he made an application to be adjudged an insolvent. That was the evidence before the Court on behalf of the Official Receiver; and it is to be observed that neither Badri Prasad nor Kishen Prasad who were parties to the proceedings, gave evidence to rebut these allegations.

It must have been quite clear to them that there was an allegation that Badri Prasad was fraudulently using his son-in-law's name and that the latter was permitting his name to be used in order to defraud creditors. In these circumstances one would have expected Kishen Prasad to have gone into the witness box and denied these statements, if they were untrue. His very silence in these circumstances strongly suggests that he was well aware that the whole of this transaction was fraudulent and bogus. It has now been argued on behalf of Kishen Prasad that Badri Prasad was at the date of this suit and compromise the general agent for Kishen Prasad and that he brought the suit and entered into the compromise as such agent. It is further said that Badri Prasad paid the money in his capacity as agent and in 1931 dealt with the property again in the same capacity. It is to be observed that there was no evidence at all before the Court that Badri Prasad acted in any such capacity. The unrebutted evidence was that Badri Prasad had entered into the original contract, brought the suit, compromised the suit and provided the money. Having regard to the fact that there was no evidence to the contrary, the Insolvency Court was bound to hold that Badri Prasad was the real owner of this property and that Kishen Prasad's name was merely put forward as a blind to defeat possible creditors or decree-holders.

When the case is approached from this point of view, it is clear that S. 53, Provincial Insolvency Act, has no application and that this is a case where the Court can go into the facts and ascertain the true ownership of this property under the powers conferred by S. 4, Provincial Insolvency Act. In my judgment, the Insolvency Court was right in declaring that the sale-deed of 1st November 1929, did not correctly represent what had, in fact, occurred, and further was right in declaring that the property in question, though standing in the name of Kishen Prasad, was property which had vested in the Official Receiver and which could be distributed amongst the creditors.

I have been in some doubt as to whether I should remit this case to the learned District Judge for a finding of fact upon this sale-deed of 1st November 1929. The learned District Judge having considered the matter only from the point of view of S. 53, Provincial Insolvency Act, has not considered the questions of fact. However the record is before me, and the evidence dealing with this particular transaction has been read. As I have pointed out, the evidence of an independent witness, that is, the general agent of the vendor, makes it clear that Badri Prasad was the person who was acquiring this property and was the person who paid for it. Where the evidence upon the record is complete, it is open to this Court to find a fact where the lower appellate Court has not done so. In my view, the evidence in this case is all one way and has not been rebutted by the persons who were in a position to do so. If I remitted this case for a finding as to the genuineness of the sale-deed of 1st November 1929, the learned District Judge would be bound to hold upon the evidence that the transaction was a fictitious one and that the real purchaser was Badri Prasad. That being so, I do not propose to remit this case, but I find as a fact upon the evidence, and particularly upon the evidence of the general agent of the seller, that Badri Prasad did in his personal capacity compromise the suit and acquire the property and that the name of Kishen Prasad was only introduced in order to hide the true nature of the transaction. Upon the evidence I am satisfied that this was a fraudulent transaction and must be set aside.

In the result therefore I allow this appeal, and restore the order of the Insolvency Court declaring that the property in question forms part of the property of the insolvent and is liable to be divided amongst the creditors. The Official Receiver must have the costs of this appeal.

B.D. *Appeal allowed.*

A. I. R. 1935 Allahabad 984

ALLSOP, J.

Nirmal Singh — Defendant — Appellant.

v.

Zamir Uddin Khan and *others*—Plaintiffs—Respondents.

Second Appeal No. 1021 of 1933, Decided on 27th August 1935, from decision of Dist. Judge, Bareilly, D/- 5th April 1933.

Appeal—Proper party — Landlord selling his interest—Landlord-vendee bringing suit against tenants for arrears of rent joining vendor as pro forma defendant—Court holding tenants to be proprietors and not tenants —Vendor is aggrieved party and can appeal against such decree.

A person claiming to be a proprietor sold his proprietary title to the vendee. Vendee brought a suit against the alleged tenants for arrears of rent and joined the vendor as a pro forma defendant. In the suit the tenants were declared to be proprietors and not tenants:

Held: that the vendor who was the pro forma defendant in the suit was an aggrieved party by the decree and could appeal against such decree: 21 *All* 117, *Appl.* [P 984 C 2; P 985 C 1]

B. Malik—for Appellant.

Judgment.—This second appeal arises out of a suit for arrears of rent in the Revenue Court. The plaintiffs in the suit alleged that they had acquired a proprietary title from the present appellant, Nirmal Singh, and they sued the defendants on the allegation that the said defendants were their tenants. These defendants maintained that they were not tenants, but proprietors. An issue was consequently remitted to the Civil Court, and that Court decided that the defendants were proprietors and not tenants. In the result, the suit was dismissed. The plaintiffs acquiesced in the decree, but Nirmal Singh, who had been impleaded as a party pro forma preferred an appeal against the decree. The learned Judge of the appellate Court held that Nirmal Singh was not entitled to appeal against the decree, because he no longer had any proprietary title in the land.

The respondents are not represented in this Court, and I have had not the advantage of hearing any argument on their behalf; but it seems to me that it is impossible to hold that Nirmal

Singh had no right to appeal. I have been referred to the case reported in 21 All 117 (1). In that case a suit had been instituted for the recovery of a debt by persons who claimed to be assignees of the creditor. The assignor was a party, and so were certain persons who claimed to be prior assignees. There was a dispute between the prior assignees and the latter assignees because if the prior assignment was valid, the latter assignment could not be. The suit was decreed. The prior assignees wished to appeal against the decree, and it was ultimately held in second appeal by the High Court that they were entitled to do so. The case was similar to the one that is before me. On principle too it seems that Nirmal Singh should be allowed to institute an appeal. He is obviously affected by the decree of the Court below, because under S. 55, T. P. Act, he must be considered to have given a warrant of his title; and if it is found that other persons, that is the defendants, were proprietors he will be liable for not having discharged that warranty. He is certainly an aggrieved party; and as he is a party to the proceedings, any decision might have the effect of res judicata against him. I consider that the appellant was entitled to institute an appeal in the Court below. I therefore set aside the decree of the lower appellate Court and remand the case under O. 41, R. 23, and O. 42, R. 1, Civil P. C., for decision upon its merits. The costs in this Court will abide the result. The court-fee paid in this Court shall be refunded.

B.D. *Case remanded.*

1. Jamna Das v. Udey Ram, (1898) 21 All 117= 1898 A W N 201.

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* A. I. R. 1935 Allahabad 985

BENNET, J.

Bachan Singh — Defendant — Applicant.

v.

Dasrath Singh—Plaintiff — Opposite Party.

Civil Revn. No. 100 of 1935, Decided on 27th August 1935, against order of Sm. C. C. Judge, Gorakhpur, D/- 4th October 1934.

*** Court-fees — Deficiency of court-fees ordered to be made good—Court rejecting plaint under O. 7, R. 11—Plaintiff filing restoration application after making good deficient court-fee—Court can treat such application as fresh plaint under O. 7, R. 13 and can allow court-fee paid on rejected plaint to be counted towards court-fee on fresh plaint under S. 149 and S. 151, Civil P. C.**

Plaint was filed without paying adequate court-fees on it. Court allowed certain time to make good the deficiency on the court-fees and ultimately rejected the plaint under O. 7, R. 11 because the deficiency was not made good. Thereupon an application for the restoration of the rejected plaint was filed after submitting the deficient court-fees:

***Held*: that the Court could treat such restoration application as a fresh plaint under O. 7, R. 13 and it can allow the old court-fee paid on the rejected plaint to be computed towards court-fee on the fresh plaint, under S. 149 and under its inherent powers derived under S. 151, Civil P. C.** [P 986 C 1]

Sankar Saran—for Applicant.

H. C. Mukerji—for Opposite Party.

Order.—This is a revision brought by two defendants against whom a Small Cause Court has passed a decree. The first point raised in revision is that the Court below had no jurisdiction to entertain an application for restoration after it had rejected a plaint on the ground that insufficient Court-fee had been paid, and that the Court having rejected the plaint was functus officio, and that the proper remedy of the plaintiff was to apply for review of judgment, and further that the suit was barred by limitation. The facts are that the plaintiff brought a suit on a promissory note dated 20th July 1929, and the plaintiff relied for saving limitation on an acknowledgment of 29th August 1931. The plaint was dated 3rd February 1934 and was valued at Rs. 751-8-0 with Court-fee stamp of Rs. 30. There was a deficiency of Rs. 47-8-0 and the plaintiff was allowed upto 13th March 1934 to make up the deficiency. He did not do so and the date was extended several times to 29th March, 9th April, 10th April, 29th April and 11th May 1934. By that time the plaintiff had deposited in all over Rs. 60 and there was a deficiency of Rs. 16. The Court rejected the plaint on the ground that the deficiency had not been made good. This order of rejection was passed under O. 7, R. 11 (c). It is provided by R. 13, of O. 7 as follows:

> The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint of the same cause of action.

Now, it is clear that under this rule a fresh plaint must be presented. It will be necessary for such a fresh plaint to be presented within the period of limitation otherwise the suit would fail on the ground of limitation. On 22nd May 1934, the plaintiff made an appli-

cation to the Court. Now that date was within the period of three years from 29th August 1931, the date of the alleged acknowledgment, and therefore if the original plaint was within limitation the plaintiff would have been within limitation if he had filed a fresh plaint on 5th July 1934. Instead of filing a fresh plaint what he did was to pay into Court Rs. 16, deficiency of Court-fee on the former plaint and he asked the Court to count the Rs. 60 already paid as making up the full Court-fee and instead of filing a fresh plaint he asked that the suit should be restored. I do not think that so far as the plaintiff is concerned there is very much difference between asking that the suit should be restored on the former plaint and filing a fresh plaint. The question is whether on that date the Court had power to treat the Rs. 60 already paid as part of the Court-fee. No ruling has been shown on the subject. Under S. 149, Civil P. C., it is provided as follows:

> Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

It is argued that this section cannot apply after the original plaint had been rejected under O. 7, R. 11. The section says "at any stage." I think it is a fair inference under this section and under S. 151, that the Court had power to allow the Rs. 60 to count for the whole Court-fee and that the Court is not compelled to require the plaintiff to pay a full Court-fee on the fresh plaint. The Court however passed a very brief order. In the order sheet it was merely stated "Deficiency of Court-fee made good. Suit to be restored." and on the original plaint it was written "Deficiency made good." The grounds of revision are not in my opinion correct in alleging that the only course open to the Court was to treat the application as one for review of judgment. I think it was open to the Court to treat the application as a fresh plaint. Accordingly the mere defects in the order of the Court should not in my opinion prevent the plaintiff from having the benefit of O. 7, R. 13, and the proceedings of 5th July 1934, may be treated as the filing of a fresh plaint in which the Court allowed the Court-fee of Rs. 60 already paid plus the Court-fees of Rs. 16 paid on that date to be treated as a whole Court-fee.

The next point which is urged by the defendants is that the liability of defendant 2 has not been established. The Court below has found as a finding of fact that defendant 2 had clearly admitted the promissory note and his liability. I do not consider that this finding of fact can be challenged in revision, but in any case learned counsel admits that there is a compromise of the same date as the promissory note, 29th August, in suit No. 395 of 1931, to which defendant 2 was a party and defendant signed that compromise and in that compromise it is stated that the defendants in that suit including defendant 2 are liable for the promissory note in question. If therefore a first appeal had lain from finding on this issue of fact, the finding would be against counsel, but I do not see how this finding can be raised in revision.

I therefore dismiss this application in revision with costs.

B.D./R.K. *Application dismissed.*

A. I. R. 1935 Allahabad 986

SULAIMAN, C. J. AND BENNET, J.

Emperor

v.

Parshottam Kandu

Criminal Ref. No. 937 of 1934, Decided on 22nd March 1935, by Addl. Sess. Judge, Ghazipur, D/- 4th October 1935.

(a) U. P. Municipalities Act (2 of 1916), S. 180 (5)—Notice under S. 178 — Sanction not given by the board— Work should not be commenced.

Under S. 180 (5) it is incumbent on a person who has given notice under S. 178, not to commence any work of which notice has been given until sanction has been given or deemed to have been given by the board. This sub-section does not require that the notice under S. 178 must be such notice as was absolutely necessary to be given. Where the notice has been given under that section, sub S. (5) is applicable.

[P 987 C 1, 2]

(b) U. P. Municipalities Act (2 of 1916), S. 307 (b)—Continuing breach— Conviction for offence already committed — Separate prosecution is necessary for continuing breach.

Section 307 (b) is applicable only to a case of a continuing breach where the offender is proved to have persisted in the offence. Obviously where the conviction for an offence was on account of an offence which has already been committed, a second prosecution would be necessary for an offence of continuing breach.

[P 988 C 2; P 989 C 1]

Assist. Govt. Advocate—for the Crown.

K. N. Gupta—for Opposite Party.

Sulaiman, C. J.—This is a reference by the Additional Sessions Judge of Ghazipur recommending that the convictions of Parshottam Kandu under Ss. 185 and 307, Municipalities Act, be set aside. The reference proceeded on the assumption that a mistake had been committed by the chairman of the Municipal Board in granting a conditional sanction to the applicant for re-erecting a wall of his house which was close to a lane, and that the chairman had no power to direct that the applicant before rebuilding his wall should leave a space of 9 feet to the south-west of the wall. The case came up before a learned Single Judge of this Court who was inclined to take the same view, but in view of certain conflict of opinion in this Court referred it to a Division Bench.

If we were to assume in favour of the applicant that he was trying to erect an old wall and not erect any building, then there might have possibly been something to be said in his favour, as S. 178 requires a notice in case of the erection of a building or part of a building, and in the case of a re-erection of a building only. But the Criminal Court has found that the accused constructed new wall in contravention of the plan and order of the Municipal Board, and not that he re-erected an old wall; and the Additional Sessions Judge is inclined to the same view. In any case it is an admitted fact that the applicant before making the construction did in fact send notice under S. 178, Municipalities Act. Such notice under Sub-S. (2) of that Act is necessary where the building is adjacent to a public street or place. In the corresponding section of the earlier Act the word "adjoining" was used, which has now been replaced by the words "adjacent to." Obviously "adjoining a public street or place" would mean "actually touching the public street or place" whereas "adjacent to such street" merely means "near such street." There is no doubt that the construction in dispute actually abuts on the lane and is near it.

Under S. 180 (5) it is incumbent on a person who has given notice under S. 178, not to commence any work of which notice has been given until sanction has been given or deemed to have been given by the board. This sub-section does not require that the notice under S. 178 must be such notice as was absolutely necessary to be given. Where the notice has been given under that section, Sub-S. (5) is applicable.

It is not necessary to decide in this case whether the chairman of the Municipal Board acted beyond his powers in laying down the condition that a space of 9 feet should be left to the south-west of the proposed wall. But we would like to point out in order that it may not be understood that we necessarily agree with that view, that there is a possibility that the board would have authority to issue written directions under S. 180 (1), under list A (h) (i) given below S. 298, prescribing the method of construction to be used for external walls. Again, it is equally possible that a case may fall under S. 180 (1) (b) authorising the board to issue written directions requiring the setting back of a part of a building to the regular line of a street so as to leave a continuous line of frontage all along. As these questions have not been gone into, we express no opinion on them. As sufficient materials have not been laid before the Court, it is impossible to say that the chairman acted beyond his authority and that his order was illegal.

There is another more serious difficulty in the way of the applicant. Even if the direction were without authority, the fact remains that the sanction was given conditionally and allowed the applicant to erect the wall at a different place from that at which it has been built. There was accordingly no sanction given to the applicant to build the wall at the place where it has been actually constructed. The case therefore fell within the scope of Sub-S. (5) of S. 180, and the applicant commenced his work without having obtained a proper sanction. When the chairman had laid down a condition that the wall should be constructed leaving a space of 9 feet, it cannot be suggested that an implied sanction must be deemed to have been given to construct a wall without leaving such space. The applicant therefore contravened the provisions of S. 180 (5) in constructing the wall. That being so, S. 185 of the Act is applicable to him because he began, continued and completed the erection or re-erection of a part of the building "in contravention of the provisions of S. 180 (5)," and was therefore liable upon conviction to a fine. It follows accordingly that the board had a perfect right under S. 186 of the Act to issue a written notice directing

him to stop the erection or re-erection of a part of his building as well as to direct the demolition of a part of the building as was considered necessary. It is impossible for the applicant to contend that the notice issued under S. 186, when he had contravened the provisions of S. 180 (5), was in any way illegal. The conviction of the applicant under S. 185 of the Act was therefore perfectly right and cannot be impugned.

The next question is whether his conviction under S. 307 can be sustained. The learned Assistant Government Advocate urges before us that under S. 321 of the Act no order or direction referred to in S. 318 shall be questioned in any other manner or by any other authority than is provided therein, i. e., in S. 318. It would seem prima facie that the orders passed under S. 318 are absolutely final and cannot be questioned afterwards. In this respect the language of section 321 is somewhat different from that employed in S. 164 where the provision is that the liability of a person cannot be questioned in any other manner or by any other authority "than is provided in this Act" 1935 A L J 68 (1). It is also the fact that the language of S. 307 has been amended, and in place of the words in S. 147 to the effect "any lawful direction given by the Board by public notice under the powers conferred upon it by this chapter, etc., etc.," we now have the words: "If a notice has been given under the provision of this Act or under a rule or byelaw to a person, etc." In several cases of this Court decided by Single Judges, the opinion has been expressed that if the action of the Board was without authority and was in direct contravention of the Municipalities Act, then its illegality and its ultra vires nature can be questioned before the Criminal Court which is called upon to convict the accused. We may refer to 18 A L J 229 (2); 18 A L J 572 (3) and 19 A L J 541 (4). The earlier case reported in 12 A L J 254 (5), is not in point, because it was decided under the former Act. On the other hand, a Bench of this Court in 1932 A L J 579 (6) has expressly held that it is not open to the Criminal Court hearing a case under S. 307 of the Act to enquire into the legality or otherwise of the notice issued by the Board. We understand that the majority of the Full Bench of the Oudh Chief Court, apparently overruling their previous decisions in 1925 Oudh 546 (7) and 1932 Oudh 306 (8) have decided that the legality of the notice cannot be gone into under S. 307 of the Act. There is however one consideration which does not appear to have been strongly pressed at the bar. Even in the new S. 307 the words "If a notice has been given under the provisions of this Act" occur at the very beginning of the section which the Criminal Court cannot ignore. It may therefore be a question whether these words merely mean that when a notice has been given professedly by the Board under the Act, the section applies, or that the section applies only where a notice has been given in compliance with the provisions of this Act. It is not necessary to express any final opinion on this question because in our opinion this is not a fit case in which it can be said that the notice issued was in reality not under the provisions of this Act. As already pointed out by us, section 186 was directly applicable because the accused had contravened the provisions of S. 185 inasmuch as he had commenced the construction without a previous sanction in defiance of S. 180 (5). We therefore do not think that this is a fit case in which this question should be considered.

It may however be pointed out that the Magistrate has not only convicted the accused and fined him but has also imposed a continuing fine of Re. 1 per day with effect from the expiry of three days allowed for the demolition of the wall. S. 307 (b) is applicable only to a case of a continuing breach,

1. Kashi Prasad v. Municipal Board, Benares, 1935 All 28=154 I C 750=36 Cr L J 560=1935 A L J 68.
2. Ram Partap Marwari v. Emperor, 1920 All 103=55 I C 302=21 Cr L J 286=18 A L J 229.
3. Municipal Board, Etawah v. Debi Prasad, 1920 All 182=58 I C 146=21 Cr L J 722=42 All 485=18 A L J 572.
4. Kashmiri Lal v. Emperor, 1921 All 267=63 I C 410=22 Cr L J 660=43 All 644=19 A L J 541.
5. Emperor v. Piare Lal, 1914 All 41=23 I C 745=15 Cr L J 377=36 All 185=12 A L J 254.
6. Har Prasad v. Emperor, 1932 All 673=1932 Cr C 825=138 I C 839=33 Cr L J 692=1932 A L J 579.
7. Ram Charan v. Improvement Trust, Lucknow, 1925 Oudh 546=85 I C 243=26 Cr L J 499.
8. Yusuf Husain v. Emperor, 1932 Oudh 306=1932 Cr C 846=140 I C 185=33 Cr L J 933=9 O W N 70.

where the offender is proved to have persisted in the offence. Obviously the conviction for such an offence must be on account of an offence which has already been committed. For such an offence therefore a second prosecution would be necessary.

We accordingly accept the reference in part and set aside the order of the Magistrate relating to the imposition of the continuing fine, and uphold the convictions of the accused under sections 185 and 307 and maintain the sentences of Rs. 30 and Rs. 5 passed on him under those sections.

B.D. *Order accordingly.*

A. I. R. 1935 Allahabad 989

HARRIES AND MULLA, JJ.

Emperor

v.

Ram Nath and *others*

Criminal Appeal No. 1046 of 1934, Criminal Revn. No. 147 of 1935 and Criminal Appeal No. 148 of 1935, Decided on 26th August 1935, from order of Asst. Sess. Judge, Etawah, D/- 19th November 1934.

*** Sentence — Power of High Court to enhance — No limitation imposed except maximum sentence provided — Sentence passed by Assistant Sessions Judge can be enhanced.**

The power to enhance a sentence is given to a High Court by S. 439 (1), Criminal P. C. The sub-section standing by itself does not suggest that there is any limitation upon the power of this Court to enhance a sentence other than the limitation imposed by the maximum sentence prescribed for the offence. In the absence of express words limiting the powers of the High Court in case of sentence passed by Assistant Sessions Judge, High Court can enhance such sentence up to the maximum sentence prescribed by law for the offence, even though it may exceed the sentence that can be passed by an Assistant Sessions Judge: 1920 *Lah* 213, *Foll.*

[P 993 C 1, 2]

Govt. Advocate—for the Crown.

Saila Nath Mukerji—for Respondents.

Harries, J.—The 13 appellants in Criminal Appeal No. 1046 of 1934, were convicted by the learned Assistant Sessions Judge of the Etawah District of an offence under S. 399, Penal Code. The appellant, Ram Nath, was sentenced under that section to a term of six years rigorous imprisonment, the appellant, Khuda Bux was sentenced under that section read with S. 75, Penal Code, to seven years' rigorous imprisonment, whereas the remaining 11 appellants were sentenced under that section each to a term of five years' rigorous imprisonment. The appellants Ram Prasad and Gulzari were also charged with an offence under S. 307, Penal Code. They were found guilty, convicted and sentenced under that section to a term of five years' rigorous imprisonment which was made to run concurrently with the sentence previously referred to which was imposed upon them under S. 399, Penal Code. The appellants, Ram Prasad, Gulzari and Shiama were further charged with an offence under S. 19 (f), Arms Act, and were found guilty, convicted and sentenced under that section each to a term of one year's rigorous imprisonment. In the case of Ram Prasad and Gulzari this latter sentence of one year was made to run consecutively with the sentences previously imposed upon them, but in the case of Shiama the sentence under the Arms Act was made to run concurrently with the sentences previously mentioned.

Against these convictions each of the appellants has preferred an appeal to this Court, but we are informed that since the appeal was filed Ram Prasad has died. That being so it is unnecessary to consider the evidence in so far as it referred to him and we shall deal only with the case of the remaining 12 appellants. The Local Government being of opinion that the sentences previously referred to were inadequate have applied to this Court for an enhancement of the same and that is the subject-matter of Criminal Revision No. 147 of 1935. The appellants previously referred to were charged with a number of other persons including Kishan Prasad, Ram Charan, Jhamman, Malkhan, Puttu Lal, Sukh Ram and Mahendra, but these seven persons together with two others were found not guilty by the learned Assistant Sessions Judge and acquitted. The Local Government have appealed against the acquittal of these seven named persons alleging that their acquittal was against the weight of evidence and therefore illegal. The Government appeal against the acquittal of Kishan Prasad and the six other named persons is the subject-matter of Criminal Appeal No. 148 of 1935.

The charge against the appellants in Criminal Appeal No. 1046 of 1934, and the respondents in Criminal Appeal No. 148 of 1935, was that they together with two others on or about 20th May 1934 had made preparations for committing a dacoity. The facts of the case can be briefly stated as follows:

One Pandit Jagannath Prasad, a Circle Inspector of Bhind in the Gwa-

lior State, became suspicious that the appellant, Ram Nath and others were living in a far better state than their means of livelihood appeared to warrant and that being so he instructed Balwant, a prosecution witness, to get into touch with these persons in order to ascertain how they obtained their money.

In consequence Balwant approached Ram Nath and eventually discovered that Ram Nath and others were committing dacoities and were at that time arranging to commit a dacoity in the Etawah District. Balwant discovered that a dacoity was to be committed in the near future and on 19th May 1934, he conveyed this information to Pandit Jagannath Prasad the Circle Inspector. According to this information it would appear that a party of dacoits had already left for the Etawah District and that the remainder were leaving the Bhind District to join the others at Etawah on the morning of the 20th May. Balwant was instructed by the Circle Inspector to accompany the second party of dacoits and he further communicated with the Etawah police and informed them of what he knew. Arrangements were immediately made to interrupt this second party of dacoits and in the early morning of the 20th May, a number of police officers took up their station at Nagla Gaur which is on the road between the Bhind District and Etawah and there stopped all ekkas and questioned the passengers. In due course an ekka driven by Silbat, prosecution witness No. 5 came along in which were seven passengers including Balwant. This ekka was stopped by the police and the seven persons arrested. Immediately behind this ekka was a second ekka in which one Kashi Ram was riding and this ekka was also stopped and Kashi Ram arrested. Shortly afterwards the Circle Inspector of Bhind Pt. Jagannath Prasad joined the police party and informed them that Balwant was an informer and he was consequently released. The persons arrested were the appellants, Jangi Singh, Darshan Singh, Manpal Singh, Gur Narain, Dwarka, Khuda Bux and Kashi Ram, and they were there and then interrogated on the spot. It appears that Khuda Bux gave the police some information and shortly afterwards a report was made at the Kotwali at Etawah by Munshi Syed Wasi Hasan, Circle Inspector of the Etawah Circle. It appears that Khuda Bux told the police that the appellant, Ram Nath was coming along later in an ekka and a number of constables were deputed to stop this ekka and effect the arrest of Ram Nath. In due course an ekka containing Ram Nath did come along and Ram Nath was arrested.

In the first information report made by the Circle Inspector of the Etawah District he mentions that the six appellants previously named and Kashi Ram had been arrested and that Khuda Bux had made a statement to the police to the effect that Ram Nath was coming along later and that steps had been taken to arrest him. It is further stated in the report that Khuda Bux had informed the police that the party of dacoits which had left the previous night had gone to the house of one Rupa Ahir in the village of Kunaiya and that it was intended to go to that village immediately to arrest these persons.

A police party was immediately organised which left for Kunaiya taking with them the appellant Khuda Bux. The village was surrounded by the police and a house to house search instituted. A number of persons who were pointed out by Khuda Bux as being in this gang of dacoits were arrested and in due course a locked house said to be the house of the appellant Rupa was surrounded. It was apparent that there were persons inside this house and attempts were made to get into it, but the persons inside resisted by force and a good deal of firing took place between them and the police party. A police constable was wounded and the Superintendent of Police, Mr. Pilditch, also received a slight graze from a bullet. After a time the police were able to get into the house and it was discovered that two of the inmates had been shot dead. The other two persons, viz., Ram Prasad and Gulzari were persuaded to throw down their arms and surrender. It is the case for the prosecution that these four persons inside the house had attempted to murder the police constable who was wounded, hence the charge under section 307, Penal Code, against Ram Prasad and the appellant, Gulzari.

In due course Khuda Bux was placed before a Magistrate who recorded his confession. In that confession he makes it clear that the appellant, Ram Nath was the organiser of a very determined band of dacoits and that it had been arranged that a dacoity should be committed in the Etawah District. In order to avoid suspicion a number of dacoits

had been sent away on 19th May 1934 and these persons had taken with them six guns. They were to go to the village of Kunaiya and wait at the house of the appellant, Rupa until the arrival of Ram Nath himself with the remainder of the party on the following day. He then stated that on the following morning he proceeded on foot while a number of other dacoits and Balwant proceeded in an ekka from the Bhind District towards Etawah and picked him up on the way as arranged previously. He then describes their arrest by the police at Nagla Gaur and states that he then informed the police that Ram Nath was coming later in an ekka and could be arrested as he was passing Nagla Gaur. He then mentions that he took the police to Kunaiya where he pointed out a number of the dacoits to them. This confession though subsequently retracted if accepted, abundantly establishes the guilt of Khuda Bux and is also a valuable piece of evidence against Ram Nath and the other appellants whom he actually names. However, it has been urged that this confession should not be accepted, but we see no reason for rejecting it. According to the learned Magistrate, Mr. G. N. Rania, who recorded the confession, Khuda Bux was given ample warning of the consequences of making any incriminating statement, but that after such warning he still desired to make a statement. In the view of the learned Magistrate the statement was voluntary and had not been induced in any way by the police authorities. At the time when the confession was recorded Khuda Bux was not in police custody and we see no reason whatsoever for arriving at a different conclusion from that arrived at by the Assistant Sessions Judge. In his view this confession was a voluntary one and not one made as the result of any inducement or threat held out or offered by the police and that being so, in our view, it was rightly admitted.

The appellant, Shiama, also made a statement to the police and in due course he took a Magistrate to the village of Kunaiya and there pointed out a spot where he said a gun was hidden. It may be observed that when this appellant was arrested a quantity of ammunition was found upon him and therefore he was a person who might well have had the charge of one of the guns. On going to the spot pointed out by Shiama a gun was discovered. When Ram Prasad and Gulzari surrendered to the police, five guns and a quantity of ammunition were found in Rupa's house and the possession of these guns is the subject-matter of the charge under the Arms Act which was brought against the appellants, Shiama, Ram Prasad and Gulzari.

Later Shiama was taken before a Magistrate who recorded his confession and in that confession he implicates himself to the hilt. He states that there had been a gathering of the dacoits in Bhind and that an advance party taking six guns with them had gone to Kunaiya to await the arrival of the others. In this confession Shiama names no one except Bhawai who was one of the persons killed in Rupa's house. The learned Magistrate, Mr. Raina who recorded this confession duly warned the appellant and asked him if anybody had threatened him or induced him to make any statement. The learned Magistrate was satisfied that the statement which Shiama made was voluntary one and that he was not under police influence at the time he made it. The learned Assistant Sessions Judge was satisfied that the confession of Shiama was a voluntary one and therefore admissible in evidence against him and with that view we agree. The confession though retracted is very strong evidence against the appellant, Shiama, though of course it is not evidence against the other appellants because no reference to them is made in it. However, the confession of Shiama clearly establishes that the evidence of the main prosecution witness Balwant is true because as it will be seen Balwant describes the meeting in the Bhind District and the despatch of the advance party of dacoits with guns to await the arrival of the remainder.

Upon investigation it was discovered that there was no evidence at all against Kashi Ram who had been arrested in an ekka immediately following the ekka in which Balwant and his six companions were travelling and consequently no proceedings were taken against Kashi Ram. A case was instituted however against the 13 appellants and the seven respondents to the Government appeal and two others. As we have stated the 13 appellants were found guilty of various offences, whereas the seven respondents to the Government appeal and the two other persons were acquitted.

The main witness for the prosecution was the informer Balwant who stated

that he had been asked by the Circle Inspector of Bhind to keep in touch with Ram Nath. He described how he was informed that a dacoity was to be committed in the Etawah District and the arrangements made to send the dacoits there. There was a meeting of the dacoits at which a number of them armed with six guns were sent away, whereas the rest were instructed to follow in ekkas on the following day. That evening Balwant conveyed this important information to Pt. Jagannath Prasad, the Circle Inspector, who communicated with the Etawah police. There can be no doubt whatsoever that Balwant did convey the information which he said he did to the Circle Inspector at Bhind because the latter at once sent a letter to the police authorities at Etawah mentioning this information and asking them for their co-operation. That letter was produced at the hearing and abundantly corroborated Balwant's statement that he gave the information concerning this arranged dacoity to the police at Bhind. Balwant then described how on the following morning Ram Nath arranged for Silbat's ekka to take himself and six others to Etawah and how they were arrested on the way. He also mentions that Khuda Bux was not actually in the party when they started from Bhind, but that he was picked up on the way as previously arranged.

In order to avoid suspicion Ram Nath arranged to travel shortly afterwards in another ekka. If Balwant's evidence is accepted there can be no doubt that Ram Nath had organised a dacoity and that elaborate preparations had been made for it. Balwant, as will be seen later, named a large number of the appellants and his evidence goes a very long way to establish the charge. Some suggestion has been made that Balwant was on inimical terms with some of the respondents, but there has been no real attempt to establish this. In our view there is no reason whatsoever for rejecting Balwant's evidence and that being so it goes a long way to establish the case for the prosecution. The arrest of Balwant and his companion at Nagla Gaur is deposed to by a number of police witnesses; so also is the arrest of Ram Nath shortly afterwards. The fact that Balwant was found in the company of a number of appellants and that Ram Nath followed in an ekka shortly afterwards is, in our judgment, very strong corroboration of Balwant's evidence and the statement which he made to Pt. Jagannath Prasad on the evening of 19th May 1924.

The arrest of the dacoits at Kunaiya and the fight that took place around Rupa's house is described by a number of police witnesses. The description of the behaviour of the dacoits inside Rupa's house establishes beyond doubt that the defenders were men of courage and spirit who were prepared to sell their lives dearly. The arrest of Ram Prasad and Gulzari in Rupa's house is abundantly proved, so also is the recovery of the five guns and ammunition after the arrest.

Further the prosecution tendered in evidence the confession of Khuda Bux implicating himself and a number of others and also the confession of Shaima implicating only himself. The Magistrate to whom Shiama pointed out the hiding place in which another gun was discovered was called who abundantly proved that fact.

In our judgment the evidence called for the prosecution establishes that a large number of persons had gathered together for the purposes of committing a dacoity and had made elaborate arrangements for the same. We are satisfied that a number of persons heavily armed went off to Kunaiya on 19th May 1934, and that the remainder left the Bhind District on 20th May 1934, to join their companions as arranged to commit this dacoity. The only question remaining therefore is whether or not the Crown had satisfactorily established that the appellants were members of this party who had arranged and prepared a dacoity. It will be convenient to deal shortly with the cases of the individual appellants. (His Lordship after considering the case of each accused separately proceeded with the judgment). In the result therefore we hold that the appellants Ram Nath, Manpal, Bhogi Ram, Dwarka, Gur Narain, Lala Ram, Shiama, Rupa, Darshan Singh, Jangi Singh, Gulzari and Khuda Bux, were properly convicted of an offence under S. 399, Penal Code. We further hold that Gulzari was properly convicted of an offence under S. 307, Penal Code, and that both Gulzari and Shiama were properly convicted of an offence under S. 19 (f), Arms Act.

In our view the sentences imposed upon the appellants by the learned Assistant Sessions Judge were not adequate. According to the evidence, preparations had undoubtedly been made for a serious dacoity in which any resistance was to be met by overwhelm-

ing force. Six guns had actually been distributed amongst the advance party of dacoits, so also a large quantity of ammunition. It is clear that amongst this advance party were men who were prepared to use force and to kill if necessary. When Rupa's house was surrounded, four dacoits kept the police party at bay for sometime and Gulzari and Ram Prasad did not surrender until two dacoits had actually been killed. During this fight a police constable was shot, though fortunately the wound sustained did not prove fatal. The Superintendent of Police also received a slight wound and the appellant Gulzari is fortunate that more serious injury was not caused. The conduct of these dacoits when surrounded in Rupa's house shows that this gang consisted of determined men who were prepared to use unlimited force if necessary to secure their ends. This gang was undoubtedly led by Ram Nath who, according to the evidence, actually produced the guns and distributed them. In our judgment this is as bad a case under S. 399 as can be imagined and that being so a sentence of six years' rigorous imprisonment passed on Ram Nath and five years' rigorous imprisonment passed on the others is wholly inadequate.

It has been contended, however, that this Court has no power to enhance the sentences passed on these appellants beyond the maximum sentence which could have been imposed upon them by the learned Assistant Sessions Judge. The maximum sentence which can be imposed under S. 399, Penal Code, is ten years' rigorous imprisonment, but by reason of the provisions of S. 31 (3), Criminal P. C., the maximum sentence which an Assistant Sessions Judge can pass is one of seven years' rigorous imprisonment. Consequently it is urged that this Court in revision can only enhance the sentences passed to sentences of seven years' rigorous imprisonment and no more.

In our judgment there is no force in this contention. The power to enhance a sentence is given to this Court by S. 439 (1), Criminal P. C. That sub-section provides that in the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428 or on a Court by S. 338, and may enhance the sentence. The sub-section standing by itself does not suggest that there is any limitation upon the power of this Court to enhance a sentence other than the limitation imposed by the maximum sentence prescribed for the offence. Prima facie therefore the powers of this Court to enhance sentences does not depend upon the powers which the trial Court may have with regard to sentences. The matter is made abundantly clear by the provisions of sub-S. 3, S. 439 which provides that where the sentence dealt with under S. 439 has been passed by a Magistrate acting otherwise than under S. 34, the Court shall not inflict a greater punishment for the offence which in the opinion of such Court the accused has committed than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the First Class. In other words where the case was originally tried by a Magistrate acting otherwise than under S. 34 of the Code, the powers of this Court are limited, but they are not limited if the case was originally tried by a Magistrate acting under S. 34 of the Code. A Magistrate acting under S. 34 of the Code may impose a sentence not exceeding seven years' rigorous imprisonment and it is to be observed that the words of S. 34 which gives a Magistrate these special powers are precisely similar to the words of S. 31 (3) which gives an Assistant Sessions Judge powers to pass a sentence in criminal cases. In our view if there is no limitation upon the power of this Court to enhance sentences passed by Magistrates acting under S. 34 of the Code, there can also be no limitation on its power in dealing with sentences passed by the Assistant Sessions Judges. In the absence of express words limiting the powers of this Court in cases of sentences passed by Assistant Sessions Judges we are bound to hold that this Court can enhance such sentence up to the maximum sentence prescribed by law for the offence. This view is supported by the reasoning in 1 Lah 453 (1), a Single Judge decision of the Lahore High Court. Though the maximum sentence which an Assistant Sessions Judge could pass under S. 399 is seven years' rigorous imprisonment this Court can, in our judgment, enhance the sentence imposed up to the maximum allowed by law, viz., ten years' rigorous imprisonment.

As Ram Nath was the ringleader

1. Emperor v. Jagat Singh, 1920 Lah 213=56 I C 861=21 Cr L J 557=1 Lah 453.

and organiser of this proposed dacoity we are of opinion that the sentence of six years' rigorous imprisonment passed upon him should be substantially enhanced and that being so we enhance it to one of ten years' rigorous imprisonment.

The sentence of seven years' rigorous imprisonment passed on Khuda Bux is, in our view, also inadequate. This appellant admitted two previous convictions, one for theft in 1916 and one for a dacoity in 1925 for which he was sentenced to a term of four years' rigorous imprisonment. S. 75, Penal Code, applies to his case and in our view the proper sentence to impose on Khuda Bux is one of ten years' rigorous imprisonment and we enhance his sentence accordingly.

The appellant, Gulzari, was properly convicted of offences under S. 399 and S. 307, Penal Code, and S. 19 (f), Arms Act, and in our view the sentences imposed upon this appellant were not adequate. We are of opinion that this appellant should also receive a total sentence of ten years and that being so, we direct that the sentences of five years passed upon him under S. 399, Penal Code, and S. 307, Penal Code, should run consecutively. The sentence of one years' rigorous imprisonment passed upon him under S. 19 (f), Arms Act, will run concurrently with the other two consecutive sentences.

Shiama. In our judgment the sentence passed upon the appellant Shiama is inadequate and we impose a sentence of seven years' rigorous imprisonment under S. 399, Penal Code, and direct that the sentence of one year passed against this appellant under S. 19 (f), Arms Act, shall run concurrently with the former sentence.

The sentences of the remaining appellants are each enhanced to seven years' rigorous imprisonment under section 399, Penal Code.

The appeal on behalf of the Local Government cannot be really pressed. The respondent Kishan Prasad is, we are informed, still absconding, so we cannot consider his case in this judgment. The evidence against the respondents, Ram Charan, Jhamman, Malkhan, Puttu Lal, Sukh Ram and Mahendra is, in our view, quite inadequate to sustain a conviction under S. 399, Penal Code. It is to be observed that Jhamman and Malkhan are residents of Kunaiya the village in question and that being so it is not surprising that they were in the village when it was surrounded by the police. There is some evidence that some of the dacoits were arrested near Malkhan's house, but that in itself is not evidence to convict Malkhan under this section. The respondents Ram Charan, Puttu Lal, Sukh Ram and Mahendra came from other villages and that being so their presence at Kunaiya might be regarded as suspicious, but that in itself is not sufficient to maintain a conviction for making preparations to commit a dacoity. It is to be observed that Balwant mentions none of these respondents; neither Khuda Bax in his confession. In short the only evidence against them is that they were arrested at Kunaiya whilst the police were searching the village for the advance party of dacoits which had left Bhind on 19th May 1934. As we have stated there is some very vague evidence connecting Malkhan with some of the dacoits, but there is little or no evidence against the remainder. In any event the evidence tendered against these respondents is wholly inadequate to support a charge of making arrangements to commit dacoity. There was some other evidence against Kishan Prasad, but with that we have no concern. However we think it right to say that the evidence against that respondent is of the slightest and the Local Government may well consider whether or not they should proceed further with the appeal against him.

In our judgment the learned Assistant Sessions Judge was abundantly justified in acquitting these appellants and in our view there was no other possible course open to him. To have convicted them upon the evidence tendered by the prosecution would have been wholly wrong and we cannot understand why an appeal should have been filed against the acquittal of these appellants. Such an appeal had no reasonable prospect of success.

In the result therefore the appeal of the Local Government against the acquittal of Ram Charan, Jhamman, Puttu Lal, Sukh Ram, Malkhan and Mahendra is dismissed. If these respondents or any of them are in custody, they must be released forthwith unless required by the authorities upon any other charge. If any of the respondents are on bail they need not surrender to their bail and their bail bonds are hereby discharged.

B.D. *Order accordingly.*

* A. I. R. 1935 Allahabad 995

NIAMATULLAH AND ALLSOP, JJ.

Dehra Dun Mussoorie Electric Tramway Co. Ltd.—Plaintiff—Appellant.

v.

Hansraj and *others* — Defendants—Respondents.

First Appeal No. 240 of 1931, Decided on 9th May 1935.

(a) Evidence — Appreciation — Finding of fact resting merely on inference to be drawn from proved circumstances — Trial Court is not in better position.

Where the conclusion rests on inferences to be drawn from proved circumstances of the case, and not on believing or disbelieving witnesses, the case is not one in which the trial Court is in a peculiarly better position than the Court of appeal in recording a finding on a question of fact. [P 995 C 2]

(b) Fraud—Proof of—Fraud not capable of direct evidence — Party alleging it must establish it by cogent evidence — Circumstances proved must be incompatible with having acted in good faith.

In all cases of fraud which is not capable of proof by direct evidence, the Courts have to fall back upon inferences to be drawn from circumstances established by evidence. The party alleging fraud is nevertheless bound to establish it by cogent evidence, and suspicion cannot be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. [P 995 C 2]

*** (c) Companies Act (1913), S. 235—Proceedings under, are domestic proceedings — Orders passed thereunder do not bar suit against third party.**

Proceedings under S. 235 are domestic proceedings between the company and its officers and the orders are passed in a special jurisdiction investing the Court with certain powers over the internal affairs of the company. Hence orders in such proceedings do not bar a suit against a third person whose wrongful act has caused loss to the company. [P 999 C 2]

(d) Limitation Act (1908) Arts. 36 and 95 —Suit for relief on ground of fraud is governed by Art. 95 and not by Art. 36.

Article 36 is a residuary article. A suit for a relief on the ground of fraud is governed by Art. 95 and not by Art. 36. That being so, time begins to run from the date of the knowledge of fraud. [P 1000 C 1]

*** (e) Succession Act (1925), S. 306—"Personal injuries" means injury to person as distinct from injury to property—Pecuniary loss through deception is not personal injury —Liability survives after death of wrongdoer.**

"Personal injury" in S. 306 is intended to mean injury to the person as distinguished from injury to property. Defamation, malicious prosecution, assault and bodily hurt may all indirectly cause financial loss or financial expenditure, but they are in the main injuries which are personal in that they directly give rise to mental or physical suffering or inconvenience. Hence pecuniary loss caused through deception is not injury of that nature and hence liability for such loss survives after the death of the person liable: *Case law referred.* [P 1001 C 1]

K. N. Katju—for Appellants.

P. L. Banerji and *G. S. Pathak* — for Respondents.

Niamatullah, J.—The facts of this case are stated in detail in the judgment delivered by my brother, Allsop, J., with whose conclusions I find myself in entire agreement. I desire to make a few observations on the important question of fact on which the decision of the case largely depends. I have taken time to consider the point in all its aspects and made due allowance for the fact that the Subordinate Judge arrived at a different conclusion. I may however point out that the case is not one in which the trial Court is in a peculiarly better position than the Court of appeal in recording a finding on a question of fact. The conclusion rests on inferences to be drawn from proved circumstances of the case, and not on believing or disbelieving witnesses. Excepting the evidence of Mela Ram, whose good faith is in controversy, the evidence bearing on the point is all circumstantial.

In all cases of fraud which is not capable of proof by direct evidence, we have to fall back upon inferences to be drawn from circumstances established by evidence. The party alleging fraud is nevertheless bound to establish it by cogent evidence, and suspicion cannot be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. I have approached the case with this point of view, and have been driven to the conclusion that the evidence as a whole, excludes all hypothesis of good faith on the part of Mela Ram in granting the three receipts to Beltie Shah Gilani.

The plaintiff's case, in the first instance, is that there was a conspiracy between Mela Ram and Beltie Shah Gilani, in pursuance of which the sum of Rs. 39,750 was embezzled. I may say at-once that the evidence falls far short of establishing any such conspiracy. I am convinced that Mela Ram was not in Beltie Shah's confidence when the latter misappropriated the various sums making up Rs. 39,750. The embezzlement took place as follows. (After giving the details as to

embezzlement, his Lordship considered questions of fact and then proceeded). I agree with my learned brother that the plaintiff's suit is not barred by limitation or by the fact that in proceedings under the Companies Act certain sums were awarded, in winding up proceedings, against the auditors. I also agree that Mela Ram acted within the scope of his authority when he gave receipts to Belti Shah. It was not disputed that, if Mela Ram had the authority to grant the receipts and if his conduct amounted to fraud, his principals are liable to the company for the fraud of their agent.

One of the pleas taken by the defendants other than Mela Ram is that the estate of Raghu Mal, which is now represented by his executors, is not liable for damages as the cause of action did not survive against the legal representatives of the deceased wrong-doer. The contention is based on the maxim "actio personalis moritur cum persona." The English Law is undoubtedly in favour of the defendant's contention. It is thus summarised in Halsbury's Laws of England (Vol. 14, paragraph 726):

The general rule is that the representative cannot be sued for wrong committed by the deceased for which unliquidated damages only would be recoverable; the rule is expressed in the maxim *actio personalis moritur cum persona*, and the principle is applicable both at law and equity. Thus an action for deceit will not lie against the representatives of a person who has fraudulently induced another to take shares in a company or even to purchase shares from the deceased himself.

The maxim has been the subject of adverse comments, in that it is too broadly stated and leads to inequitable results in many cases. By some Judges it has been characterised as "barbarous." In India there is no statutory law of torts and the Courts are expected to administer rules of justice, equity and good conscience. They however apply English law which is taken to embody rules of justice, equity and good conscience. If all that has been said about the maxim is even partially true it cannot be applied as embodying those high-sounding principles. The Indian legislature seems to have recognised this drawback and attempted to provide against an indiscriminate application of the maxim. The Legal Representatives Act (12 of 1855) allows an action to be maintained against the legal representatives of a wrong-doer for damages for wrongs committed within one year before his death. This left a big loophole for application of the maxim, inasmuch as the Act covers only torts committed by a person since deceased, during the year preceding his death. In the case before us Raghu Mal died in 1926 and the alleged fraud committed by his servant occurred in 1923. The Act therefore does not help the plaintiffs. Another inroad made on the maxim by the Indian legislature was the rule enacted by S. 89, Probate and Administration Act (5 of 1881) since re-enacted in S. 306, Succession Act (39 of 1925) which provides:

All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party the relief sought could be enjoyed or granting it would be nugatory.

This again abrogates the maxim only partially; legal representatives other than executors and administrators are outside the section and certain causes of action are expressly excluded from the operation of the section. This gave rise to an interesting question of interpretation of the exception, on which there is a difference of opinion between the Calcutta High Court on one side [31 Cal 993 (1)] and the High Courts of Bombay, Madras, Allahabad and Patna, on the other [44 Mad 357 (2), 13 Bom 677 (3), 48 All 630 (4) and 4 Pat L J 676 (5)]. In all these cases the question was whether the cause of action for a suit for damages for malicious prosecution survives against the executors and administrators of the deceased wrong-doer and the exception, contained in the Probate and Administration Act or the Indian Succession Act, applied or not. The Calcutta High Court interpreted the exception strictly and held that no cases except those of "defamation, assault, or other personal injuries not causing the death of the party" were outside the section. They construed the words "personal injuries" as physical injuries. Malicious prosecution which, according to them, is distinct from de-

1. Krishna Behari Sen v. Commissioner of Calcutta, (1904) 31 Cal 993=8 C W N 745.
2. Rustomji Dorabji v. Nurse, 1921 Mad 1=62 I C 260=40 M L J 173=44 Mad 357 (F B).
3. Haridas Ramdas v. Ramdas Mathuradas, (1889) 13 Bom 677.
4. Mahtab Singh v. Hub Lal, 1926 All 610=98 I C 590=48 All 630=24 A L J 796.
5. Punjab Singh v. Ramautar Singh, 1920 Pat 841=52 I C 348=4 Pat L J 676.

famation, is not within the exception. The other High Courts, on the contrary maintain that the words "personal injuries" should be taken ejusdem generis with defamation and are not confined to strictly physical injuries. Some Judges have gone so far as to hold that malicious prosecution is an aggravated form of defamation. All of them are of opinion that injury to a man's reputation which is involved in malicious prosecution is a personal injury.

It seems to me that the case before us is free from the difficulty which is involved in cases of malicious prosecution which is akin to defamation and may be personal injury in that it affects a person's reputation and causes mental pain and physical discomfort and therefore within the exception. But a fraud of the kind alleged in this case is not by any means, akin to defamation, nor is it personal in the sense of being an injury to a person's reputation, mind or body. It has no reference to his person in the widest sense of the term. The fraud complained of in this case prevented a timely disclosure so as to deprive the company of a chance of recovering more than it was able to do later when the fraud came to light in another manner. It is a wrong which affected the company's property. The advocate for the defendants seemed to suggest that personal injury includes injury to the "personal property" as distinguished from "real property" as known to English law. This is too far-fetched a construction of the simple words "personal injuries" occurring in an Indian statute book which does not recognise the classification of property adopted in the English law. I cannot persuade myself to accept such interpretation of the words in question. I would hold that the executors of Raghu Mal are liable for damages just as he would have been liable if he had been alive. In other words the cause of action survived Raghu Mal and his estate should pay such damages as can be awarded to the plaintiffs.

The only question that remains to be considered is as regards the amount of damages to which the plaintiffs are entitled. They claim the entire sum embezzled by B. S. Gillani and might have been held to be entitled to it if it had been established that Mela Ram aided or abetted the misappropriation thereof. As already found, the evidence does not take us as far as that. Mela Ram's part in the fraud commenced long after the embezzlement was complete. His complicity merely prevented the disclosure of the already accomplished fraud which would have been but was not discovered by the auditors in July and August 1923. It should be remembered that all the sums making up the entire amount of Rs. 39,750 had been misappropriated by Belti Shah Gillani during the period between April 1922 and January 1923. The plaintiffs are, in my opinion, entitled to recover from the employers of Mela Ram such loss as can be said to have arisen from the wrongful act of the latter. This view is in consonance with the principles on which damages are assessed under the English law:

> **Where damages are not merely nominal, and are not fixed by statute, or by agreement of the parties, but are to be assessed by the Court or jury, the cardinal principle is that only such damages are recoverable as arise naturally from the act complained of, and this rule applies both in contract and tort: Halsbury's Laws of England, Vol. 10, para. 571.**
>
> **Damages in order to be recoverable must be the immediate or proximate consequence of the act complained of. If they are not the immediate or proximate consequence of such act, they are termed too remote and are not recoverable: Ibid, para. 572.**

These principles have been recognised and enacted by the Indian legislature for cases in which damages have to be assessed for breach of a contract (cf. S. 73, Contract Act). Applying these principles to the case before us we have to determine what would have been the position of the company if Mela Ram had not lent himself to the machinations of Belti Shah when he was devising means to deceive the auditors for concealing the embezzlement previously made by himself. Assuming that Belti Shah had no other means of preventing the disclosure of his fraud at the time of the audit, it is fair to accept that the company would have promptly endeavoured to recover through the Court such amount as could be realised by attachment and seizure of his property and cash. We do not know what property and cash Belti Shah Gillani possessed at the time of the audit. The lower Court has not recorded any finding on this point. We think that we should have the benefit of the finding of the Court below on this question of fact. The issue to be remitted by us should be decided by the lower Court with due regard to the observations contained in our judgments.

Allsop, J.—This is an appeal against a judgment and decree of the Subordinate Judge of Dehra Dun who dismissed a suit instituted by the Dehra Dun Musscorie Electric Tramway Company, Ltd., (in liquidation) through its official liquidators for the recovery of a sum of Rs. 39,750 against the defendants. These defendants were six persons, Hansraj and four others were the representatives-in-interest of Lala Raghu Mal, deceased and the sixth was Lala Mela Ram. The defendants are the respondents in the appeal and the official receiver of Bengal has also been impleaded as a respondent as the estate of Raghu Mal is the subject of dispute and the receiver is in possession of it. The plaintiffs are the appellants.

The Dehra Dun Mussoorie Electric Tramway Company was floated in the year 1921 by Belti Shah Gilani who acted as the managing agent of the company. In the month of March 1926 the company went into compulsory liquidation. Thereafter, as the result of misfeasance proceedings Belti Shah Gilani and the auditors were directed to make certain contributions. A criminal prosecution was also lodged against Belti Shah and he was sentenced to imprisonment for a period of five years. Lala Raghu Mal carried on business in Calcutta under the style of Madho Ram Hardeo Das and in Delhi under the style of Madhu Ram Budh Singh. Mela Ram was the agent of Lala Raghu Mal and as such was in charge of the Delhi business. There were certain relations between Lala Raghu Mal and the Dehra Dun Mussoorie Electric Tramway Co. At this stage it is sufficient to say that Raghu Mal was a shareholder in the company and that he received certain contracts for the supply of materials. It is contended by the appellants that Belti Shah and Raghu Mal entered into various transactions for their mutual benefit at the expense of the shareholders. This however is a subsidiary point and is not directly in issue in the appeal. It appears that Belti Shah in the years 1922 and 1923 converted three sums of Rs. 21,750, Rs. 12,000 and Rs. 6,000 to his own use. The gravamen of the charge against the defendants is that Mela Ram assisted Belti Shah in concealing these embezzlements from the auditors by executing false receipts and that he is therefore liable to the company, who could have recovered the money from Belti Shah at that time if the receipts had not been executed. The representatives-in-interest of Raghu Mal are, it is claimed, also liable because Mela Ram executed the receipts in exercise of his duty as the servant of Raghu Mal, and Raghu Mal as the master was liable for the fraud of his servant. The learned Subordinate Judge has found that Mela Ram did by executing the receipts enable Belti Shah to conceal his misappropriations for a number of years, but has dismissed the suit because he has also found that Mela Ram was an innocent dupe of Belti Shah's and was not acting deliberately in bad faith when the receipts were executed. (His Lordship then examined the evidence, and proceeded). Having held that Mela Ram deliberately issued false receipts in order to deceive the auditors and to conceal Belti Shah's embezzlement I have now to consider whether that wrongful act gave rise to any claim for damages. I should make it clear that two alternative causes of action were set up in the plaint. The first was based upon the allegation that Mela Ram and Raghu Mal had entered into a conspiracy with Belti Shah to misappropriate the money claimed. The second was based upon the allegation that Mela Ram issued false receipts in order to conceal the embezzlement. The learned Subordinate Judge found that the allegation of conspiracy had not been proved and that it had not been established that any part of the money embezzled by Belti Shah had passed to Mela Ram or Raghu Mal. No such evidence has been brought to our notice as would justify us in differing from the learned Subordinate Judge and I hold that he was right in the conclusion to which he came. We are thus left with the second allegation that the wrongful act which gave rise to the claim for damages was the issue of the false receipts and the concealment of the defalcation.

The respondents argue that there can be no decree because this wrongful act did not cause any loss. The money, they say, had already passed into the possession of Belti Shah and had been lost to the company before the receipts were issued, and even if it cannot be said that it was lost beyond re-call, still they are not liable unless it can be shown that all of it or some definite part of it could have been recovered from Belti Shah if the embezzlement had been discovered at the audit.

It is true that it has not been established or, at any rate, that there is no finding that a certain particular sum might have been recovered by the company from Belti Shah if Mela Ram had not deceived the auditors by using false receipts and thus prevented them from making further enquiry and discovering the embezzlement. It may perhaps be said that Mela Ram is responsible only for the direct loss which was incurred because the embezzlements were not brought to light at the time when the audit took place. In any case it is desirable that there should be a finding upon this question of fact, namely, whether any amount, and if so, what amount would have been recovered if the receipt had not been issued. There does not seem to have been any clear issue before the parties upon this point in the Court below. I would therefore remit an issue on this point and allow the parties to produce evidence upon it if they wish to do so. It cannot be said that it is certain that no sum was recoverable from Belti Shah because it appears that he had to his credit a sum of about Rs. 4,000 in his ledger in the company's books in the middle of August 1923. This apparently was a sum which he might at least have been prevented from withdrawing. I would not express any definite opinion so as to hamper the Court below in coming to its findings, but as there is this prima facie evidence I think it is advisable that the matter should be enquired into.

The respondents allege that the claim of the appellants is barred by certain orders which were passed in proceedings under the Companies Act. One of these orders was to the effect that Belti Shah should refund something over three lakhs of rupees to the company. The other directed the auditors to refund three sums of money. Two of these sums when added together amounted to something over Rs. 20,000. By the order of the Court that sum was to be paid immediately. The third item was that of Rs. 39,750 now in dispute. The Court was informed that the suit which has given rise to this appeal was pending and it directed that execution in respect of the sum of Rs. 39,750 should be stayed as against the auditors till the suit was decided and should then proceed only in respect of any part of the sum which was not recovered from the defendants. The auditors obtained leave to appeal to their Lordships of the Privy Council, but when matters had reached that stage the parties with the leave of the company Judge settled their dispute, out of Court. The liquidators of the company accepted a sum of between Rupees 18,000 and Rs. 19,000 in full satisfaction of their claim and the auditors withdrew their appeal.

The respondents argue that the appellants' right to institute a suit has merged by these orders in rem judicatam. The appellants rely upon the rule in the case, (1924) P 140 (6), that a suit against one wrong-doer does not bar a suit against the other when there are two wrongs which jointly cause a single loss and the rule in (1918) 1 K B 180 (7) that a suit to recover a specific sum of money paid does not bar a suit to recover damages for the deceit which led to the payment. It may be that the former rule applies to Mela Ram and the auditors and the latter to Mela Ram and Belti Shah, but I do not think that it is necessary to express any definite opinion upon these points. The fact in this case is that the liquidators never sought and never obtained any decree for damages for tort either against Belti Shah or against the auditors. The proceedings under S. 235, Companies Act, were, if I may so describe them, domestic proceedings between the company and its officers and the orders were passed in a special jurisdiction investing the Court with certain powers over the internal affairs of the company. If any sums had been recovered under those orders Mela Ram might have escaped liability wholly or in part upon the ground that the loss had disappeared or had been diminished, but there can be no question of the disappearance of a cause of action because it has been the basis of a suit. Nothing has been recovered from Belti Shah and one of the liquidators has made a statement which I see no reason for not accepting that he is now a pauper. The auditors or one of them has paid between Rs. 18,000 and Rs. 19,000. but there was an immediate liability of over Rs. 20,000 apart from the possible deferred liability of this Rs. 39,750 which is now in issue. The respondents suggest that the compromise must be interpreted

6. Koursk, (1924) P. 140=93 L J P 72=131 L T 700=40 T L R 399=68 S J 842=16 Asp M L C 374=18 L Rep 228.
7. Gouldrei, Foucard & Sons v. Sinclair and Russian Chamber of Commerce in London, (1918) 1 K B 180.

to mean that the whole claim was satisfied. I cannot accept this suggestion. It has been explained by one of the liquidators that there were doubtful questions of law involved in the Privy Council appeal and that inquiries had disclosed that the auditor concerned would not have been able to pay more than the sum he preferred while the other auditor had left the country and had no property available to the liquidators. That being so, the liquidators wisely accepted all that they could hope to get. As against the auditor with whom they came to terms they can claim no more, but that is no reason why we should constructively hold something which is not true, namely, that the company has recovered a sum of money which it has not recovered. The company is still out of pocket to the extent of Rs. 39,750. Mela Ram is in whole or part responsible and he must make good the loss to the limit of his responsibility.

The respondents plead that the suit is barred by limitation because it was instituted in June 1929 and the wrong, if any, was done in 1923. They wish to apply the provisions of Art. 36, Limitation Act. That is a residuary article. This is clearly a suit for a relief on the ground of fraud and Art. 95 applies to it. That being so, time begins to run from the date of the knowledge of the fraud. The respondents argue that the company must be deemed to have had knowledge at least on the date (7th November 1924) when the directors passed their resolution sanctioning the transfer of this sum from the ledgers of Madho Ram Budh Singh and Madho Ram Hardeo Das to the Materials Purchased Awaiting Delivery Account because the directors should have known then that no cash payment had been made to the two firms. There is no force in the argument. It is clear that the directors were deceived and had not knowledge. The liquidators have established that the fraud came to light only when Mela Ram made a statement in 1928 in the course of misfeasance proceedings. The liquidators were appointed in April 1926 and one of them has stated that they first became suspicious about the transactions in dispute in December 1926 after making an investigation into the affairs of the company. There is no reason to doubt this statement. Even if time began to run in December 1926 the suit was within time. The appellants also relied upon the provisions of Ss. 14 and 18, Limitation Act, but it was not necessary to invoke the aid of these provisions. I hold that the suit was not barred by limitation.

It was one of the points taken by the respondents in the Court below that the appellants were barred from suing because the directors had sanctioned the transfer of the liability from one account to another and had thus countenanced the whole proceeding. This point was not argued before us. It is difficult to see why the liquidators should not be allowed to recover because Belti Shah had deceived the directors and had thereby induced them to sanction the transfer. The directors, as one of them has explained in evidence, had no idea that they were dealing with anything but a formal matter.

On the findings which I have recorded Mela Ram is certainly liable for the amount which was lost owing to his action. There still remains the question of the liability of the estate of Ragghu Mal, as represented by the other respondents. Ragghu Mal himself would, I have no doubt, have been liable if he had been alive. Learned counsel for the respondents is not prepared to admit that Mela Ram had authority to issue receipts, but he had to concede that Mela Ram did issue receipts and that his right to do so was never questioned. There are also letters and telegrams which give him full authority to deal with the company on behalf of Ragghu Mal. I hold that Mela Ram was the servant of Ragghu Mal and that in giving the receipts he acted within the scope of his employment.

It remains then to be decided whether the cause of action against Ragghu Mal survives against his executors and administrators. According to the principles expressed in the maxim "actio personalis moritur cum persona" the right of action would not survive. We are however not concerned so much with those principles as with the statutory provisions in S. 306, Succession Act. According to that section the liability of a deceased wrong-doer survives except in case of defamation, assault as defined in the Indian Penal Code and other personal injuries not causing death. The question is what the term "other personal injuries" is intended to mean. In 31 Cal 993 (1) and 53 Cal 987 (8) the Calcutta High Court gave the term the very restricted meaning of bodily injuries analogous

8. Bhupendra Narain Sinha v. Chandra Moni Gupta, 1927 Cal 277=100 I C 286=53 Cal 987.

to assault. In 47 Bom 716 (9), 44 Mad 357 (2), 4 P L J 676 (5) and 48 All 630 (4), the term was given a wider interpretation so as to include malicious prosecution. I would agree that these four cases were rightly decided, but they are not authority for the proposition that the word "personal" was used in the section in any technical sense. In my opinion "personal injury" is intended to mean injury to the person as distinguished from injury to property. Defamation, malicious prosecution, assault and bodily hurt may all indirectly cause financial loss or financial expenditure, but they are in the main injuries which are personal in that they directly give rise to mental or physical suffering or inconvenience. In the case before us there was no injury of that nature. Mela Ram's deception was the direct cause of pecuniary loss to the company. No mental or physical suffering was directly inflicted upon any person. I would therefore hold that Ragghu Mal's estate is liable to the plaintiffs in the same degree as Mela Ram himself.

K.S. *Order accordingly.*

9. Motilal Satynarain v. Harnarain Premsukh 1923 Bom 408=73 I C 365=47 Bom 716=25 Bom L R 435.

A. I. R. 1935 Allahabad 1001

SULAIMAN, C. J. AND MULLA, J.

Umrao Singh—Objector—Applicant.

v.

Pahlad Singh—Decree-holder—Opposite Party.

Execution First Appeal No. 84 of 1934, Decided on 22nd July 1935, from decision of Sub-Judge, Meerut, D/- 18th November 1933.

Execution—Decree assigned out of Court—Assignee not getting name substituted—Decree-holder assignor can execute decree—Court cannot recognize private assignment unless names are substituted.

Private transactions outside the Court cannot be recognized by the execution Court when the alleged assignee has not come forward to claim such right and get his name substituted. There is nothing in the provisions of O. 21, Civil P. C., which debars the original decree-holder, whose name appears on the face of the record, for executing the decree merely because there has been some assignment out of Court which has not yet been recognized by the execution Court. [P 1001 C 2]

S. N. Sen and *A. M. Gupta* — for Applicant.

N. C. Vaish—for Opposite Party.

Judgment.—This is a judgment-debtor's appeal arising out of an execution proceeding. A simple money decree was passed in favour of the respondent, Pahlad Singh, against the appellant, Umrao Singh. Under a private award delivered out of Court, the rights under this decree were transferred to Pahlad Singh's creditor, Mt. Sagia, on 4th June 1931. This award was made a rule of the Court on 27th November 1931. Before this happened, namely, on 23rd November 1931, Pahlad Singh applied for the execution of the decree against the appellant. The judgment-debtor (appellant) took the objection that inasmuch as under the award the interest of the decree-holder had been transferred to Mt. Sagia, the execution could not proceed. Before the matter was disposed of, Mt. Sagia, under a deed of relinquishment, re-transferred the rights given to her in the decree to the respondent, Pahlad Singh. The Court below has dismissed the objection on the ground that, inasmuch as the alleged transferee did not get her name substituted, the original decree-holder was entitled to go on with the execution.

It seems to us that the view taken by the Court below is perfectly correct. On the face of the decree, Pahlad Singh is the person entitled to execute it. Private transactions outside the Court cannot be recognized by the execution Court when the alleged assignee has not come forward to claim such right and get her name substituted. If this were allowed, the result would be that an execution Court would be compelled to go behind the decree in many cases and start an investigation as to the way in which interest has devolved on other persons not before it. It is significant that under O. 21, R. 10, Civil P. C., when the holder of a decree desires to execute it, he shall apply to the Court which passed the decree whereas with reference to transferees, O. 21, R. 16, merely says that where the interest of any decree-holder in a decree is transferred by assignment, the transferee may apply for execution of the decree to the Court which passed it. There is nothing in the provisions of O. 21, which debars the original decree-holder, whose name appears on the face of the record, from executing the decree merely because there has been some assignment out of Court which has not yet been recognized by the execution Court. We therefore dismiss the appeal with costs.

B.D. *Appeal dismissed.*

* A. I. R. 1935 Allahabad 1002

SULAIMAN, C. J. AND BENNET, J.

B. Nihal Chand and *another*—Defendants—Appellants.

v.

Mt. Bhagwan Dei—Plaintiff—Respondent.

Letters Patent Appeal No. 27 of 1934, Decided on 31st July 1935, against judgment of Kendall, J., reported in 1934 All. 527.

(a) Easement—Right of privacy — Right based on natural modesty and human morality should be observed—Right not confined to any class or creed—Such right should not be exercised in an oppressive way.

The right of privacy based on social custom and parda system is quite different from the right of privacy based on natural modesty and human morality; the latter is not confined to any class, creed, colour or race and it is the birthright of a human being and is sacred and should be observed, though the right should not be exercised in an oppressive way. [P 1002 C 1, 2]

*** (b) Easement—Right of privacy—Plaintiff not owning superior tenement but occupying it can sue to establish right of privacy.**

Even if a plaintiff suing to establish a right of privacy is not the owner of the superior tenement but only an occupier he can have a right as occupier to maintain the suit under S. 4, Easements Act. [P 1002 C 2]

(c) Custom—General, prevalent and generally recognized custom should be taken judicial notice of by Courts—Evidence to establish such custom in every case is not necessary.

Where a particular custom is of general prevalence and is commonly recognized, it is open to a Court to take judicial notice of such custom having the force of law under S. 57, Evidence Act, and it is therefore not necessary that there should be evidence produced in each case to establish such a custom: 1929 *All* 676, *Dist*; *Case law discussed.* [P 1003 C 2]

G. S. Pathak—for Appellants.

Shiva Prasad Sinha—for Respondent.

Sulaiman, C. J. — This is a defendants' appeal arising out of a suit brought by the plaintiff for the closing up of a large window in the upper storey opened recently by the defendants, on the ground that her right of privacy was infringed inasmuch as her courtyard and house were overlooked. The First Court dismissed the suit relying mainly on certain observations made in the case of 1929 A L J 1028 (1); but the lower appellate Court has reversed that decree holding that the right of privacy, based on social custom and parda system, is quite different from the right of privacy based on natural modesty and human morality, and that the latter is not confined to any class, creed, colour, or race, and it is the birthright of a human being and is sacred and should be observed, though the right should not be exercised in an oppressive way. That decree has been affirmed by the learned Judge of this Court.

In appeal the learned counsel for the defendants has first urged before us that there being no finding that the plaintiff is the owner of the house occupied by her, she has no locus standi to maintain the suit. It has been found by the Courts below that the plaintiff has been occupying this house for the last quarter of a century, that her possession has never been challenged during this period and that she is not in wrongful possession of this house at all. Even if she were not the owner, she would have a right as occupier to maintain the suit under S. 4, Easements Act.

The next contention urged in appeal is that in view of the observations made in the case referred to above, the right of privacy cannot be allowed unless it is affirmatively urged and proved in each case that there is a custom of privacy prevailing in the particular locality. The case of 1929 A L J 1028 (1), was not one in which the whole of the plaintiff's house or a courtyard or even the whole of a room was over-looked by the new windows and doors. But it was possible to see from the defendant's window into the plaintiff's window. No doubt the learned Judges made some observations suggesting that the right of privacy may not now be in full force after the lapse of nearly half a century since the case of 10 All 358 (2) was decided, but in the special circumstances of that case they did not feel called upon to consider that point. Apparently the attention of the learned Judges was not drawn to the fact that there have been numerous cases in this Court even subsequent to 10 All 358 (2), in which such a right of privacy has been recognised even without strict proof of the existence of a custom in the particular locality. In 16 All 69 (3), Edge, C. J., and Knox, J., held that the

1. Bhagwan Das v. Zamurrad Husain, 1929 All 676=119 I C 833=51 All 986=1929 A L J 1028.

2. Gokul Prasad v. Radha, (1888) 10 All 358=1888 A W N 135.

3. Abdul Rahman v. D. Esmile, (1894) 16 All 69 =1894 A W N 217.

customary right of privacy which prevailed in various parts of the North-Western Provinces was a right which attached to property and was not dependent on the religion of the owner thereof. In that case the right of privacy was recognised in Landour. The learned Judges pointed out that on the question of privacy, the defendant's plea that the law recognised no such right of privacy as was claimed was not sound and that the law does recognise the right of privacy in these provinces, when established by custom, and followed 10 All 358 (2).

In 29 All 582 (4), Knox, J., upheld the right of privacy, even though some other portion of the plaintiff's house was actually overlooked from the defendant's roof. The learned Judge observed:

The primary question will be, does the privacy in fact and substantially exist, and has it been and is it in fact enjoyed? If it is found that it did substantially exist and was enjoyed, the next question would be, was that privacy substantially or materially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking reliefs against those acts?

In that case however it was admitted that in the town of Meerut there was a local custom in favour of privacy. In 13 A L J 361 (5), Rafiq, J., held that even apart from the evidence as to the existence of a right of privacy, it had been laid down in 10 All 358 (2) that, at any rate, in these provinces the custom of parda has for centuries been strictly observed by all Hindus except those of the lowest classes and by all Mohamedans except the poorest.

In 26 A L J 49 (6), Iqbal Ahmad and Sen, JJ., held that a customary right of privacy within certain limitations exists in the North-Western Provinces and a material interference with such a right is an actionable wrong and affords a good cause of action to the person or persons affected thereby, and that in view of the social conditions of this country and as the direct result of the custom which has descended from olden times, the right of privacy has taken, too deep a root to be dislodged by any a priori reasoning.

In 26 A L J 537 (7), another Bench of this Court, of which one of us was a member, held that even the existence of a public lane in between the houses of the parties would not destroy such a right of privacy.

Unfortunately, these earlier cases were not brought to the notice of the Bench which decided 1929 A L J 1028 (1). In the case of 1935 A L J 432 (8), it was conceded that by local custom a right of privacy does exist in the cities and plains of these provinces, and it was only argued that no such custom exists in towns and villages situated in the hills.

When a particular custom is of general prevalence and is commonly recognised, it is open to a Court to take judicial notice of such custom having the force of law under S. 57, Evidence Act, and it is therefore not necessary that there should be evidence produced in each case to establish such a custom. Indeed, in many villages where the custom has been so well-recognised that no one has dared to infringe it, there might be no instance to prove that the custom was denied and upheld on a previous occasion. We therefore think that the view taken by the learned Judge of this Court that the suit was rightly decreed was correct.

The appeal is accordingly dismissed with costs.

B.D. *Appeal dismissed.*

4. Abdul Rahman v. Bhagwan Das, (1907) 29 All 582=4 A L J 445=1907 A W N 183.
5. Jamiluddin v. Abdul Majeed, 1915 All 218=28 I C 674=13 A L J 361.
6. Fazal Haq v. Fazal Haq, 1928 All 201=107 I C 584=26 A L J 49.
7. Chhedi Ram v. Gokul Chand, 1928 All 717=114 I C 932=50 All 706=26 A L J 537.
8. Tika Ram Joshi v. Ram Lal Sah, 1935 All 754=155 I C 1056=1935 A L J 432.

A. I. R. 1935 Allahabad 1003

BENNET, J.

(*Bohra*) *Tara Chand* — Plaintiff — Appellant.

v.

Haibat Shah and *others* — Defendants —Respondents.

Second Appeal No. 861 of 1933, Decided on 20th July 1935, from decision of Dist. Judge, Agra, D/- 9th March 1933.

Civil P. C. (1908), O. 34, Rr. 2, 4 and 11—R. 4 is imperative and interest must be allowed for six months after mortgage decree under R. 2—Court has no discretion to allow lesser interest under R. 11.

The wording of O. 34, R. 4 is imperative and it directs that an account of the interest on the mortgage should be taken at the date of the decree and that interest will run for six months subsequent to that date which is allowed for payment under sub-R. (c). O. 34, R. 11 gives the Court no discretion to order a less amount of interest for this period. The rate of interest to be awarded is the contractual one for the period down to the date fixed for redemption

under O. 34, R. 2 : 1921 *P C* 100, *Dist.*; 1927 *P C* 1, *Foll.* [P 1004 C 1,2]

N. P. Asthana, B. Malik and *B. N. Sahai*—for Appellant.

Din Dayal—for Respondents.

Judgment.—This is a second appeal by a plaintiff against concurring decrees of the two lower Courts. The facts are that the plaintiff was mortgagee on a hypothecation bond dated 26th August 1912, executed by three persons. The plaintiff brought a suit for sale on his bond on 25th August 1924, impleading one Saadat Shah and on 26th January 1927, the plaintiff applied to bring the heirs of Saadat Shah on the record as Saadat Shah had died on 13th April 1926. Saadat Shah left a widow whom the plaintiff would not admit to be the legally married wife of Saadat Shah, and it was held that she was a legal widow. The Court held that Saadat Shah had no interest in the property and the lower appellate Court upheld this finding. On appeal to the High Court it was decided that Saadat Shah had an interest as the son and nephew of the original mortgagors. On 11th December 1930, the High Court set aside the decrees of the Courts below and remanded the case under O. 41, R. 23, for a finding on an issue, "What is the extent of the share in the mortgaged property owned by Saadat Shah deceased?" and directed that after a finding on that issue the trial Court should pass a decree for sale of the remaining property excluding the share of Saadat Shah. The Courts below accordingly have now passed decrees. The question which arises is in regard to the contractual rate of interest. The plaintiff claims that the contractual rate of interest should run until six months after the last decree, that is, six months after 5th May 1931. The Courts below have held that the contractual rate shall only run until six months after the first decree, that is of 9th March 1927. Learned counsel for the plaintiff-appellant relies on the provisions of O. 34, R. 4 which directs that the preliminary decree in a suit for sale shall be to the effect mentioned in R. 2, Cl. (a), etc. Cl. (a) provides that an account should be taken of what was due to the plaintiff at the date of the decree for the principal and interest on the mortgage. The wording of this rule is imperative and it directs that an account of the interest on the mortgage should be taken at the date of the decree and that interest will run for six months subsequent to that date which is allowed for payment under Sub-R. (c). Learned counsel refers to R. 11, but it does not appear to me that R. 11 gives the Court discretion to order a less amount of interest for this period. For the respondent reference was made to 58 I C 891 (1). But that ruling dealt with a usufructuary mortgage and not with a simple mortgage and is not in point. For the appellant reference was made to a ruling of their Lordships of the Privy Council reported in 54 Cal 161 (2). This ruling appears to be in point and it states that the rate of interest to be awarded is the contractual rate for the period down to the date fixed for redemption under O. 34, R. 2. Following this ruling I hold that the plaintiff has a good claim and accordingly I allow this second appeal with costs throughout and I direct that the decree shall be amended to specify that the contractual rate of interest should be paid from the date of suit up to six months from 13th May 1931.

As no authority has been shown for the respondent, I do not grant permission for a Letters Patent appeal.

B.D. *Appeal allowed.*

1. Mohammad Ali Mohammad Khan v. Ramzan Ali, 1921 P C 100=58 I C 891=23 O C 150 (P C).
2. Jagannath Prasad Singh v. Surajmal Dalal, 1927 P C 1=99 I C 686=54 I A 1=54 Cal. 161 (P C).

A. I. R. 1935 Allahabad 1004

THOM AND IQBAL AHMAD, JJ.

(*Firm*) *Meghraj-Roormal*—Defendant—Appellants.

v.

(*Firm*) *Anup Singh-Battu Mal*—Plaintiffs—Respondents.

Second Appeal No. 1010 of 1933, Decided on 4th September 1935, from decision of Sub-Judge, Meerut, D/- 8th March 1933.

(a) Agent—Pakka Arhatia — Position explained.

The position of a pakka arhatia is analogous to that of a del credere agent who incurs only a secondary liability towards the principal, and whose legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent : 1927 *All* 617, *Foll.* [P 1005 C 1,2]

(b) Custom— Validity — 'Pakka Arhatia' system of contract—Custom entitling commission agent to protection from eventual loss is not illegal or immoral—Position of 'Pakka Arhatia' in Arhat transaction.

In the case of transactions entered into on the pakka arhat system a custom or usage that entitles the commission agent to protect himself from loss in the event of the failure of the contracting party to insure him against the loss is not either unreasonable or immoral. There is direct contractual relationship between the pakka arhatia and the purchaser and the seller; and he, as principal, is liable to both for the performance of the contract. The failure of a purchaser, who has entered into a forward contract for the purchase of some commodity through a pakka arhatia, to take delivery on due date does not exonerate the arhatia from the liability to take delivery from the seller in pursuance of the forward contract. It follows that a pakka arhatia is himself vitally interested in the performance of the contract that has been entered into through him and a custom that provides means to insure the arhatia against prospective loss cannot be characterized as unreasonable or immoral. On the contrary such a custom is calculated to check reckless speculation and to promote fair dealing and the transaction of business on honest lines, and, as such, is reasonable and salutary : 1923 *All* 242, *Dist.*

[P 1006 C 2: P 1007 C 1]

(c) Custom—Mercantile usage in Ghaziabad District — Pakka Arhatia calling for margin money due to fluctuation in rate—If margin money is not paid Pakka Arhatia can close contract.

According to the mercantile usage prevalent in Ghaziabad a pakka arhatia is entitled to call for margin money, if the rise or fall in the market justifies such a demand, and, in the event of the demand not being met, is entitled to close the contract. [P 1007 C 1]

(d) Practice—Plea—Second Appeal.

A ground of appeal which was raised in the lower appellate Court but was abandoned cannot be allowed to be raised in the course of second appeal. [P 1008 C 1]

K. N. Katju, *K. Verma* and *K. N. Gupta*—for Appellants.

N. C. Vaish—for Respondents.

Iqbal Ahmad, J. — This is a defendant's appeal and arises out of a suit for recovery of a sum of Rs. 2,400 on account of the loss suffered by the plaintiff-respondent in certain forward contracts for the purchase of grain-pits entered into by the plaintiff firm on behalf of the defendant firm. The plaintiff firm carries on the business of commission agents in Ghaziabad and the defendant firm carries on business in Lucknow. The business of commission agency carried on by the plaintiff firm is admittedly on what is known as the pakka arhat system. The position of a pakka arhatia is analogous to that of a del credere agent who incurs only a secondary liability towards the principal, and whose legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent: vide, 26 A L J 81 (1).

The defendant firm entered into certain forward contracts for the purchase of grain-pits through the plaintiff firm and most of those contracts resulted in loss to the defendant. One of the forward contracts, that was entered into by the defendant for the purchase of 5 grain-pits, formed the subject of the suit giving rise to the present appeal. This contract was entered into on 14th November 1929. The contract was for the purchase of approximately 3,000 maunds of wheat at the rate of Rs. 4-13-3 per maund, and the delivery was to be effected between 15th January and 15th February 1930. After the purchase made by the defendant the price of wheat began to fall, and ultimately the plaintiff firm sold the grain-pits to certain persons on 7th February 1930, at the rate prevailing in the market, viz., at the rate of Rs. 3-13-6, and the present suit was for the recovery of the loss suffered by the plaintiff firm in consequence of the decline in the price of wheat since the date of the contract. A sum of about Rs. 750 belonging to the defendant was in the hands of the plaintiff and, in claiming damages, the plaintiff credited the defendant with the said amount.

It was stated in the plaint that in the Mandi at Ghaziabad delivery of grain-pits is made according to the wishes of the seller in the month in which the delivery has been stipulated to be made and that as soon as the parcha of the delivery of grain-pit is received the commission agents have to make payment of the margin money. The plaintiff firm therefore alleged that it was bound to take delivery of the goods when the same was offered by the seller and, as the price of the wheat had fallen since the date of the contract, the plaintiff asked the defendant firm to arrange for money and deposit the same with the plaintiff so that delivery might be taken. The plaintiff's case further was that the defendant neither put sufficient funds in the hands of the plaintiff to cover the losses incurred in the transaction, nor did supply sufficient funds to enable the plaintiff to take delivery and, accordingly, the plaintiff had to square up the transaction by selling the grain-pits to third persons on 7th February 1930.

1. Champa Ram v. Tulshi Ram, 1927 All 617= 105 I C 739=26 A L J 81.

The suit was resisted by the defendant firm on a variety of grounds, but as in the present appeal by the defendant only three points have been raised, it is unnecessary to mention the other contentions of the defendant. The defendant urged that the sale of the grain-pits by the plaintiff on 7th February 1930, was without the consent or permission of the defendant and the defendant was therefore not liable to answer the plaintiff's claim for damages. It was further contended by the defendant that, in any case, the plaintiff firm was not entitled to dispose of the grain-pits and square up the transaction, without giving the defendant sufficient and reasonable notice of its intention to do so and that in the present case such notice was not given by the plaintiff. Lastly it was contended that in the absence of the proof of the fact that the plaintiff firm had suffered loss to the extent of the amount claimed by it the suit was not maintainable.

All these contentions were overruled by the trial Court and the plaintiff's suit was decreed. The defendant firm filed an appeal in the lower appellate Court and that Court, being of the opinion that certain questions essential for a satisfactory disposal of the suit had not been decided by the trial Court, framed the following issues and remitted the same for findings to the trial Court:

(a) Is there any ordinary practice or mercantile usage in Ghaziabad which entitled paka arhatias to call for margin if the rise or fall in the market justified a demand for it and to close the contract in default of that margin being provided ? (b) Is there any mercantile custom in Ghaziabad which authorizes a pakka arhatia to demand the balance of purchase price from his principal from the first date of the month of forward delivery and to sell those goods in the event of the failure of the principal to pay the same within a reasonable time ?

The trial Court held that the mercantile usage referred to in the first issue was proved to exist in the Ghaziabad market. As regards the mercantile custom set forth in the second issue the finding of the trial Court was that the existence of that custom was not proved. On receipt of the findings submitted by the trial Court the lower appellate Court decided the appeal on the merits. It affirmed the decision of the trial Court with a slight variation—a variation which is immaterial so far as the present appeal is concerned.

The learned counsel for the defendant-appellant has argued that the plaintiff, whose position was that of a mere agent, had no right to sell the khattis without the instruction of the defendant firm inasmuch as, by the terms of the contract between the parties, the plaintiff was not given the right to close the transaction before the due date, nor was there any mercantile usage that authorized the plaintiff to do so. In support of this contention reliance has been placed on a Division Bench decision of this Court reported in 1923 All 242 (2). That case was from Hapur where, like Ghaziabad, numerous forward transactions for the purchase and sale of grain-pits are entered into in the course of a year. In that case a custom was put forward according to which the commission agents carrying on business in Hapur were entitled, without the knowledge or the consent of their principals, to dispose of the grain-pits, and it was held that:

The alleged custom is unreasonable, it is immoral in the sense that it is likely to lead to gross frauds and in any event, puts an agent in double capacity in which his duty and interest must necessarily conflict and is contrary to the general principle of agency and, therefore ..... highly unreasonable.

It does not appear from the report of the case whether the commission agent in that case carried on his business on pakka arhat system. If the learned Judge intended to lay down that a custom, that entitles a pakka arhatia commission agent—who qua the persons entering into contracts through him for the purchase and sale of grain or other commodity is himself in the position of a principal—to protect himself from loss by closing the transaction after giving to the seller or buyer reasonable notice of his intention to do so, is immoral and unreasonable we, with great respect, are unable to agree with that decision.

We are unable to discover any justification for the view that in the case of transactions entered into on the pakka arhat system a custom or usage that entitles the commission agent to protect himself from loss in the event of the failure of the contracting party to insure him against the loss is either unreasonable or immoral. There is direct contractual relationship between the pakka arhatia and the purchaser and the seller and he, as principal, is liable to both for the performance of the contract. The failure of a purchaser, who has entered into a forward contract for the purchase of some com-

2. Kishori Lal v. Jiwan Lal, 1923 All 242=67 I C 231.

modity through a pakka arhatia, to take delivery on due date does not exonerate the arhatia from the liability to take delivery from the seller in pursuance of the forward contract. It follows that a pakka arhatia is himself vitally interested in the performance of the contract that has been entered into through him and a custom that provides means to insure the arhatia against prospective loss cannot be characterized as unreasonable or immoral. On the contrary such a custom is calculated to check reckless speculation and to promote fair dealing and the transaction of business on honest lines, and, as such, is reasonable and salutary.

In the case before us we have the definite finding recorded by the Courts below that according to the mercantile usage prevalent in Ghaziabad a pakka arhatia is entitled to call for margin money, if the rise or fall in the market justifies such a demand, and, in the event of the demand not being met, is entitled to close the contract. No exception has been taken to this finding on behalf of the defendant-appellant. We have therefore to approach the consideration of the case on the assumption, that the plaintiff firm was entitled to sell the grain-pits in question, if the defendant made default in placing in the hands of the plaintiff sufficient funds to indemnify him against the loss that was occasioned by the fall in the price of wheat. When the case is so approached, there is no escape from the conclusion that the plaintiff firm was within its rights in selling the grain-pits on 7th February 1930. The letters and telegrams that passed between the plaintiff and the defendant leave no room for doubt that the defendant was trying to evade the fulfilment of the obligation which the contract between the parties imposed on him. The price of wheat began to fall soon after the contract was entered into and on the 16th January the rate was Rs. 4-9-3 per maund. According to the practice prevailing in Ghaziabad the seller has the right to offer delivery within the first 25 days of the month in which the delivery is to be effected. In the present case the delivery was to be effected between the 15th January and the 15th February. Therefore the seller had the right to offer delivery to the plaintiff firm from the 16th January to the 10th February. On such delivery being offered 1/4th of the price is to be paid immediately by the pakka arhatia. Accordingly on the 16th January the plaintiff by a telegram demanded from the defendant a sum of Rs. 2,500 which together with the sum of Rs. 750, that the plaintiff had in hand, would have enabled the plaintiff to pay 1/4th of the price of the wheat contracted to have been purchased by the defendant firm The reply sent to this telegram by the defendant was as follows:

> Take delivery. Don't sell without our authority otherwise you will be liable for all losses and expenses. Ready to send money on your giving security.

Subsequent history shows that the offer by the defendant to send money to the plaintiff on the latter furnishing security was a mere eye-wash. It is abundantly clear from the letters of the defendant firm itself that by 16th January 1930, the business of the defendant firm had become hopelessly involved. Huge losses had been suffered by it in forward contracts of purchase entered into by it in Bombay and elsewhere and the defendant was hard pressed for funds. After the 16th January the market went on declining and on 4th February 1930, the plaintiff firm was faced with the alarming situation that a loss of no less than Rs. 3,000 was imminent on the transaction in question in the present litigation. The plaintiff therefore on the last mentioned date sent a registered notice to the defendant asking the latter either to send Rs. 3,000 "to cover the margin money" or to deposit a sum of Rupees 15,000 with the Allahabad Bank if the defendant wanted to take delivery of the goods. This notice did reach the defendant on 6th February 1930. The defendant took no steps to comply with the request contained in the notice and the plaintiff firm then sold the wheat on 7th February 1930. If the defendant was in right earnest to take delivery, the natural course of conduct on the part of the defendant would have been either to deposit the margin money in some bank at once or to send the same by money order to the plaintiff firm, and to inform the plaintiff of the fact of payment of the margin money by means of a telegram. The fact appears to be that the defendant firm was not in possession of funds, and therefore took no steps to acknowledge the registered notice sent by the plaintiff. The plaintiff therefore sold the goods. It follows that the defendant firm had sufficient and reasonable notice of the demand made by the plaintiff and the plaintiff firm was within its right to sell the goods. Ac-

cordingly the defendant was liable to make good the loss suffered by the plaintiff firm.

The last point argued by the learned counsel for the defendant-appellant was that, as the plaintiff firm did not prove that it had to pay the amount claimed by it to the seller of the grain-pits, the plaintiff was not entitled to a decree. This point was argued in the trial Court and was decided against the defendant. In the memorandum of appeal filed in the lower appellate Court the point was raised by the defendant, but does not appear to have been argued before the learned Judge of the lower appellate Court. The point must therefore be taken to have been abandoned in the lower appellate Court and, having been abandoned in that Court, it cannot be allowed to be raised in second appeal.

For the reasons given above we affirm the decrees of the Courts below and dismiss this appeal with costs.

B.D. *Appeal dismissed.*

A. I. R. 1935 Allahabad 1008

THOM AND IQBAL AHMAD, JJ.

L. Shiam Lal—Plaintiff—Appellant.

v.

Shiam Lal and *another* — Defendants —Respondents.

Second Appeal No 846 of 1933, Decided on 3rd September 1935, from decision of Dist. Judge, Agra, D/- 20th February 1933.

(a) Partnership— Partnership commences from execution of partnership deed, unless deed specifically provides for late date to commence partnership.

Unless there is something in the deed to show that the partnership evidenced by it was not to commence till a future date, the presumption is that the partnership came into existence on the very date of the execution of the deed.

[P 1010 C 1]

(b) Partnership—Dissolution of, is mixed question of law and fact.

The question as to when a partnership is dissolved is a mixed question of fact and law: 1928 *All* 58, *Foll.*

[P 1010 C 2]

Panna Lal and *B. Malik*—for Appellant.

S. K. Dar and *Din Dayal* — for Respondents.

Iqbal Ahmad, J.—The arguments in this appeal have extended over a wide range, but we have come to the conclusion that the decrees of the Courts below are perfectly correct and ought to be affirmed.

The suit giving rise to the present appeal was for settlement of accounts and, if necessary, for the dissolution of a partnership, which was entered into between the plaintiff-appellant and the defendant-respondents by means of a registered deed of partnership dated 9th March 1925. The partnership was to run an oil mill at Allahabad. The building and the machinery belonged to the defendants and the plaintiff agreed to invest a sum up to Rs. 40,000 as working capital. It was provided in the deed of partnership that no partner shall have the right to dissolve the partnership for a period of three years, and that if the partners desired to carry on the partnership business after the expiry of three years they could do so with mutual consent. It was also provided by the deed that at the time of the conclusion of partnership the stock, etc., in hand will be sold by auction.

The present suit was filed by the plaintiff on 19th March 1931. It was alleged in the plaint that the partnership was not dissolved till the month of June 1928, and, as the suit was filed within three years from that date, it was within time. The defendants contested the suit inter alia on the ground that the partnership was dissolved more than three years before the date of the suit and the suit was barred by limitation. This contention of the defendants has been accepted by both the Courts below.

The trial Court held that, as the partnership was for a fixed term of three years, and as there was no reliable evidence to show that the parties either expressly or impliedly agreed to extend that period, the partnership came to an end on 9th March 1928. In this connexion that Court emphasised the fact, that, long before the expiry of three years, the plaintiff withdrew a substantial portion of the amount contributed by him towards the working capital of the partnership and that, as from the very outset the business was carried on at a loss, it was to the interest of the parties to terminate the partnership as soon as possible. The trial Court also made reference to the fact that the accounts of all the servants of the mill were cleared up and the servants were discharged in February 1928, and that after January 1928, the mill never worked.

In the trial Court it was argued on behalf of the plaintiff-appellant that, even if the partnership was for a fixed period of three years, it could not be

deemed to have been dissolved till June 1928, as the business of the partnership was not commenced till June 1925. The trial Court repelled this contention holding that there was nothing in the partnership deed to show that the period of three years was to be computed from the date from which the mill began to work and that, in the absence of any such indication, the date of the commencement of the partnership must be deemed to be the date on which the partnership deed was executed. The trial Court pointed out that the contention of the plaintiff that the partnership did not commence business till June 1928, was unfounded as it appeared that the period between the date of the execution of the partnership deed and June 1925 was spent in cleaning the mill and in making preparations for crushing oil seeds.

It appears that some of the stock of the partnership remained undisposed of on 9th March 1928, and this stock was sold up to June 1928. The plaintiff maintained that the sale of the stock was in continuance of the business of the partnership, and, as such, the partnership must be deemed to have continued till the stock was sold, viz., till 23rd June 1928. The trial Court held that the sale of the stock was not in pursuance of any express or tacit agreement to continue the partnership business, but was simply with a view to winding up the business, and, as such, the partnership could not be deemed to have been in existence during the period during which the stock in hand was sold.

Having arrived at the findings noted above the trial Court dismissed the plaintiff's suit. On appeal by the plaintiff the lower appellate Court accepted the conclusions arrived at by the trial Court. It commenced its judgment with the observation that the trial Court had written a very clear judgment to which nothing of importance could be added. It held that the partnership commenced from the date of the partnership deed, viz., from 9th March 1925, and, as the partnership was for a fixed period of three years, it came to an end on 8th March 1928. It also accepted the finding of the learned Munsif that the sale of the stock was not in continuance of the partnership business, but was simply with a view to facilitate the winding up of the concern.

The position that the partnership was for a fixed term of three years, with the option to the parties to continue business after the expiry of that period, has been contested on behalf of the plaintiff-appellant. But in our judgment the conclusion arrived at by the Courts below on the point is correct. The deed provides that it shall not be open to any of the partners to sever his connexion with the partnership for a period of three years. This provision in the deed is followed by another stipulation that if the partners desired to continue the partnership after the expiry of three years they could do so. These two provisions in the deed of partnership lead to the irresistible conclusion that the parties contemplated that the business of the partnership shall be carried on for a fixed period of three years and that this period could not be curtailed by any of the partners. It is further clear that the parties to the deed also intended and did agree that the period of three years could not be extended except with the mutual consent of all the parties concerned. It follows that the period fixed for the continuance of the partnership business was a fixed term of three years a period which could not be cut short, but which could be extended by the express or implied consent of the partners. The conclusion of the Court below that the partnership was for a fixed period of three years, is therefore correct.

Learned counsel for the plaintiff-appellant next contended that the partnership did not come into existence till the business of the partnership, viz., the crushing of oil seeds, actually commenced, and as this event did not happen till June 1925 and the suit was filed within three years from that date, the suit was within time. In support of this contention the learned counsel has referred to the definition of partnership in the English Partnership Act of 1890, (53 and 54 Victoria, Cl. 39, para. 1 (1). By that Act "partnership" has been defined as the relation which subsists between persons carrying on a business in common with a view of profit. It is argued that having regard to this definition a partnership cannot be deemed to have come into existence till the business is actually carried on. In our judgment there is no substance in this contention.

In the case before us we are not concerned with any oral agreement for carrying on a partnership business and we need not therefore discuss the various questions that may arise when a partnership is or has been carried on in pursuance of such an agreement.

In the present case we have a written deed of partnership and, the question that arises for consideration is whether the mere fact, that the pressing of the oil seeds did not commence till June 1928, leads to the conclusion that the partnership business did not commence from the date of the partnership deed, though there is nothing in the deed to indicate that the partnership was to come into existence not from the date of the execution of the deed, but from a future date.

Prima facie every instrument takes effect from the date of its execution provided there is no expression in the document indicating an intention to postpone its operation to a future date. A deed of partnership must also be governed by a similar rule, and therefore unless there is something in the deed to show that the partnership evidenced by it was not to commence till a future date, the presumption is that the partnership came into existence on the very date of the execution of the deed; vide Lindley on Partnership, Edn. 9, p. 501. Whether or not parol evidence is admissible to show when a partnership actually commenced, when there is no provision in the deed of partnership specifying a date from which the partnership is to commence, is a question that does not arise in the present case. In the case before us it is specifically mentioned in the partnership deed that the parties became partners from the date of that deed. The whole tenor of the deed shows that the parties were in right earnest to run the mill immediately, and there is nothing in the deed to suggest directly or indirectly that the parties contemplated to defer the business of the partnership to a future date. Apart from this, as pointed out by the Courts below, the period intervening between March 1925 and June 1925 was utilised for the purpose of setting the mill in order with a view to working the same when the seeds were available. That being so, there is no escape from the conclusion that the partnership came into existence from the date of the deed of partnership and, as the partnership was for a fixed term of three years, it stood dissolved on 8th March 1928, unless it could be shown that the parties by express or implied agreement consented to continue the partnership business.

This brings us to the consideration of the question whether the contention of the plaintiff-appellant that the partnership was continued till 23rd June 1928, is or is not correct. The finding recorded by the lower appellate Court on the point is adverse to the plaintiff-appellant. The learned counsel for the respondents has urged that the finding is a finding on a question of fact, and is, as such, binding on us in second appeal. In support of this contention reliance has been placed on a Division Bench decision of this Court in 26 A L J 243 (1). One of the members of this Bench was a party to that decision. In that case the question was when the partnership stood dissolved and it was observed, towards the close of the judgment in that case, that the appeal was concluded by the "finding of fact" recorded by the lower appellate Court. The case relied upon by the learned counsel no doubt lends support to this contention, but, on further consideration, we have come to the conclusion that the question when a partnership was dissolved is a mixed question of fact and law. The facts relied upon by the parties in support of their respective contentions on the question as to when a partnership was dissolved must necessarily be questions of fact and the findings recorded on those questions must therefore be findings on questions of fact. But the conclusion drawn from proved facts is always a question of law. In other words the question, whether the inference about the dissolution or non-dissolution of a particular partnership drawn by the lower appellate Court from the facts found by it is or is not correct, is a question of law. It follows that in the case before us we must accept the facts found by the lower appellate Court, but we must decide whether the conclusion drawn by that Court from those facts, viz., that the partnership was dissolved in March 1928, is or is not correct in law.

The facts found by the lower appellate Court are as follows: (1) The partnership business was run at a loss from the very outset, and, as such, it was to the interest of the parties to terminate the business as soon as possible. (2) The mill ceased to work from January 1928. (3) The accounts of the servants of the mill were cleared up and the servants were discharged in February 1928.

These facts coupled with the fact that the partnership was for a fixed term of three years furnished sufficient justification for the finding recorded by the lower appellate Court that the partnership came to an end in March

1. Baijnath v. Chhote Lal, 1928 All 58=107 I C 673=26 A L J 243.

1928. We therefore accept that finding. The answer to the question, whether or not the disposal of the assets of a partnership, which had been entered into for a fixed and definite period, is or is not in pursuance of an agreement to continue the business after the stipulated period is never free from difficulty. In some cases the disposal of the assets may be in pursuance of such an agreement; in others the disposal may be simply to facilitate the winding up of the concern. The decision of each case much depend on its own facts and circumstances and it is impossible to lay down any rule of universal application on the subject. In the present case the Courts below held that the sale of the little stock that remained in hand could not be deemed to have been in pursuance of an agreement to extend the period of partnership and we agree with that finding.

Learned counsel for the appellant lastly argued that a reply to a notice sent on behalf of the defendants to the plaintiff constituted an acknowledgment of liability on the part of the defendants to render accounts and as the present suit was filed within three years of the date of that acknowledgment, it was within time. This point was not raised in either of the Courts below, nor was any reference to this alleged acknowledgment made in the plaint as required by O. 7, R. 6, Civil P. C. It would not therefore be fair to the respondents to allow this point to be raised for the first time in second appeal. Apart from this, on a perusal of the reply referred to, it is abundantly clear that it does not contain an acknowledgment of liability by the defendants to render accounts to the plaintiff. For the reasons given above we affirm the decrees of the Courts below and dismiss this appeal with costs.

Appeal dismissed.

B.D.

A. I. R. 1935 Allahabad 1011

ALLSOP, J.

Molvi Muhammad Umar Khan — Defendant—Appellant.

v.

Naziruddin Ahmad Minai — Plaintiff —Respondent.

Second Appeal No. 869 of 1933, Decided on 16th April 1935, from decision of Addl. Sub-Judge, Basti, D/- 8th May 1933.

Malicious Prosecution — Application by defendant to returning officer to correct omission of names from electoral rolls after prescribed time — Plaintiff publishing in a newspaper fact of application during its pendency before returning officer — Defendant drawing attention of Court to such publication—Contempt of Court proceedings against plaintiff instituted and dismissed—Plaintiff suing defendant for damages for malicious prosecution—Held, there was no cause of action and if there was any, plaintiff was not entitled to damages because complaint was in good faith.

Defendant had applied to the returning officer to enter his name in the electoral rolls from which it was omitted. The application was preferred after the due period prescribed for it. Defendant published in a newspaper the fact of omission, and that of the application by the defendant to correct the electoral rolls was filed after the due time prescribed for it. The defendant having naturally thought that this publication might prejudice him brought it to the notice of the Court. The remarks in the paper, though not actually referred to the Court, were made when the application of the defendant was pending before it. The Court thereupon started proceedings against the plaintiff publisher for contempt of Court, which proceedings were eventually dismissed. The plaintiff brought a suit against the defendant for damages for malicious prosecution:

Held : it could not fairly be said that the defendant had no reason for thinking that the remarks in the newspaper, if they were made with reference to an officer of a Court of law, would not amount to contempt. The remarks were of course actually not made with reference to proceedings before such an officer, but at a time when the only proceeding actually before anybody was the inquiry into the omission of the names from the electoral rolls. It could not be said in the circumstances that the defendant did institute a prosecution in any sense of the term against the plaintiff but even if he did so it could not be said that he had no reasonable and probable cause for so doing. [P 1013 C 2]

Muhammad Ismail, M. Waliullah and *Mansur Alam*—for Appellant.

Harnandan Prasad and *H. C. Asthana* —for Respondent.

Judgment.—This second appeal arises out of a suit for damages for malicious prosecution. The defendant-appellant is a lawyer practising in Basti. He and his two sons were entered on the electoral roll for the District Board, but when that roll was revised in the year 1931 their names were omitted. The period for making objections about entries in the rolls expired in September 1931. On 7th October the appellant made an application to the Deputy Magistrate who was acting as the returning officer or election officer and was dealing with the preparation of the roll. He complained that his name and the names of his sons had been omitted and suggested an enquiry into the reasons why this had been done. He, at the same time, said that if

such an enquiry were made it would appear who the persons were who were concerned in the conspiracy. Then on 15th October 1931 the plaintiff-respondent, who is the editor of a paper called the "Insaf," published a notice in which he said that he had learnt with surprise that the names of the appellant who was a pillar of the Aman Sabha and the names of his sons had been omitted from the District Board electoral roll and that they had not discovered this fact till the period for making objections had expired. The appellant then made an application to the election officer in which he drew that officer's attention to the matter published in the paper and suggested that it constituted contempt of Court. He asked that suitable action should be taken.

I may mention that the first application of 7th October 1931 was directed to the Sub-Divisional Officer, but it appears that the Sub-Divisional Officer of that time was also the election officer. His name was Mr. Ahmad Husain. The second application was directed to the election officer as such, but for some reasons it was transferred to another Magistrate of the same name (Mr. Ahmad Husain) who issued a notice to the plaintiff to show cause why he should not be reported to the High Court so that action for contempt of Court might be taken against him. The plaintiff-respondent appeared in answer to the notice and after the parties had been heard the Magistrate decided that there was no sufficient cause for proceeding and he dismissed the application of the defendant-appellant. It is in respect of this application suggesting a prosecution for contempt of Court that the plaintiff instituted the suit which has given rise to the appeal. He obtained a decree for a sum of Rs. 475 as damages from the trial Court, but that was reduced to a sum of Rs. 150 by the learned Judge of the lower appellate Court.

It has been argued in second appeal that there was no cause of action for a suit for damages for malicious prosecution. It is said that there was no prosecution at all. It has been held in 9 All 59 (1), that an application for leave to prosecute does not give rise to a cause of action for damages, for malicious prosecution. It does not appear that this ruling has been dissented from expressly by this Court, but there have been cases in the High Court at Calcutta which suggest that an opposite view might be taken. I do not think it is necessary in the case before me to express any definite opinion upon this point.

Another argument was that there could be no cause for damages because the defendant-appellant had not in any way misled the Court when he made his application. The facts which he stated were entirely true. There was no doubt that the plaintiff-respondent had published the paragraph to which reference was made in the application. Whether that paragraph amounted to contempt of Court was a question of law and it has been represented that where the facts are true, a person instituting a prosecution cannot be mulcted in damages merely because his notions of the law are incorrect. I have been referred to the case of 18 I C 925 (2). In the present case it does not even appear that the appellant was making any application or intending to make any application in a Criminal Court. He addressed his application to the election officer and it does not appear that it was through any fault of his that it was transferred by the election officer to another Deputy Collector who treated it as though it was a criminal complaint addressed to a Magistrate. In any case the facts stated were perfectly true.

It has been argued on behalf of the defendant-respondent that the appellant must have known very-well, as he was a lawyer, that there was really no case for proceedings for contempt of Court because in the first place the words used in the paper were not such as would amount to contempt and, in any case, there was no proceeding in any Court which could be prejudiced by the use of those words. On a broad consideration of the matter it appears clear enough that the appellant was agitating before the election officer the question of the removal of his name from the electoral roll and undoubtedly he must have had the intention, which was afterwards carried into effect, that his name should be restored by the District Magistrate under the special powers which that officer has in these matters.

It was suggested apparently in the Courts below and to the Magistrate who was dealing with the contempt of Court matter that that contempt con-

1. Ezid Bakhsh v. Harsukh Rai, (1886) 9 All 59= 1886 A W N 297.

2. Mrs. M. J. Powell v. A. E. Hart, (1913) 18 I C 925.

sisted in the fact that an impression was created that it was too late for the appellant to get the electoral rolls corrected. On behalf of the respondent it is pointed out that the appellant himself admitted in the first application which he made that the period of limitation for putting in objections to the electoral roll had expired and that there was therefore nothing in the paragraphs in the paper which he himself had not admitted to be true. It seems however that there was a possibility of having the roll corrected, as it ultimately was corrected, by the District Magistrate, and although probably nobody on a strict consideration of the matter would think that the statement in the paper would affect any question which was pending at the time, still it is not unnatural that a person who was affected by the statement might quite honestly believe that he was prejudiced by the paragraph.

There is another point which was not apparently agitated in the Courts below for some reason or other, but which I think may well be mentioned. There is a reference in the paragraph to the fact that the appellant is a prominent member of the Aman Sabha, a body which is organised for the purposes of combating subversive political tendencies and which may perhaps be generally supposed to have the support of the executive officers of Government. It may be that the appellant may have thought that the references to his membership of this body made in the same breath as a statement that his opportunities for redress were barred by limitation might be suggestive of an insinuation that if his name was ultimately entered in the electoral roll it would be due to some form of partisanship. If that was so, he might have felt that he would be prejudiced by the publication of such remarks in the paper. In these circumstances, I do not think that it can fairly be said that he had no reason for thinking that the remarks, if they were made with reference to an officer of a Court of law, would not amount to contempt. They were of course actually not made with reference to proceedings before such an officer, but at a time when the only proceeding actually before anybody was the enquiry into the omission of the names from the electoral rolls, an enquiry which was proceeding before an executive officer, namely, the officer in charge of such matters in connection with the election. Doubtless there was no question of any contempt of Court in these circumstances, but it cannot be said that the appellant was obviously not in good faith when he made the suggestion which he did make and if he without a proper consideration of the legal aspect of the matter suggested proceedings against the respondent which could not properly be taken, that in itself is not a sufficient ground for passing a decree in a suit for damages for malicious prosecution. I am doubtful whether it can be said in the circumstances of this case that the appellant did institute a prosecution in any sense of the term against the respondent, but even if he did so, I do not think that it can be said that he had no reasonable and probable cause for so doing. I consider therefore that there was no sufficient ground for passing a decree against him.

I allow the appeal and dismiss the suit with costs throughout. Leave to appeal is allowed.

B.D. *Appeal allowed.*

A. I. R. 1935 Allahabad 1013

ALLSOP AND BAJPAI, JJ.

Emperor

v.

S. M. Wahid Ullah Ahrari—Opposite Party.

Criminal Appeal No. 281 of 1935, Decided on 1st August 1935.

(a) Contempt of Court—High Court can award costs.

High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court. [P 1014 C 1]

(b) Costs—Court awarding costs in contempt of Court proceedings can recover it as a decree under its inherent jurisdiction.

High Court awarding costs in a case for contempt of Court has inherent jurisdiction to recover the costs on the lines on which a decree is executed. [P 1014 C 1]

M. Nasim and *Begam Faruqi*—for Complainant.

Asst. Govt. Advocate—for the Crown.

B. S. Darbari—for Opposite Party.

Judgment.—On the complaint of one Mohammad Istehsan proceedings under the Contempt of Courts Act, 1926, were started in this Court against S. M. Wahidullah Ahrari in connection with certain articles published by the latter in a paper at Aligarh while a complaint under S. 500, Penal Code, was pending in the Subordinate Criminal Court at Aligarh. By an order dated 26th October 1934, passed by a Bench

of this Court, Wahidullah was punished with simple imprisonment for a term of four months. He was also directed to pay the costs of Mohammad Istehsan and the Crown, and the costs of Mohammad Istehsan were fixed at Rs. 100 and of the Crown at Rs. 100. In the result Wahidullah was directed to deposit Rs. 200 as costs in this Court within two months.

The costs were not so deposited within the time allowed by this Court and on 30th April 1935, notice was issued to Wahidullah to show cause why the costs should not be realised as a fine under the provisions of S. 547, Criminal P. C? In reply to the notice it is contended by Mr. Darbari that this Court had no jurisdiction to pass an order for costs and that in no event could such costs be recoverable as a fine under the Code of Criminal Procedure. So far as the first contention is concerned, we are of the opinion that it is open to this Bench to consider the matter. If the order of the former Bench Court was without jurisdiction, other proceedings ought to have been taken for questioning the order. As it is, we are satisfied that this Court has such jurisdiction. In a number of cases this Court under similar circumstances has directed the person punished under the Contempt of Courts Act to pay the costs of the Crown. The same procedure was followed in the English Courts, and cases to that effect are mentioned by Oswald in his Book on "Contempt," third edition, p. 242.

The next question that arises is whether we have the power to direct the realisation of costs as a fine according to the provisions of the Code of Criminal Procedure. This question is not without some difficulty, and it is not necessary for us to express an opinion on the point. In any event if we have jurisdiction to direct the payment of costs as indeed we have inherent jurisdiction to order its recovery. We think that the proper method by which these costs should be recovered should be on the lines on which decrees are executed by the Civil Court. We issue a warrant to the Collector of Aligarh authorising him to realise the amount by execution against the moveable or immovable property of Wahidullah.

Finally, it was contended that Wahidullah was very poor and that we should on the ground of such poverty allow him to be discharged without paying the costs which he was ordered to pay. An application to this effect has been filed before us to-day, but it is not supported by any affidavit, and it is not possible for us to investigate the matter as to whether he is possessed of sufficient means or not. After all we are not directing the recovery of this amount by the arrest of Wahidullah; we have only authorised the Collector to realise the amount by proceeding against the moveable and immovable property of the defaulter and, if he is not possessed of such property, execution obviously will be infructuous.

B.D. *Order accordingly.*

A. I. R. 1935 Allahabad 1014

BAJPAI, J.

Ganga Singh and *others* — Defendants —Applicants.

v.

Kr. Jitwar Singh and *another*—Plaintiff and Pro forma Defendant—Opposite Parties.

Civil Revn. No. 562 of 1934, Decided on 29th August 1935, against order of Munsif, Jalaun, D/- 31st August 1934.

(a) Award—Validity.

A reference to arbitration by a Court to which all parties interested in dispute do not join is bad. [P 1015 C 1]

(b) Award — Court ordering reference — Reference bad in law—Same Court cannot set aside award under Sch. 2, Cl. 15, Civil P. C.

The Court itself which made the reference to arbitration is not competent to set aside the award under Cl. 15 on the ground that the reference was bad: 1921 *All* 16; 1926 *All* 238; 1928 *All* 740 and 1927 *All* 563, *Foll.* [P 1015 C 2]

Krishna Murari Lal—for Applicants.

A. M. Gupta—for Opposite Parties.

Order.—The facts of this case, at least those which can engage the attention of this Court, are similar to the facts in Civil Revision No. 627 of 1934, and my decision in this case will govern my decision in the other revision as well.

It appears that Kunwar Jitwar Singh brought a suit for pre-emption against Ganga Singh, Sughar Singh, Deo Singh and Mt. Pariharin. The last defendant was the vendor and as such a proforma defendant. At one stage the plaintiff and Ganga Singh and Deo Singh referred their dispute to arbitration. Sughar Singh, defendant 2, was a Sub-Inspector at a different place and proceedings against him were exparte and he neither filed a written statement nor engaged any counsel nor was he a signatory to the deed of reference. The Court however referred

the matter to arbitration and the arbitrator decided that the plaintiff's suit ought to be dismissed.

On this Jitwar Singh the plaintiff filed objections before the Court below and prayed that the award be set aside because the reference to arbitration was not by all the parties interested and because the arbitrator was guilty of misconduct. The Court below has held that the arbitrator took great pains in the matter and acted with perfect impartiality. It has however held that the order of reference was bad inasmuch as Sughar Singh was a person interested and he did not join in the agreement to refer. I agree with the Court below that Sughar Singh was a person interested and the reference to agree was in that sense perhaps bad, although it is contended before me that Ganga Singh was the head of the family and his agreement should be deemed to be an agreement on behalf of the other two defendants who were his younger brothers. The fact however remains that Ganga Singh at first tried to defend the suit on behalf of his brothers, but ultimately the written statement was by him alone. It is not possible upon the materials on the record to hold that the agreement by Ganga Singh should be deemed to be an agreement by Sughar Singh as well who did not sign the agreement.

The question which has however been strongly argued before me is that the learned Munsif has set aside the award purporting to act under Cl. 15, Second Schedule to the Civil P. C., and it is said that the Court below had no jurisdiction to set aside the award under Cl. 15, inasmuch as the jurisdiction of the trial Court in a matter like this is confined to the conditions laid down therein. It is clear that the objection to the award in the shape in which it is made, namely on the ground of a bad order of reference, does not come within clauses (a) and (b) of Cl. 15, nor even within clause (c) except perhaps on the ground "of being otherwise invalid." So far as this Court is concerned the authorities are to the effect that it is not possible to hold that an objection which attacks the validity of the agreement to refer can come within the expression "or being otherwise invalid." I might refer to the case of 19 A L J 33 (1), where Walsh, J. at p. 37, after having stated the facts of the case, observes:

> The ground taken and adopted in the decision of this case is no ground affecting the validity of the award at all. It is merely a decision that the Court ought not to have referred. Is that a matter affecting the validity of the award once the dispute has been referred?

This case was considered in the case of 24 A L J 235 (2), where Sulaiman, J. says:

> But in 19 A L J 33 (1) decided by a Bench of which the same learned Judge was a member it was remarked that objections as to the validity of a reference to arbitration was not an objection within the meaning of R. 15. . . . . With this last observation we agree.

In 26 A L J 1009 (3), Mukerji J. observes:

> We are of opinion that on principle and on authority the four words quoted (or being otherwise invalid) do not and cannot cover an award where the reference itself is bad. The Court is required to consider whether an award is good or bad. . . . . On principle therefore the words 'or being otherwise invalid' should not be taken as including the question whether there was a valid reference to the arbitration.

In 49 All 812 (4), Ashworth, J. held that:

> Paragraph 15 of the schedule does not apply to an award which has been made upon a reference to make which the Court had no jurisdiction.

It would thus appear that the force of authority in this Court is in favour of the view that the Court itself which made the reference is not competent to set aside the award under Cl. 15 on the ground that the reference was bad. There is therefore considerable force in the contention of learned counsel for the applicants that the Court below had no jurisdiction to set aside the award on the ground that the reference to arbitration was bad inasmuch as it had not the concurrence of all the parties interested, and I am asked to set aside the decision of the Court below under S. 115, Civil P. C., as being without jurisdiction.

On behalf of the opposite party it is contended that I should not so act because after all the matter is before me and I should see for myself whether the reference was bad and whether the award should be set aside on that ground. This contention is advanced on behalf of the plaintiff and to my mind it comes with a very bad grace from him. He signed the agreement to refer; he was present throughout the proceedings before the arbitra-

1. Kanhya Lal v. Jagannath, 1921 All 16=60 I C 857=43 All 305=19 A L J 33.
2. Gopal Das v. Baij Nath, 1926 All 238=91 I C 930=48 All 239=24 A L J 235.
3. Mahadeo Prasad v. Badri Das Ram Sarup, 1928 All 740=110 I C 881=50 All 955=26 A L J 1009.
4. Tej Singh v. Ghasi Ram, 1927 All 563=102 I C 236=49 All 812=25 A L J 606.

tor and when he lost before the forum chosen by himself he comes to the Court and asks that Court to cancel its previous order to which he had given his full concurrence on the ground that it is defective by reason of the fact that one of the parties interested (that party not being himself) had not assented to the agreement to refer. I think it does not lie in the mouth of the plaintiff to pick holes in the award on this score.

I therefore am of the opinion that if the matter had come up before me in revision on the plaintiff's application if the Court below had passed a decree in accordance with the award, I would have been very loath to interfere. The last contention by Dr. Vaish was that although the trial Court may not have jurisdiction under Cl. 15, Second Schedule, Civil P. C., to set aside an award under circumstances like the present, yet there is nothing to prevent the Court from acting under S. 151, Civil P. C., in a matter of this kind. The answer to this is that the Court below has not purported to act under section 151, but the entire trend of his judgment shows that he was of the opinion that he had jurisdiction under Cl. 15 to interfere. If the Court below had acted under S. 151, Civil P. C., it might have been a question open to some doubt whether I in my revisional jurisdiction should have interfered with the Court below where he had acted in order to prevent any abuse of the process of the Court.

On the whole I am of the opinion that the order of the Court below should be set aside. I have been influenced to a great extent by the fact that if the order of the Court below is maintained the inviolability which attaches to an award where the arbitrator has taken great pains and has acted with perfect impartiality would vanish, and after all the plaintiff was a pre-emptor asserting a right which is not a very strong right and under the award all that happened was that the suit was dismissed.

For the reasons given above I allow this application, set aside the order of the Court below, and confirming the award pass a decree in terms of the award. Parties will bear their own costs subsequent to the filing of the award up till this Court. In the decree that will be passed on the basis of the award the suit of the plaintiff will be dismissed with costs.

B.D. *Order accordingly.*

A. I. R. 1935 Allahabad 1016

SULAIMAN, C. J. AND MULLA, J.

Pokhar Singh — Judgment-debtor — Appellant.

v.

Tula Ram—Decree-holder— Respondent.

Execution First Appeal No. 495 of 1933, Decided on 20th July 1935, from decision of Sub-Judge, Pilibhit, D/- 31st July 1933.

(a) Appeal—Order of sale under O. 21, R. 64, Civil P. C. is not appealable.

An order for sale under O. 21, R. 64, Civil P. C. is no longer appealable under the new Civil P. C. The right of appeal arises only when the sale has been confirmed. [P 1017 C 2]

(b) Execution—Sale of non-attachable property not confirmed—Objection to such sale falls under S. 47, Civil P. C. and not under O. 21, Rr. 89 and 90—Objection can be raised any time before sale confirmation.

The right to object to the sale of a non-saleable property arises after such a sale has taken place. The objection that a certain property is not saleable is obviously not an objection which would fall within the scope of O 21, Rr. 89 and 90, but is an objection to the execution of the decree governed by S. 47, Civil P. C. There is no time limit prescribed for raising such an objection and so long as the Court is functioning and has not become functus officio after the confirmation of the sale and the satisfaction of the decree, it cannot be too late for the judgment-debtor to invite the attention of the Court to its statutory duty under S. 60, to see that a property which is not saleable should not be sold. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself may affect the question of costs but would not necessarily amount to an estoppel against him, as there should be no estoppel against the statutory right: 4 *A L J* 519; 26 *Cal* 727 and 7 *All* 641, *Dist.*

[P 1017 C 2; P 1018 C 1]

G. S. Pathak—for Appellant.

Basudeva Mukerji—for Respondent.

Judgment.—This is a judgment-debtor's appeal from an order dismissing an objection under S. 47, Civil P. C., to an auction sale. In execution of a simple money decree a house of the judgment-debtor-objector was attached sometime before 13th December 1931. He did not appear at all to file any objection to the attachment. Various steps were taken and notices were issued under O. 21, R. 50, for the judgment-debtor to appear at the time of the settlement of the terms of the proclamation of sale; but he did not appear at all. Ultimately the property attached was sold on 19th January 1933, and purchased by the decree-holder. Before however the sale could be confirmed, the judgment-debtor on 18th February 1933, filed an applica-

tion under O. 21, R. 90, praying for the setting aside of the sale on the ground of certain irregularities and fraud in conducting and publishing it. Later, on 27th April 1933, but before the sale could be confirmed, he filed another application under S. 47, Civil P. C., objecting to the sale on the ground that the property was the house of an agriculturist and was exempt from attachment and sale under S. 60, Civil P. C. The Court below has dismissed this objection summarily on the ground that it was not maintainable inasmuch as it was filed after the sale had taken place. The appeal has been preferred from this last order.

The Court below has relied on the authority of the case in 4 A L J 519 (1) in support of the view that the objection was too late. In that case the learned Single Judge relied on 26 Cal 727 (2) and 7 All 641 (3) both of which can be easily distinguished. Indeed, in the former case, the Calcutta High Court actually held that:

> Even the confirmation of the sale was no bar to an application made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, as the question was one relating to the execution, discharge and satisfaction of the decree.

The main ground on which the learned Judge held that the objection could not be entertained was that:

> In my opinion a judgment-debtor who might have raised objections prior to the sale but who has refrained from doing so, and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable.

That case was decided under the provisions of the old Civil Procedure Code (Act 14 of 1882). Under S. 284 of that Code the Court could order the sale of any property which had been attached, or a portion thereof. That section did not lay any particular stress on the question as to whether the property was saleable or not. It was held in some cases that such an order was appealable and was tantamount to an order against the judgment-debtor, which necessarily implied that the property was saleable. It was presumably on account of this view that the learned Judge considered that, where a judgment-debtor allows an order for sale to be passed and does not appeal from such an order, he should not be allowed to object to the sale at a later stage.

The scheme of the new Civil Procedure Code is not identical. O. 21, R. 61, which corresponds to the old S. 284, is differently worded and authorises the Court executing a decree to order a sale of the property attached by it, or a portion thereof, only if it is liable to sale. Thus, where there is property not liable to sale, R. 64 would not be applicable. A further difference arises because of the fact that an order under R. 64 is no longer appealable. The right of appeal arises only when the sale has been confirmed later. It cannot therefore be said under the new Code of Civil Procedure that, when an order for sale was made under R. 64, the judgment-debtor had a right of appeal of which he did not avail himself. S. 60, which is embodied in the substantive part of the Civil Procedure Code, provides that certain particulars "shall not be liable to attachment or sale." Among these particulars are houses and other buildings belonging to an agriculturist and occupied by him.

It is our duty to interpret the section in such a manner as not to make any words used therein in any way superfluous. The fact that the legislature has thought it fit to make the specified particulars neither liable to attachment nor liable to sale is very significant. It would seem to follow prima facie, that, even, if by some mistake or other a wrong attachment has taken place, there is still a prohibition against the sale of such property. Admittedly the right to object to the attachment of a non-attachable property can arise after the attachment has taken place. It would seem to follow that the right to object to the sale of a non-saleable property ought also to arise after such a sale has taken place. When a sale has been confirmed and the property has become completely vested in the auction-purchaser, it may be said to imply a decision that the property was saleable which may operate as a bar against any objection raised by the judgment-debtor after the confirmation; but that argument cannot be applied to a case where there has yet been no confirmation and the sale is still subject to confirmation. It is impossible, in the latter case, to say that there has been by a necessary implication any decision at any stage of the case, that the property was sale-

1. Umed v. Jas Ram, (1907) 29 All 612=4 A L J 519=1907 A W N 193.
2. Durga Charan Mandal v. Kali Prasanna Sarkar, (1899) 26 Cal 727=3 C W N 586.
3. Ram Chhaibar Misir v. Bechu Bhagat, (1885) 7 All 641=1885 A W N 190.

able, which would be conclusive as between the parties, and would operate as a bar against all objections. Had an appeal been allowed from an order of sale under O. 21, R. 64, we might have been inclined to follow the ruling in the earlier case but that is not the position now.

The objection that a certain property is not saleable is obviously not an objection which would fall within the scope of O. 21, R. 89 or R. 90, but is an objection to the execution of the decree governed by S. 47, Civil P. C., Under that section it is the duty of the Court to decide all questions arising between the parties to the suit relating to execution, discharge or satisfaction of the decree. There is no time limit prescribed for raising such an objection; and we are unable to hold that, so long as the Court is functioning and has not become functus officio after the confirmation of the sale and the satisfaction of the decree, it can be too late for the judgment-debtor to invite the attention of the Court to its statutory duty under S. 60 to see that a property which is not saleable should not be sold. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself may affect the question of costs, but would not necessarily amount to an estoppel against him, as there should be no estoppel against a statutory right. To hold that, once a sale has taken place, however wrong and illegal it may be, there is a complete bar and the Court has no option, but to proceed to confirm the sale of a property, which is non-saleable under S. 60, will be nullifying the provisions of that section, which is a result that ought to be avoided.

We are therefore of the opinion that the Court below has erred in holding that the objection of the judgment-debtor to the saleability of the property was not maintainable. We accordingly allow this appeal and setting aside the order of the Court below send the case back to that Court with the direction to restore it to its original number and to dispose of it according to law. As there was a great delay on the part of the judgment-debtor in taking the objection, we direct that the costs should abide the result.

B.D. *Appeal allowed.*

A. I. R. 1935 Allahabad 1018

GANGA NATH, J.

Abdul Ghafoor—Defendant — Appellant.

v.

Sri Thakur Ram Krishna Murari Ji —Plaintiff and others — Defendants — Respondents.

Second Appeal No. 517 of 1932, Decided on 9th August 1935, from decision of Addl. Dist. Judge, Cawnpore, D/- 16th March 1932.

Limitation — Person seeking recovery of property against tenor of instrument executed by himself—Art. 91, Lim. Act, applies —Instrument of alienation executed by person not full owner—Art. 91 does not apply—Suit for possession—Cancellation incidental —Suit is governed by Art. 120.

When a person seeks to recover property against the tenor of the instrument executed by himself or one under whom he claims, he must first obtain cancellation of the instrument and the three years' rule enacted by Art. 91, Lim. Act, applies to a suit brought by such person. But where an instrument of alienation is executed by a person who is not the full owner of the property but has only conditional authority to dispose of it, Art. 91 would not apply. But where the relief sought by the plaintiff is for possession and the cancellation of the lease, the latter relief is to be regarded as merely subsidiary to the main relief. Art. 91, Lim. Act, does not apply and Art 120 would apply : 22 *All* 90, *Foll.*; 14 *Mad* 26 and 32 *All* 392, *Appr.*; 1928 *All* 267, *Dist.* [P 1019 C 2 ; P 1020 C 1]

Mushtaq Ahmad—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—This is a defendant's appeal and arises out of a suit brought against him by the plaintiff to recover possession over plots Nos. 141 and 142 described in the plaint by declaring that the lease dated 4th November 1925, executed by Jugal Kishore, general attorney of Hari Chand in favour of the defendant is invalid, ineffectual and null and void against the plaintiff. The plots in dispute belonged to Hari Chand and Madan Mohan who were brothers. Both the brothers had mortgaged their proprietary rights. In 1924 the share of Hari Chand was sold in the mortgage decree and was purchased by Ram Gopal. Madan Mohan died sometime in 1924 or 1925 without an issue and his share was succeeded to by Hari Chand. So Hari Chand again became the owner of half of the mahal. This share was also sold in 1927 and purchased by the plaintiff. The plaintiff after the purchase of this half-share purchased from Ram Gopal Hari Chand's share also which had been purchased by Ram Gopal in 1924. The

plaintiff thus became the owner of the whole mahal. In September 1925, Hari Chand who was the lambardar of the mahal executed a general power of attorney in favour of Jugal Kishore. On 4th November 1925, Jugal Kishore executed a lease of the plots (Nos. 141 and 142) whose area was 23 bighas 6 biswas in favour of the defendant-appellant, Abdul Ghani, for 25 years. At the time this lease was given Hari Chand and Ram Gopal were the owners of the mahal and Hari Chand was the lambardar. The plaintiff filed this suit in 1930 for possession over the plots in dispute with a declaration that the lease was void and ineffectual against him. The defendant contended that he had been in possession over the plots in dispute from before the lease in dispute with the permission of the proprietors, Hari Chand and Madan Mohan, and had built a kuchcha bungalow, a house and a well with their permission on the land in dispute, subsequently in 1925 he got the lease in dispute from Hari Chand's general attorney, Jugal Kishore and that he was not liable for ejectment. The trial Court found the lease as valid and dismissed the suit. On appeal the learned Additional District Judge found that the lease was not beneficial and was invalid and decreed the suit. The lower appellate Court further found that Ram Gopal had not consented to the lease in dispute and that the suit was within time.

The first point urged by the learned counsel for the appellant is that the lease is valid and binding inasmuch as it was beneficial. As already stated the learned Judge has found that the lease is not beneficial. He says:

So 2 biswas of land are let by the railway for Rs. 35. Having regard to this fact how is it possible to say that Rs. 11-11-0 is a fair rent for 23 bighas odd of land in question? There can be no doubt that the rent is an inadequate one. Consequently the lease cannot be for the benefit of the cosharers.

The learned Judge further found that the lease was granted to injure the mortgagee's interests and that there was no circumstance to show that the granting of the lease for 25 years was a necessity and beneficial to the interests of the co-sharers. I agree with this finding of the learned Judge and find that the lease was not beneficial, but was granted on a very inadequate rent for a very long term of period to injure the interests of the mortgagees. The next point urged by the learned counsel for the appellant was that the appellant had been in possession before the lease as a licensee and that he was not liable for ejectment. As this point has not been considered by the lower Court, issues were remitted on which findings have been received. The lower Court has found that the appellant had no building of permanent nature on the land before the lease and that the building which was of a temporary nature which he had built before the lease had also fallen down before the lease and he has also found that there was no license for making the construction in favour of the appellant. That it was so is apparent from the fact that there is no mention of any building in the lease. If there had been any building at the time of the lease or if the appellant had been allowed to construct any building on it before the lease, there must have been some mention of it in the lease. The land was given to the appellant for storing fuel and he had been using this land before the lease for the same purpose. Under these circumstances the appellant has no right to remain in possession independently of his rights under the lease.

The third point urged by the learned counsel for the appellant was that the suit was time-barred inasmuch as the lease was given on 4th November 1925, and the plaintiff purchased half of the property on 21st February 1927, since when the plaintiff should be presumed to have notice of the lease which was registered and under Art. 91, Limitation Act, the suit having been brought beyond three years would be time-barred. In order to appreciate this argument of the learned counsel it has to be seen whether Art. 91, Limitation Act, applies. The learned counsel relies on 50 All 510 (1). This case is distinguishable inasmuch as the suit was brought for a mere declaration that the sale-deed dated 26th August 1918, was null and void and that the defendants had not acquired any right thereby. This document had been executed by the plaintiff himself in favour of the defendants. When a person seeks to recover property against an instrument executed by himself or one under whom he claims he must first obtain the cancellation of the instrument and the three years' rule enacted by Art. 91 applies to a suit brought by such person. But where an instrument of alienation is executed by a person who is not the full owner of the property, but has only conditional authority to

1. Mohammad Nazir v. Zulaikha Bibi, 1928 All 267=109 I C 54=50 All 510=26 A L J 289.

dispose of it that Article would not apply, vide 14 Mad 26 (2) and 32 All 392 (3) at p. 395. The case which applies on all fours to the present case is 22 All 90 (4). There during the continuance of a mortgage which contained a covenant against alienation of the mortgaged property, the mortgagor made a perpetual lease of that property. The mortgagee brought a suit on his mortgage and having obtained a decree put the mortgaged property up to sale. The auction-purchaser of the mortgaged property on becoming aware of the existence of the perpetual lease sued for the cancellation and for a declaration that the defendant had no right to interfere with or obstruct the plaintiff in respect of the property in question. It was held that the limitation applicable to such a suit was that prescribed by Art. 120, Sch. 2, Limitation Act, 1877, and not the prescribed Art. 91 or Art. 95. The main prayer of the plaint was for a decree declaring and establishing the plaintiff's title and the prayer for cancellation of the lease could be treated as merely subsidiary to the main relief asked. In this case also, the relief sought for by the plaintiff is for possession and the cancellation of the lease is to be regarded as merely subsidiary to the main relief. I am therefore of opinion that Art. 91, Limitation Act, does not apply and Art. 120 as held in 22 All 90 (4), referred to above, would apply.

In this connexion there is another point which may be mentioned here. According to the argument of the learned counsel the plaintiff is to be presumed to have notice of the registered lease, but there is nothing to show that the plaintiff knew within the last three years of the facts entitling him to have the instrument cancelled or set aside. I therefore find that Art. 91, Limitation Act, does not apply and the suit is not time-barred. There is no force in the appeal. It is therefore ordered that it be dismissed with costs. Permission to file a Letters Patent appeal is granted.

B.D. *Appeal dismissed.*

2. Unnai v. Kunchi Amma, (1891) 14 Mad 26.
3. Bachchan Singh v. Kamta Prasad, (1910) 32 All 392=5 I C 585=7 A L J 507 (PC).
4. Mohamad Baqar v. Mango Lal, (1900) 22 All 90=1900 A W N 188.

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* A. I. R. 1935 Allahabad 1020

IQBAL AHMAD, J.

Dori and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 392 of 1935, Decided on 19th August 1935, from order of Sess. Judge, Bareilly, D/- 18th May 1935.

*** Criminal Trial — Charge to jury—Verdict of jury clear and unambiguous—Judge cannot charge jury afresh or discuss facts of case again and ask jury to re-consider their verdict.**

After the jury have considered the verdict and the foreman has informed the Judge what is their verdict or what is the verdict of a majority, the Judge has no jurisdiction to charge the jury afresh. The law contemplates only one charge by the Court and that after the case for the defence and the prosecutor's reply are concluded (vide S. 297, Criminal P. C.), and there is no provision in law entitling the Judge either to re-charge the jury or to argue out the matter with the jurors after the verdict has been delivered. If the jury, after retiring to consider their verdict, inform the Judge that they did not understand the law as explained to them by the Judge, it is no doubt open to the Judge to explain the law again to the jury, but there is no provision in law that authorizes a Judge, in the event of his disagreeing with the verdict of the jury, to charge the jury afresh. Where the verdict of the jury is vague and uncertain, S. 303, Criminal P. C., authorizes the Judge to put necessary, questions with a view to ascertain whether the jury intended to bring in a verdict of guilty or not guilty, but, beyond putting questions with a view to ascertain what the verdict of the jury is, the Judge has no jurisdiction to enter into a discussion of the facts of the case with the jury. If the verdict is general and complete and free from ambiguity, the Judge is not competent to put questions to the jury, nor can he ask the jury to re-consider their verdict. If the Judge disagrees with the verdict he can proceed under S. 307, Criminal P. C., but he cannot again proceed to charge the jury and ask them to re-consider their verdict. [P 1022 C 1, 2]

G. S. Pathak—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—This is an appeal by 17 persons who have been convicted by the learned Sessions Judge of Bareilly of an offence punishable under S. 395, Penal Code. The trial was by jury. After the Judge had finished his charge the jury retired to consider their verdict. The foreman thereafter delivered the verdict of the jury in the following terms:

We do not find the offence proved because although we think that the accused were present there is no evidence that they intended to commit dacoity when they went there. The affair seems to be rather what happens in a village and in such a case it is quite ordinary to use

such an expression as 'even though you cut our throats we will not let you cut the crop.' We think that they went to the field with the idea of settling the dispute. I know of such a case in one of my own villages.

At this stage the learned Judge stopped the foreman and explained certain matters to the jury and also put certain questions to the foreman to which he replied. Thereafter the jury was asked to retire again to re-consider the facts and the points which the Judge had laid before them. The jury then returned a verdict of guilty as regards each of the appellants and the learned Judge accepting the verdict convicted the appellants. It is contended on behalf of the appellants that the procedure adopted by the learned Judge had no sanction in law and the amended verdict of guilty returned by the jury was illegal. In my judgment, this contention is well founded and ought to prevail.

The incident forming the subject of the charge took place in village Panwaria on 2nd January 1935. It is common ground that a sugarcane crop alleged to belong to two persons named Dori and Chet Ram was attached in execution of a decree and was sold by the Amin on 1st January 1935. One Gauri Shankar purchased the same for Rs. 74. Gauri Shankar paid the sale price and the Amin passed a receipt.

The Amin delivered possession to Gauri Shankar and left the village. The next day, viz. on 2nd January, Gauri Shankar went with labourers and carts to cut and remove the crop.

The case for the prosecution was that after some sugarcane had been cut Gauri Shankar was informed that an attack was to be made on him and he therefore ran away. Immediately after a crowd of 30 or 35 men came from the village to the field. When the crowd arrived they found Balak Ram, the brother of Gauri Shankar, 3 or 4 carts and 10 or 12 labourers. They surrounded and caught some of these while others ran away. Those that were caught were knocked about and kicked and the cane that was cut was taken to the sugar refinery in the village in the carts and on the heads of the labourers. Gauri Shankar had left his "Lehru" in the field. It is said that the "Lehru" was covered with cane leaves and set on fire.

The case put forward on behalf of the accused was that the cane crop that was sold by the Amin belonged not to Dori and Chet Ram, but to the brothers of Dori named Jiwan and Gomid. It was alleged that on the morning of 2nd January, Jiwan Ram and Gomid tried to have the matter settled through the intervention of a man named Siwa Ram, but their attempt failed. Then some of the accused went to the field where the cane was being cut and the following conversation ensued between them and Gauri Shankar. The Panwaria party said to Gauri Shankar: "We will not let you cut this field as it belongs to Gomid and Jiwan." Gauri Shankar replied "I bought the field and I propose to cut it." The Panwaria party then said "Even though it means that our own throats are cut we will not allow you to cut it." After this Gauri Shankar and his labourers went away and the cane that was cut was removed by Gomid and Jiwan. The accused denied that they burnt the "Lehru" or removed any articles belonging to Gauri Shankar or to his labourers.

In order to appreciate the observations of and the questions put by the learned Judge to the foreman of the jury after the verdict quoted above was delivered, it is necessary to mention that in the course of the investigation the investigating officer is alleged to have recovered an axle from a certain pond and the case for the prosecution was that the axle was of the "Lehru" of Gauri Shankar. After the learned Judge stopped the foreman when he was delivering the unanimous verdict of the jury, he (the learned Judge) warned the jury that

(1) the case was to be decided on the evidence on the record and not on any outside personal knowledge he might possess of similar cases, and (2) that whatever might have been the intention of the accused when they went to the field, the jury had to decide whether in the light of what occurred any offence had been committed.

The learned Judge further pointed out that

It was admitted that Gauri Shankar had left the field and that the accused's party had taken away at least two cartloads of cane.

and explained that

If they found that the removal of the cane was due to threats given by the accused the offence of dacoity was complete.

The learned Judge then asked the foreman whether in the opinion of the jury such threats had been given and his reply was

there may have been threat or there may not have been threat.

The Judge then observed that it was no verdict and

the jury must decide whether or not threats had been given if they did not accept the prosecution story of Balak Ram and the labourers having been knocked about by the accused.

The learned Judge also told the jury that:

> There was also the question of the alleged burning of the 'Lehru' which though not an offence charged as such against the accused, would be strong corroboration of the charge of having threatened the complainant's party to induce them to give up the cane.

The foreman then suggested that the

> axle alleged to have been recovered from a pond near the house of Munir accused might have been another one.

On the learned Judge pointing out that the axle bears the name of Gauri Shankar's brother, the foreman replied that "this is not usually done." The learned Judge then pointed out that

> Whether or not it be usual, the fact remains that this axle does bear the name of Gauri Shankar's brother, and moreover, it has never been suggested by the defence that the axle recovered could have been in the village by accident. The jury had to face the fact that in Panwaria, if they accept the prosecution evidence as to the actual recovery of the axle, from a pond near the house of the accused Munir and on this man's pointing it out is recovered an axle bearing the name of a man who lives two miles away in village Parasrampur.

After the jury have considered the verdict and the foreman has informed the Judge what is their verdict or what is the verdict of a majority, the Judge has no jurisdiction to charge the jury afresh. The law contemplates only one charge by the Court and that after the case for the defence and the prosecutor's reply are concluded (vide S. 297, Criminal P. C), and there is no provision in law entitling the Judge either to re-charge the jury or to argue out the matter with the jurors after the verdict has been delivered. If the jury after retiring to consider their verdict inform the Judge that they did not understand the law as explained to them by the Judge, it is no doubt open to the Judge to explain the law again to the jury, but there is no provision in law that authorizes a Judge, in the event of his disagreeing with the verdict of the jury, to charge the jury afresh. Where the verdict of the jury is vague and uncertain, S. 303, Criminal P. C., authorizes the Judge to put necessary questions with a view to ascertain whether jury intended to bring in a verdict of guilty or not guilty, but, beyond putting questions with a view to ascertain what the verdict of the jury is, the Judge has no jurisdiction to enter into a discussion of the facts of the case with the jury. If the verdict is general and complete and free from ambiguity, as was in the present case, the Judge is not competent to put questions to the jury, nor can he ask the jury to re-consider their verdict. If the Judge disagrees with the verdict he can proceed under S. 307, Criminal P. C. but he cannot again proceed to charge the jury and ask them to re-consider their verdict.

In the case before me the verdict originally delivered was clearly a unanimous verdict of not guilty and the learned Judge therefore had no jurisdiction to again discuss the facts and to ask the jury to re-consider their verdict. The verdict of guilty subsequently delivered by the jury was therefore illegal, and the Judge could not act on the same. It follows that the conviction of the appellants cannot be sustained and must be set aside.

The question however remains whether I should order a re-trial of the appellants. In the circumstances of the present case I have come to the conclusion that re-trial should not be ordered. The dacoity was a technical one and no injury was caused to any man of Gauri Shankar's party. The learned Judge of the Court below had "a strong suspicion" that the removal of the crop and the attack was inspired by the karinda of the zamindar and I share the suspicion of the learned Judge. The learned Judge observed that:

> The dacoity was due mainly to annoyance at Gauri Shankar having purchased the cane which was regarded as the property of the local zamindar.

and therefore a heavy sentence was not called for. Further having regard to the fact that the accused had been in jail for some time, the learned Judge considered that a sentence of nine months' rigorous imprisonment and a fine of Rs. 20 on each of the appellants would meet the ends of justice. The appellants have had to undergo the expense and trouble of a protracted trial. They have been in jail for some time. In view of these facts I do not consider it desirable to order re-trial of the accused.

The result is that I allow this appeal and set aside the conviction and sentences passed on the appellants. The appellants need not surrender to their bail. Their bail bonds are discharged.

B.D. *Appeal allowed.*

** A. I. R. 1935 Allahabad 1023

SPECIAL BENCH

BENNET, IQBAL AHMAD AND GANGA NATH, JJ.

In the matter of *B, an Advocate, Ghazipur.*

Misc. Case No. 147 of 1933, Decided on 20th August 1935.

*** (a) Legal Practitioner — Enquiry under Legal Practitioners Act — Evidence and judgment against pleader in civil suit are admissible in inquiry but are not conclusive proof.**

Judgment and evidence given in the civil suit filed by a party against the pleader is admissible as evidence in an inquiry against the pleader under the Legal Practitioners Act but the judgment and evidence are not conclusive proof in the enquiry: 22 *All* 49 (*P C*) and 1934 *Rang* 33, *Dist*; 1914 *Mad* 512 (*F B*), *Foll.*

[P 1023 C 2; P 1024 C 1]

(b) Evidence — Statement by another in writing with regard to partnership cannot be proved by different person.

A statement in regard to partnership cannot be proved by a witness who merely says that the statement is in the handwriting of a certain person. A statement oral or written by a person not called as a witness comes under the general rule of hearsay. [P 1027 C 1]

*** (c) Legal Practitioner — Legal Practitioners carrying on partnership business against High Court rules and making untrue statements regarding partnership — Lenient view should not be taken.**

A pleader, who in contravention of the rules made by a High Court entered into a partnership business and made an untrue statement that he was not a partner:

Held: that rules on this point were very strict and were strictly administered by the Allahabad High Court and lenient view should not be taken of the conduct of the pleader.

[P 1028 C 2]

**** (d) Legal Practitioner— Professional misconduct — Charge must be proved by clear and convincing evidence.**

Per *Iqbal Ahmad, J.*—The charges of professional misconduct against an advocate must be proved by clear and convincing evidence and should not be inferred from mere grounds for suspicion however reasonable those grounds may appear to be: 1930 *P C* 144, *Foll.* [P 1027 C 1]

K. Verma, A. P. Pandey, S. N. Verma, S. N. Misra and *Lalta Prasad* — for Applicant.

Govt. Advocate—for the Crown.

Bennet, J.—This case against Mr. B, advocate of Ghazipur, was sent to the Bar Council for an enquiry and the Bar Council framed the following two charges: (1) That you, Mr. B, carried on a business in partnership with others, but took steps not to disclose your connection as a partner and thereby committed professional misconduct. (2) That in the suit, out of which F. A. 481 of 1929 arose, you denied that you were a partner, which denial was held not to be true both by the Subordinate Judge and the Hon'ble High Court, and your conduct in the said suit disclosed that you took steps to make out that you were a creditor, which was also found to be untrue, and by such action you were guilty of professional misconduct.

The Bar Council conducted an enquiry and heard evidence on both sides and have come to a conclusion as follows:

Our conclusions therefore are that Mr. B was never a partner but had advanced Rs. 2,000 as a loan to Harnandan Prasad, that his defence in suit No. 85 of 1928 was true, that the charges against him are not proved and that he is not guilty of any professional misconduct.

Against this conclusion the learned Government Advocate has filed two objections as follows: (1) That the finding of the Tribunal is against the weight of evidence on the record. (2) That the Tribunal has erred in going behind the finding of the High Court in First Appeal No. 481 of 1928.

This finding of the High Court was to the effect that Mr. B was a partner in the business in question. We will first dispose of this point of law. The learned Government Advocate relied on two rulings for his proposition. One of these is reported in 22 All 49 (1). In that it was held by their Lordships that the High Court was correct in deciding that the propriety in law or in fact of the conviction maintained by the Court of appeal could not be brought into question and that it was final and that the appellant could not argue that he did not fraudulently or dishonestly use a copy of the decree as he had been convicted of doing. The learned Government Advocate also referred to 12 Rang 110 (2). In that case an advocate had been convicted under S. 177, Penal Code, of furnishing an income-tax return which he knew to be incorrect. On the other hand in 37 Mad 238 (3), a Full Bench laid down that the judgment and evidence given in the civil suit filed by a party against the pleader was admissible as evidence in an enquiry against the pleader under the Legal Practitioners Act, but the judgment and evidence was not conclusive

1. *In the matter of* Rajendro Nath Mukerji, (1900) 22 All 49=26 I A 242=7 Sar 556 (P C).
2. *In the matter of* an Advocate, 1934 Rang 33=149 I C 856=12 Rang 110.
3. Muni Reddi v. K. Venkata Row, 1914 Mad 512=17 I C 544=13 Cr L J 800=23 M L J 447=37 Mad 238 (F B).

proof in the enquiry. It appears to us that a distinction is to be drawn between the judgment in a criminal case and the judgment in a civil case where these judgments are produced in an enquiry against a legal practitioner. In the case of a criminal conviction the Court is making an enquiry as to whether the character of the legal practitioner is such that he should be allowed to remain on the rolls. In this enquiry the proceedings are of a criminal or quasi-criminal nature. The Evidence Act, S. 54, provides as follows:

In criminal proceedings the fact that the accused person has a bad character is irrelevent, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

In our opinion the case we are supposing would be one in which the bad character of the legal practitioner was itself a fact in issue and therefore a previous conviction would be relevant as evidence of bad character under Explanations 1 and 2. The fact that a man had been convicted therefore would be relevant evidence and the grounds on which he had been convicted could not be called into question. But when we come to a civil decree as in the present case, S. 54, Evidence Act, cannot be applied. The learned Government Advocate was not able to refer to any section of the Evidence Act, which he could apply to show that the findings of the civil Court were conclusive proof. Accordingly we agree with the view expressed by the Full Bench of the Madras High Court that the judgment and evidence in the civil suit are admissible as evidence in this enquiry, but the judgment and decree are not conclusive proof.

We now come to examine the admitted facts in this case. Mr. B was a vakil of the High Court who had acted as a Munsif at Etah in 1911 and 1912 and he states that he came to Ghazipur in August or September 1920 and began to practise in Ghazipur. He had a cousin, Trijugi Narain, who was an assistant master in the D. A. V. School at Ghazipur, and the school authorities did not desire to retain the services of Trijugi Narain any longer. Harnandan Singh and his brother, Harcharan Singh, had a flour mill in Ghazipur and Harnandan Singh desired to start a flour mill in Ballia. Trijugi Narain and Harnandan Singh and Mr. B. were concerned in the starting of this mill as follows:

A sum of Rs. 2,000 was advanced by Mr. B, and received by Harnandan Singh through Trijugi Narain. This is shown by a receipt (Ex. 1) printed on p. 34 of the paper book as follows:

Mill Mills Tank,
Ghazipur, U. P. 24th February 1921.

Received from Babu Trijugi Narain and Babu B, the sum of Rupees two thousand only on account of making up for the payment of an oil engine, worth Rs. 2,046-15-0 (as per draft National Bank, Calcutta).
Rs. 2,000.
One anna stamp.
Sd. Harnandan Singh.

On an earlier date Ananda Prasad Singh had also advanced money as is shown by receipt (Ex. 5) of 20th October 1920:

Barh,
20th October 1920.

"Received Rupees two thousand (Rs. 2,000) only from Ananda Prasad Singh (Rs. 1,000 on 15th instant, and Rs. 1,000 this day) on account of purchasing an Oil Engine from Messrs. Parkins & Co., Leeds, England.
Rs. 2,C00
One anna stamp.
Sd. Harnandan Singh,
20th October 1920.

This receipt is almost identical in its nature with the receipt, Ex. 1, and the money in each case is stated to be received to make up the money for the payment of the oil engine. We may also note that in Ex. 1 the money is put down as received from B. Trijugi Narain and B. The evidence for defence is that Mr. B had alone made a loan. The explanation he gave in evidence was that because the money was sent through Trijugi Narain therefore his name was also entered and that he thought there was no harm in this as Trijugi Narain was working in the mill. This explanation is childish. Mr. B is a lawyer and he must have known perfectly well that if he made a loan the name of his cousin ought not to appear in the receipt. Another point to be noted in regard to these receipts (Exs. 1 and 5) is that they both state the purpose for which the money was received, for the payment of an oil engine or on account of purchasing an oil engine. It is not usual to enter such a purpose in a mere receipt for money lent.

The mill started work and it is stated in evidence by Trijugi Narain that he was to receive a half share of the profits. This was confirmed by a draft deed of partnership between Trijugi Narain and Harnandan Singh (Ex. 15) printed on p. 45. The date of this as

printed is admittedly incorrect as the year was 1920. This draft was drawn up by Mr. B and it sets out in paragraph 2 that Trijugi Narain and Harnandan Singh were sharers half and half and that profit and loss would be in the same shares. Now what happened subsequently in regard to the deed of partnership is in dispute, and no deed of partnership is produced other than this draft. It is to be noted that Trijugi Narain is related to B as a cousin and on the other hand Ananda Prasad is related to Harnandan Singh as a brother-in-law, the sister of Ananda Prasad being married to Harnandan Singh. The suggestion of the learned Government Advocate is that the division half and half represents As. 8 for Trijugi Narain and Mr. B, his cousin, and eight annas for Harnandan Singh and Ananda Prasad, his brother-in-law. Later someone added the name of Ananda Prasad on the top of the draft, but the draft was not altered in the body of the draft. This alteration may have been merely to indicate that the new draft should take into account the share of Mr. Ananda Prasad. That Trijugi Narain and Ananda Prasad were partners in the mill is further shown by a sarkhat, Ex. 10, printed on page 47 bearing the signatures of Trijugi Narain and Ananda Prasad and Trijugi Narain has admitted that he signed this document and wrote the whole of this document. This sarkhat states that certain cash was received through Trijugi Narain and Ananda Prasad, owners of Sri Lakhshmi Flour Mills, Ballia, and cash was also received through Harnandan Singh. The person who received this cash was Vishnu Ram who had supplied petrol to the mill. Trijugi Narain stated in the paper book, p. 18:

> Harnandan Singh had never paid me half the profits. He had given me my bare expenses. I returned from Ballia where the flour mill was first started in April 1922. After that I had no connexion with the mill. I used to manage the mill so long as I had remained in Ballia. I had filed an objection regarding the levying of income-tax on this mill at the instance of Harnandan Singh who was sick at the time.
>
> I used to take from the mill nothing definite or fixed but used to take as much money as I required. I used to take an average of Rs. 30 or Rs. 40 p. m.

Now when the connection of Trijugi Narain as manager of the mill terminated in April 1922 a document was shortly afterwards executed on 7th June 1922, printed on p. 37. This is a hypothecation bond of half the flour mill executed by Harnandan Singh alone in favour of Mr. B. This document sets out:

> I borrowed Rs. 2,000 from B, B pleader practising at Ghazipur. I have not yet been able to pay up that amount. After payment only Rs. 1,600 is due by me up to this time . . . I shall pay the entire debt with interest at the rate of one per cent p. m. within 2½ years in the instalments detailed below . . . . whatever liability is on the mill up to this time, all that shall be liable to be paid by me after rendering the account. Trijugi Narain shall not be liable for payment of Rs. 73-8-0 due under a note of hand in the name of Kundan Ram Bishun Ram; rather I shall be liable for the payment of that amount. From 1st June 1922 and from that date the amount of interest also mentioned in this document shall run and be considered.

Now, the receipt, Ex. 1, bears an endorsement on the same date 7th June 1922 to the effect that Rs. 400 was paid on that date. The finding of the Bar Council is that Rs. 358 was paid in cash and the balance set off against a debt due by Trijugi Narain. Therefore the original advance of Rs. 2,000 was reduced by this payment of Rupees 400 to Rs. 1,600 and the bond for Rs. 1,600 was written in favour of Mr. B. Now it is regrettable that the Bar council in making their enquiry by some oversight omitted to enquire into a most important point, that is what rate of interest was fixed on the original advance of Rs. 2,000, if any. All that we find is a brief statement of a few words in their finding as follows: "Mr. B gave up the interest."

We think this question of whether interest was fixed and what was the rate is one of great importance as obviously, if Mr. B's contention is correct that this was a loan, the loan would have carried interest. Now the receipt, Ex. 1, is silent on the point of interest. Further the bond of 7th June 1922 does not state that interest due on the original advance was given up. That bond merely states that after payment only Rs. 1,600 was due. It is very strange that if interest on the original advance had been fixed and was given up when that bond was executed, the bond should be silent on the point. In his statement on pp. 16 and 17 Mr. B does not mention any rate of interest as fixed at the time of the advance. Nor did he make this statement in his evidence recorded by the Bar Council.

When his counsel, Mr. Kamla Kant Verma, was asked by us what was the rate of interest, Mr. B. made a statement which he has signed: "Trijugi Narain told me that eight annas per cent. per mensem would be paid." This seems very strange that Mr. B should have

made a loan of Rs. 2,000 without agreeing with Harnandan Singh what the rate of interest should be. It is true that Trijugi Narain had stated on page 20: "The rate of interest was not entered in the receipt. Interest was settled at As. 8 per month." Now in regard to this question as to whether 8 per cent. p. m., interest or any rate was settled for the advance there are the following points: (1) The receipt is silent as to any interest and also the receipt does not say that the money was given as a loan. (2) It is admitted that no interest was paid. (3) The fact of remission of interest is not stated in the bond of 7th June 1922. (4) No definite evidence was put forward by B that he had fixed a rate of interest, nor did he ever cross-examine on those lines.

For these reasons we consider that no rate of interest was fixed between the parties and that the Rs. 2,000 was advanced by Mr. B without any interest to be paid to him.

Mr. B filed a suit No. 301 of 1928 in the Court of the Munsif of Ghazipur against Harnandan Singh on the basis of this bond of 7th June 1922 claiming Rs. 1,990 due under the bond, the amount of the principal with interest less certain payments. The bond had not been registered and therefore he treated it as a simple money bond. Harnandan Singh alone was impleaded. It is important to notice that the case of partnership was put forward on this, the earliest opportunity and Harnandan Singh pleaded that he, Trijugi Narain, Ananda Prasad and Mr. B were partners in the flour mill. As a defence against the claim he pleaded that the bond was obtained merely by way of security and that the partnership still subsisted and plaintiff was only entitled to profits. The Munsif held that the defence of partnership was not proved and he decreed the suit on 22nd August 1928. Next month on 15th September 1928 Mr. B executed his decree and attached the machinery of the flour mill which had been moved to Ghazipur to another mill of Harnandan Singh. On 30th October 1928 Ananda Prasad filed suit No. 85 of 1928 in the Court of the Subordinate Judge against three defendants, Mr. B, Trijugi Narain and Harnandan Singh. The plaint asked for a decree declaring that the Lakshmi Flour Mill is a partnership firm in which each of the parties owned a fourth share, defendants 1 and 2, B, and Trijugi Narain owning a half share, and that the property was not attachable in satisfaction of the decree passed by the Munsif. The suit was not defended by Harnandan Singh but Mr. B and Trijugi Narain defended the suit. The Subordinate Judge held that the partnership of all four persons was proved but he held against the plaintiff, Ananda Prasad, on the ground of limitation. An appeal was filed in the High Court F. A. No. 481 of 1929 by Ananda Prasad and a Bench of this Court held that the suit was within time and upheld the finding of fact of the Subordinate Judge that there was a partnership between these four persons and further that although there had been this hypothecation bond of 7th June 1922 the partnership still subsisted in law. The Bench ordered this enquiry to be made against Mr. B. Now it will be noted that the Subordinate Judge and the Bench of this Court have come to the conclusion of fact that Mr. B was a partner in this flour mill. Those findings are based on the documentary evidence which we have set out. The Bar Council have come to a contrary finding and we now proceed to examine the grounds that they have put forward.

More than two pages of the finding of the Bar Tribunal is taken up with the consideration of certain account books alleged to have been kept by the flour mill. These account books were produced by a witness, Muhammad Sami Khan on 26th February 1929 in the Court of the Subordinate Judge and he stated that the amin had appointed him as tahvildar of the mill when the mill was attached and these books were put into his possession by the amin. The Bar Council object that these books were not produced in the Munsif's Court in suit No. 301 of 1928 and they were not produced in the Subordinate Judge's Court on the date of issues and the amin when called as a witness before the Bar Council in 1935 stated that he had not given these books over to Sami Khan whom he had appointed receiver. The Bar Council came to the conclusion on these grounds apparently that the account books were fabricated by Ananda Prasad and Harnandan Singh when Ananda Prasad brought his suit, No. 85 of 1928. Now one objection to this finding is that the books were not put forward in the Subordinate Judge's Court as proving the partnership although there is an entry in the book for 1921 setting out that these four

persons were partners of four annas share each. That book is stated by the witness, Raja Ram, to have been written by Harnandan Singh. We are of opinion that to put that entry in evidence it would be necessary to call Harnandan Singh as a witness and this was not done. Learned counsel for defence argued that as the books were books of account they could be tendered under the provisions of S. 34, Evidence Act. We do not consider that a statement in regard to partnership could be proved in this manner by a witness who merely says that the statement is in the handwriting of a certain person. In our opinion a statement oral or written by a person not called as a witness comes under the general rule of hearsay. Learned counsel alluded to S. 47, but that section deals with the question arising when the Court has to form an opinion as to the person by whom any document was written or signed. It is not a question here of whether Harnandan Singh wrote this entry or not. It is a question of whether the statement in the entry is true or not. That like any other statement can be only proved by legal evidence. As regards the objection that the books were not filed in the suit before the Munsif we are of opinion that Harnandan Singh naturally considered that as that suit was brought against him on a bond which he had executed the books would not be of service as a defence. The bond of 7th June 1922 indicated that no partnership subsisted after that date between Mr. B and Harnandan Singh and as between these two Harnandan Singh had undertaken to pay off a certain sum of money. His defence was that the bond was taken merely by way of security. But the non-production of the books in that suit does not in our opinion indicate that they did not exist at that time or that these are not the books of the mill. Learned counsel further argued about certain entries of payment. These entries have been noted by the learned Subordinate Judge as totalling Rs. 625-5-6 paid to defendants 1 and 2 between 11th July 1921 and 31st May 1922. We have already mentioned that defendant 2 Trijugi Narain admits that he received between Rs. 30 and Rs. 40 a month from the mill. The difference is not so extensive as to indicate that the books were fabricated. We are of opinion that in this case the books have been drawn across the trail of evidence as a mere red herring and that no conclusion can be arrived at from a consideration of the books as they were not properly put in evidence before the Bar Council to prove the case against Mr. B. That case in our opinion rests in the main on the documentary evidence.

In regard to the oral evidence the Bar Council had before them the persons who had given evidence before the Subordinate Judge in 1929. When those statements were taken in 1929 the matter was much fresher in the memory of the witnesses than it was in 1935. In particular we may note that the Bar Council lay stress on the evidence of one Dr. Prio Nath Choudhury. This gentleman who lives in Ghazipur stated that he had advised Harnandan Singh to start a flour mill, that he had refused to advance him a loan, that later he heard that a flour mill had been started in Ballia, that:

> **B and Harnandan Singh both came to my dispensary along with Kalicharan and asked me to settle the matter of the money advanced by B to Harnandan Singh. I induced B to give up the interest and take the capital gradually. By capital I meant the principal amount advanced by him, and he agreed to forego the interest. I do not remember if I was told that Trijugi Narain was a partner in the flour mill.**

Now this gentleman was not produced in the Courts in 1928 or 1929 and he appears only in 1935 to give evidence for the first time in regard to transactions of 1922, that is 13 years earlier. His evidence is extremely vague as he does not know whether Trijugi Narain was a partner in the flour mill or not, and apparently he does not know whether Mr. B was a partner or not. The suggestion is made that because he claims to have induced Mr. B. to give up interest therefore the advance must have been a loan. We do not think that any weight should be assigned to this evidence taken after so many years from a witness who had apparently made no memorandum of what was stated to him at the time. Now as regards the oral evidence produced against Mr. B the Bar Tribunal has stated:

> **We can place no reliance on this evidence. Dasrath states that he had been sent for by Mr. B and was appointed by him and sent to Ballia. He wishes to make out that his father had engaged Mr. B as a vakil, but it is proved that Mr. B had started practice in Ghazipur only in 1920. We are satisfied that Dasrath is not telling the truth.**

From this comment one would suppose that Dasrath had stated in evidence that his father had engaged Mr. B before 1920. There is no such statement in the evidence of Dasrath as

recorded by the Bar Council or anywhere else. It is stated in the evidence of Trijugi Narain (p. 19, line 15): "The mill began to work in Ballia 4 or 5 months after the preparation of the draft agreement" (which was made by Mr. B) and before the Bar Tribunal he stated: "The flour mill began to work in Ballia from May 1921." This witness Dasrath who is a Mallah was employed to clean the machinery. He therefore would not have taken up work before May 1921. Mr. B stated that he came to practise in Ghazipur in August or September 1920 and Trijugi Narain has stated that the date was even earlier, May 1920. It is clear therefore that there was a considerable interval of time during which the father of Dasrath might have got to know Mr. B by engaging him in some case before Dasrath was employed in the mill. We are unable to understand how the Bar Tribunal have found that the evidence of Dasrath should be rejected on this ground. The comment on the evidence of Badal Khan is that he only says that there was a discussion when Mr. B was not present as to how the money would be contributed. This comment ignores the statement in the paper book, p. 14: "I had seen all the four persons checking the account and supervising the business at Ballia." Learned counsel argued that before the Bar Council in cross-examination this witness had said:

> I never saw any accounting taking place. But the witness had repeated his statement quoted above and a distinction is to be drawn between "accounting" and supervising the business and checking accounts.

No comment is made on the evidence of Harcharan Singh who is a step-brother of Harnandan Singh. He stated that the mill was owned in partnership by the four persons and he was a marginal witness of the bond in question. One other point which we may mention is that the bond of 7th June 1922 states that Harnandan Singh undertook all the liabilities. If B had merely made a loan to the mill on interest then he would not have been interested in the question of whether Harnandan Singh was or was not liable for other liabilities. This statement in the bond clearly indicates to our minds that Mr. B was a partner in the mill and as a partner had a liability along with the other partners for debts incurred by the mill. The document therefore provided that in regard to those liabilities Harnandan Singh would alone be liable. It therefore followed that by this provision Mr. B would not have any liability for the debts of the mill. This was why this provision was made in this bond and in our opinion it is a very strong piece of evidence against Mr. B with which the Bar Council have entirely failed to deal. Another point we desire to note is that in the draft deed of partnership on p. 45, para. 7 it was agreed:

> If at any time any party wanted to be separated then he shall transfer his share in the mill to the other party.

We find in the hypothecation deed of 7th June 1922 that instead of hypothecating the flour mill only half the flour mill was hypothecated. In our opinion this confirms the view that at that time the two partners Mr. B and his cousin Trijugi Narain retired and the Rupees 2,000 which had been advanced from them was returned, Rs. 400 being in cash and Rs. 1,600 being applied by this bond. The bond therefore was taken on the one-half of the mill which they were giving up. This question of two partners having retired is also confirmed by the action of Ananda Prasad who when the decree was obtained on his bond against Harnandan Singh did not object because Harnandan Singh had executed the bond, but when the mill was attached he came forward with his objections that he was a partner in the mill. He therefore was interested in the matter and this explains why he objected.

In view of the considerations we have set forth, we have come to the conclusion that the two charges against Mr. B have been established by the evidence which has been produced. The question now remains as to what should be the order of this Court in regard to this finding. Mr. B as a vakil of the High Court was not permitted by the rules to take part in business or enter into a partnership. The rules on this point are very strict and have been strictly administered by this Court, and it is the custom of this Court to refuse permission for any member of the Bar to enter into such a partnership. It is an aggravation of the offence that Mr. B did not inform this Court of the matter. Further Mr. B has put forward statements in evidence that he was not a partner and therefore has made statements which are untrue. Under these circumstances we cannot take a very lenient view of the conduct of Mr. B. However we do not desire to take an

extreme view of the matter and the order which we pass is that Mr. B will be suspended from practice for a period of six months from the date of this order.

Iqbal Ahmad, J.—I respectfully dissent as, after giving due weight to all that could be and has been urged against the finding of the Bar Council, I remain unconvinced. I can discover no justification for not accepting the finding of the Bar Tribunal that Mr. B, advocate, was never a partner in Sri Lakshmi Flour Mills, and that the sum of Rs. 2,000 advanced by him to Harnandan Singh was by way of loan and not as a contribution to the capital of the partnership and that his defence in suit No. 85 of 1928 was true. The finding of the Bar Council being in favour of the advocate, the burden to displace that finding lies on the Government Advocate and that burden, in my judgment has not been discharged. It is to be remembered that the question for consideration by the Bar Tribunal was a pure question of fact and its findings on the question are entitled to great weight. It is further to be remembered that the charges of professional misconduct against an advocate must be proved by clear and convincing evidence and should not be inferred from mere grounds for suspicion, however reasonable those grounds may appear to be: vide 1930 P C 144 (4).

It may be that in the present case there were certain grounds for suspicion against the advocate; but clear and cogent evidence to bring the charges home to the advocate was wholly wanting, and I therefore have no hesitation in accepting the finding of the Bar Council.

The charges framed by the Tribunal against the advocate were as follows:

(1) That you Mr. B carried on a business in partnership with others but took steps not to disclose your connexion as a partner and thereby committed professional misconduct.
(2) That in the suit out of which F. A. 481 of 1929 arose, you denied that you were a partner, which denial was held not to be true both by the Subordinate Judge and the Hon'ble High Court, and your conduct in the said suit disclosed that you took steps to make out that you were a creditor, which was also found to be untrue, and by such action you were guilty of professional misconduct.

Mr. B started practice as a vakil in Etah and practised there till the year 1920. He left Etah and commenced practice in Ghazipur from August or September 1920. His first cousin, Trijugi Narain, was then employed as an assistant master in the D. A. V. School of Ghazipur. It is in evidence in the case that they were joint, but their "incomes are separate." One Harnandan Singh was also a teacher in the D. A. V. School. Trijugi and Harnandan were known to each other from the year 1909. Both were together in college in Allahabad and resided in Oxford and Cambridge Hostel and both were teachers in the D. A. V. School, Ghazipur. Harnandan along with his brother Harcharan owned a flour mill at Ghazipur. The mill existed from the time of his father. Harnandan had therefore some experience about the business of flour mills. Harnandan was keeping bad health and, it appears from the evidence of Dr. Preo Nath Chaudhri which evidence I accept that he was suffering from slow fever and cough and on the advice of the doctor went to the sanatorium at Bhowali. On his return from Bhowali the D. A. V. School authorities refused to keep him in service presumably because of the infectious disease from which he was supposed to be suffering. Harnandan then conceived the idea of starting a flour mill at Ballia and in November 1920 an order for the engine of the mill was placed. The engine arrived in January 1921 and a sum of about Rs. 3,000 was required for payment of the price of the engine with a view to take its delivery. It is alleged that Harnandan received a sum of Rs. 2,000 in October 1920 from his brother-in-law (wife's brother) Ananda Prasad. A further sum of Rs. 2,000 was paid by the advocate in February 1921. Harnandan passed a receipt on 24th February 1921, for the sum of Rs. 2,000 and this receipt constitutes the sheet anchor of the case against the advocate. The receipt is in the following words:

Received from B. Trijugi Narain and B. B the sum of rupees two thousand only on account of making up for the payment of an oil engine, worth Rs. 3,046-15-0 (as per draft, National Bank, Calcutta) Rs. 2,000.

The delivery of the engine was then taken. It is alleged that there were four partners in Lakshmi Flour Mills, viz., Harnandan Singh, Ananda Prasad, Trijugi Narain and B, and that each partner contributed Rs. 1,000 to the capital of the partnership. It is said that out of the sum of Rs. 2,000 advanced by Ananda Prasad in October 1920 a sum of Rs. 1,000 represent-

4. A. a Pleader v. The Judges of the High Court of Madras, 1930 P C 144=123 I C 184=31 Cr L J 489 (P C).

ed his share of the partnership capital and the balance of Rs. 1,000 was advanced by him as a loan to his brother-in-law, Harnandan Singh. It is also asserted that the sum of Rs. 2,000 paid by the advocate in February 1921 was on account of the share of the advocate and his cousin Trijugi Narain in the capital of the partnership. In short the case against the advocate is that he was a partner in the mill and that the advance made by him was on account of his share in the capital of the partnership. The case put forward by the advocate, on the other hand, was that a sum of Rs. 2,000 was advanced by him as a loan and that he never was a partner in the mills.

The cardinal question that arises for consideration in the case therefore is whether Mr. B was a partner in the mill and advance made by him was by way of loan. The answer to the question, whether a person is a creditor of a partnership concern or the money advanced by him was in the capacity of a partner, is always beset with difficulties of varying intensity and, as observed by Underhill, in "Principles of the Law of Partnership" 1931 Edition, p. 23:

A person whose intention was to be a bona fide lender finds himself in the mortifying position of an apparently mala fide partner with all its consequent litigation, worry and not impossible ruin.

The flour mill began to work in Ballia from May 1921 and Trijugi Narain resigned his post as a teacher in the school on 14th May 1921, when the sessions closed. It is common ground that Trijugi Narain took an active part in the working of the mill at Ballia and remained there till April 1922. By this time it became apparent that the mill was working at a loss and the mill was then shifted from Ballia to village Reotipur (vide the evidence of Dasrath, a witness examined by the counsel who was appointed to prosecute the case against the advocate). From Reotipur the mill was taken to Ghazipur and located in close proximity to the ancestral flour mill of Harnandan Singh.

On 7th June 1922, Harnandan Singh executed a hypothecation bond for a sum of Rs. 1,600 in favour of the advocate. Half of the Lakhshmi Flour Mills was hypothecated to secure the sum of Rs. 1,600, but, as the document was not registered, it did not operate as a mortgage. The bond was in respect of the amount taken under the receipt dated 24th February 1921, referred to above. It is a matter of admission that some amount was paid in cash and a sum of about Rs. 45 was set off against a debt due from Trijugi Narain and the bond was for the balance of the amount paid by the advocate in February 1921. The sum of Rs. 1,600 with interest at 1 per cent. per mensem was stipulated to be paid by Harnandan by instalments extending over about two and a half years. It was recited in the bond that the flour mill at Ballia was purchased by Harnandan out of his "own expenses" and that as he had not sufficient amount of money he borrowed Rs. 2,000 from the advocate.

Some of the instalments were paid by Harnandan Singh and endorsements about those payments were made on the back of the bond, but most of the instalments remained unpaid and then the advocate filed a suit (suit No. 301 of 1928) in the Court of the Munsif of Ghazipur for recovery of Rs. 1,990 against Harnandan Singh. Harnandan pleaded that the advocate, he himself and Ananda and Trijugi were partners in the flour mill and that the sum of Rs. 2,000 advanced by the advocate was by way of investment and not as a loan, and that the bond in suit was obtained from him (Harnandan) by way of security. He contended that as the partnership still subsisted, the advocate was only entitled to profits and his claim was not maintainable. The Munsif held that the advocate was not a partner and the amount was advanced by him as a loan and, accordingly, decreed the suit on 22nd August 1928.

In execution of the decree the advocate attached the flour mill on 15th September 1928, and then on 30th October 1928, Ananda Prasad filed a suit (suit No. 85 of 1928) in the Court of the Subordinate Judge of Ghazipur impleading B, Trijugi Narain and Harnandan Singh as defendants. Ananda prayed for a declaration that the parties to the suit were the four partners of the Lakshmi Flour Mills each having an equal share in the assets thereof and that B, the advocate, was not entitled to have the mill attached and sold in execution of the decree obtained by him against Harnandan Singh. In the plaint he alleged that:

When a loss was caused to the business, defendant 1 (advocate), cunningly and dishonestly with a view to his future gain and the loss of this plaintiff, and also for the purpose of safeguarding his profit and the principal amount, brought defendant 3 (Harnandan Singh) in his collusion and got a bond, dated 7th June 1922, of which the plaintiff has got the information

now, executed without plaintiff's knowledge . . . and obtained a fictitious and collusive decree against defendant 3, and by means of the same he has got the whole machine attached.

B contested the suit mainly on the allegation that he was never a partner in the mill, nor did he pay the sum of Rs. 2,000 as his share in the firm. He maintained that the sum of Rupees 2,000 was taken by Harnandan Singh as a loan from him through Trijugi Narain. He also alleged in the written statement that Ananda had full knowledge of the suit filed by him on the basis of the bond and, that Ananda had filed the suit for declaration at the instance and for the benefit of Harnandan and, that the suit was really prosecuted by Harnandan himself. In short he alleged that the suit was a collusive suit filed for the benefit of Harnandan. Harnandan also filed an appeal against the decree in suit No. 301 of 1928 which was numbered as appeal No. 414 of 1928. This appeal was transferred for disposal to the same Subordinate Judge who tried suit No. 85 of 1928.

Suit No. 85 of 1928 was decided by the Subordinate Judge on 10th May 1929. He held that: (1) Lakshmi Flour Mills was a partnership concern in which the four parties were partners, and that Rs. 2,000 paid on 20th October 1920 represented the share of the advocate and Trijugi Narain in the capital of the partnership. (2) The partnership was dissolved in June 1922; and (3) the claim on the basis of the partnership was time-barred; and on these findings dismissed the suit. The Subordinate Judge also dismissed the appeal filed against the decree passed by the Munsif holding that the bond dated 7th June 1922, was executed by Harnandan as a debtor and that the relationship of creditor and debtor existed between the advocate and Harnandan. Ananda Prasad preferred an appeal (F. A. 481 of 1929) to this Court against the decree of the Subordinate Judge in suit No. 85 of 1928. The appeal was allowed by a Bench of this Court, wherein it was held that Harnandan, Ananda Prasad, B and Trijugi Narain were partners in the flour mill and continued as such up to the date of attachment. Ananda's claim for declaration mentioned above was therefore decreed.

The case was then referred to the Bar Council for enquiry and Mr. Prem Mohan Lal was appointed to prosecute the case against the advocate. Mr. Prem Mohan Lal contended before the Tribunal that the finding of the High Court on the question of fact was final. This argument has also been advanced by the learned Government Advocate before us. On the other hand it was contended on behalf of the advocate that, as the case was sent to the Bar Tribunal for enquiry, the Tribunal was bound to record the evidence produced by the parties, and then to record a finding on consideration of that evidence, irrespective of the fact that this Court has arrived at a decision adverse to the advocate.

In support of his contention the learned Government Advocate relied on the decisions of their Lordships of the Privy Council in 22 All 49 (1) and 12 Rang 110 (2). In the case in 22 All 49 (1) a vakil was convicted under section 471, Penal Code, of fraudulently using as genuine a document which he knew to be forged. His conviction was affirmed on appeal. The High Court then ordered notice to be given to the vakil to show cause why he should not be removed from the roll of vakils and his certificate be cancelled in consequence of the offence of which he had been convicted. This Court held that the propriety in law or in fact of the conviction could not be questioned by the advocate, and the decision of this Court was affirmed on appeal by their Lordships of the Privy Council. The Privy Council observed that:

The conviction of forgery followed by a sentence of two years' rigorous imprisonment is sufficient without further inquiry to justify the Court in removing the vakil from the roll of vakils.

In 12 Rang 110 (2) also the propriety of the conviction of the advocate was not allowed to be questioned in the proceedings taken against him for the removal of his name from the roll of advocates. These two cases are distinguishable on the broad ground that in those cases the conviction itself was the basis of the charge against the advocate, and are no authority for the proposition that the finding recorded against an advocate by a civil Court is final and conclusive in proceedings taken against the advocate under the Bar Councils Act. When a case is referred to the Bar Council under S. 10, Bar Councils Act, for enquiry into the conduct of an advocate it is the duty of the Council to enquire into the matter and to record a finding on the materials produced before it, irrespective of any finding on the point recorded by a civil Court.

The enquiry by the Council is with a view to ascertain whether or not the advocate concerned has been guilty of misconduct. The enquiry is of a quasi criminal nature and a finding has to be arrived at on a consideration of the materials before the Council. I am not aware of any provision of law that supports the contention that the finding of the civil Court is either relevant or conclusive in the enquiry before the Bar Council. I therefore hold that the Bar Tribunal in the present case was right in recording its own finding on the question before it untrammelled by the finding recorded by the Subordinate Judge or by this Court.

In the enquiry before the Tribunal both sides agreed that the documentary evidence already on the record of suit No. 85 of 1928 (F. A. 481 of 1920) be treated as evidence. The parties further agreed that the evidence of Ananda Prasad as recorded in suit No. 85 of 1928 be read as evidence, as Ananda Prasad did not appear before the Tribunal, neither side produced further documentary evidence. But Mr. Prem Mohan Lal examined four witnesses named Dasrath, Harcharan, Badal Khan and Raja Ram and the advocate examined himself, his cousin Trijugi Narain, Tribeni Sahai, Abdul Aziz Khan and Preo Nath Chaudhri. Some of these witnesses were examined before the Subordinate Judge in suit No. 85 of 1928, but their evidence as recorded by the Subordinate Judge is not legal evidence in the present proceedings.

In support of the contention that B, advocate, was a partner in the mill and that the sum of Rs. 2,000 was not advanced by him as a loan reliance is placed on the receipt dated 24th February 1921, (Ex. 1, paper book H. C., p. 34), a sarkhat (Ex. 10, paper book, H. C., p. 47), a draft of partnership agreement (Ex. 15, paper book, H. C., p. 45), and an account book for the year 1921 (Ex. 6), and also on the evidence of the witnesses examined before the Tribunal against the advocate.

I propose first to deal with the account books. Certain account books alleged to have been kept by the flour mill in dispute are relied upon. One of these account books is marked Ex. 6. This book purports to be the account book of the flour mill for the first year, viz., the year 1921. On the very first page of the account book there is an entry to the effect that Harnandan's share in the mill was to the extent of four annas and Ananda's share also was four annas and eight annas share in the mill belonged to B and Trijugi Narain. There are also entries showing that a sum of Rupees 1,000 was deposited by Ananda and a similar amount was deposited by Harnandan and that Rs. 2,000 was deposited by B and Trijugi Narain. This account book, if genuine, is proof positive of the fact that the allegation that the advocate was a partner in the mill is true. I however have no hesitation in holding that the account book is a forged document.

The issues in the suit filed by the advocate in the Munsif's Court and in the suit filed by Ananda Prasad in the Subordinate Judge's Court were identical, and the cardinal question for decision in both the suits was whether or not the advocate was a partner in the Mills. This account book would therefore have been a valuable piece of evidence in the suit in the Munsif's Court. Indeed it would have been conclusive against the advocate and would have afforded a complete answer to his claim. The account book was however not produced in the Munsif's Court. No explanation, good, bad or indifferent, is forthcoming as to why this account book was not produced in the Munsif's Court suit. It is not pretended that the account book was not under the control of Harnandan. It is worthy of note in this connection that Harnandan studiously avoided the witness box both in Ananda's suit and in the proceedings against the advocate before the Bar Tribunal. His absence from the witness box is significant, and must have been due to the fact that it would have been impossible for him to account for the non-production of the account book for the year 1921 in the suit filed by the advocate. The non-production of the account book in the Munsif's Court, in my opinion, raises a violent presumption against its genuineness.

When suit No. 85 of 1928 was filed by Ananda Prasad, he did not mention, as is required by O. 7, R. 14 (2), Civil P. C., this account book, Ex. 6, or the other account books now relied upon against the advocate. The account books were not even produced on the date of issues (3rd January 1929), but were produced on 26th February 1929, through a witness named Sami Khan. The account books were produced after Ananda Prasad had left the witness box. Again no explanation is forthcoming as to why

the account books, particularly, Ex. 6, were not produced on the date of issues. It is suggested on behalf of the advocate that the belated production of the account book, Ex. 6, is due to the fact that it was not ready till 3rd January 1929, and, in my opinion, there is considerable force in this suggestion.

A witness, Raja Ram, was produced before the Tribunal and he stated that he wrote the account books after the mill was transferred to Ghazipur and the first book which he wrote commenced on 1st June 1926. He admitted that the account books written by him were not produced in the Munsif's Court suit. He further stated that all the account books before his time, i. e., upto 1925 were in the handwriting of Harnandan Singh. But Dasrath and Badal Khan, witnesses, admitted that "the accounts of the mills used to be written mostly by Trijugi Narain." The account book for the year 1921 however does not contain even one entry in the handwriting of Trijugi Narain. Thus it is conclusively proved even from the statement of the witnesses examined against the advocate that Ex. 6 is not the account book that was maintained at the mills in the year 1921. It follows that Exhibit 6 was fabricated for the purposes of the suit filed by Ananda Prasad.

It is said that as no demand was made by the advocate in the Court of the Subordinate Judge for the account book of 1929 the argument that Ex. 6 is a forged document is not open to him. The answer is that as a book purporting to be the book for 1921 was produced by Ananda it would have been idle for the advocate to demand another book for the same year, because Ananda's answer would have been that the book for 1921 has already been produced.

In execution of the decree obtained by the advocate the mill was attached on 15th September 1928 by an amin named Abdul Aziz Khan, Sami Khan stated in suit No. 85 of 1928 that the account books were made over to him by the amin, but this is falsified by the statement of Abdul Aziz Khan examined on behalf of the advocate, and also by the warrant of attachment, Ex. A, and the report of the amin Ex. B. The amin made the following statement:

I had not attached any account books. I did not make over the attached property to any Supurddar. When the Court appointed me a receiver I then entrusted the work of writing daily account books to Muhammad Sami Khan. I never made over any account books to Mohammad Sami Khan as I had never received any. If I had attached any account books I would have put my signature on them so that their identity should be established.

Trijugi Narain after looking into the account books stated that they were not the account books that used to be kept. He had filed an objection in the income-tax department on 19th January 1922. (Ex. 12, paper book H. C., p. 36) and he stated that he had filed a bahi khata in support of the objection and the account book produced by him before the income-tax officer was not in the account books produced by Ananda Prasad. For the reasons already given I consider that this statement of Trijugi Narain is true.

There is a slip pasted on Ex. 6 and it purports to be signed by Ananda Prasad, Trijugi Narain and Harnandan Singh. Ananda stated in suit No. 85 of 1928 that "the label on the cover of the bahi bears the signatures of myself, Trijugi Narain and Harnandan Singh." Trijugi Narain denied the signature on the slip. He always spells his name as "Trijugi" and not as "Tirjugi" as appears on the label, and therefore it is proved that the name of Tirjugi Narain is not in the handwriting of Trijugi Narain and his name was also forged on the slip. As the account book itself contained no entries in the handwriting of Trijugi the slip appears to have been pasted and Tirjugi's name forged on the same with a view to show that the account book was the book of the mill and was a genuine document. It is needless to observe that such slips are never pasted to account books and it was wholly unnecessary to affix the slip on Ex. 6.

The other account books produced in the case are for the period subsequent to the execution of the bond dated 7th June 1922. It appears from the statement of Raja Ram that in the account book for the year 1926 some amounts are entered as having been paid to B, Trijugi Narain and that:

there are small amounts credited to the khata of B. Trijugi Narain, and similarly to the khatas of Ananda Prasad and Harnandan Singh.

The account book for 1926 must, if genuine, have been in existence during the pendency of the suit filed by the advocate in the Munsif's Court. This account book was also not produced in that suit and again no explanation is offered for its non-production. For the reasons given above I am in complete agreement with the

following finding recorded by the Bar Tribunal:

We are therefore definitely of opinion that these account books were fabricated by Ananda Prasad and Harnandan Prasad when Ananda Prasad brought his suit No. 85 of 1928 and no reliance can be placed on anything contained therein.

The draft of the deed of partnership which is relied upon against the advocate also contains an interpolation, and, in my opinion, the interpolation was dishonestly made with a view to support the case of Ananda Prasad. The draft is printed at p. 45 of the High Court paper book. The draft as originally prepared purported to be the draft of an agreement between Trijugi Narain and Harnandan Singh. Ananda Prasad's name clearly appears to have been interpolated over the line in a different ink. This draft shows that the idea was that Harnandan Singh and Trijugi Narain would become partners. That this is so is manifest from the various paragraphs of the draft and particularly by para. 2 which runs as follows:

We Trijugi Narain and Harnandan Singh are sharers half and half and according to the same proportion they will be entitled to and responsible for the profit and loss.

The draft is in the handwriting of the advocate with the exception of the portion (the name of Ananda Prasad) which appears in a different ink. Ananda Prasad made the following statement in his evidence before the Subordinate Judge:

A partnership deed was executed on an unstamped paper. B has prepared the draft of the partnership. The faired out partnership deed was signed by myself, Trijugi Narain and Harnandan Singh. B had not signed the deed on the plea that he was a pleader and therefore could not engage openly in any trade. For this reason Trijugi Narain was alone shown as the holder of the eight annas share in the partnership.

In cross-examination he stated that:

The partnership deed was executed about three months after the starting of the Mill. I do not remember even approximately how many days or months before the execution of the partnership deed the draft was prepared. I cannot even say whether the Mill had commenced working at that time or not . . . The draft made by B. was faired out after the addition of my own name and some other alteration. I do not know why B. had omitted my name as a partner from the draft.

If Ananda Prasad was one of the partners in the Mill there was absolutely no reason for the omission of his name from the draft. Again the whole tenor of the draft shows that the partners were to be only two persons, viz., Harnandan and Trijugi. The alleged faired out partnership deed is not forthcoming and I am of the opinion that the statement of Ananda Prasad that the deed was faired out and signed by three persons is untrue. If a partnership deed had been executed it would have been registered. Even if it was not registered either it would have been in the possession of the managing partner, viz., Harnandan Singh, or duplicates of the same would have been prepared and would have been handed over to each partner.

Harcharan Singh, the brother of Harnandan, who was examined before the Tribunal also stated that a deed of partnership was faired out at the house of B after the mill had started work and that the draft remained with Harnandan and the faired out document was taken by B. According to his evidence Trijugi Narain, Harnandan and Ananda were the executants of the deed. His evidence on the point is open to the same criticism as the evidence of Ananda Prasad. Apart from this, if instead of two partners there were to be three partners in the mill, drastic alterations would have been necessary in the draft, but there is not one single alteration in the draft.

The case put forward by the advocate is that after his arrival in Ghazipur he was informed by his cousin, Trijugi Narain, that Harnandan wanted to set up a flour mill in Ballia and as he himself was keeping indifferent health he wanted Trijugi Narain's services for the working of the mill. Some time later he was approached by Harnandan to make a draft for a partnership deed and then he prepared the draft. He however denied that the draft was ever faired out or that any faired out deed was in his possession. In view of the observations made above, I hold that the case of the advocate on the point is true.

I now proceed to consider the receipt, Ex. 1, on which great emphasis has rightly been laid by the learned Government Advocate. This receipt and receipt, Ex. 5, are practically in identical terms. The latter receipt is dated 20th October 1920, and the former bears the date 24th February 1921. The receipt, Ex. 1, has been quoted in extenso above. Receipt, Ex. 5, runs as follows:

Received Rupees two thousand (Rs. 2,000) only from Ananda Prasad Singh (Rs. 1,000) on 15th instant, and Rs. 1,000 this day on account

of purchasing an oil engine from Messrs. Parkins & Co., Leeds, England.

Rs. 2,000.

Ananda Prasad stated that he had paid Rs. 1,000 as his share of the partnership capital on 15th October 1920, and that Harnandan had also contributed a like amount on 20th October 1920, after taking a loan from him, and that he had taken a receipt from Harnandan regarding both the items. This statement of Ananda Prasad is not convincing. If Rs. 1,000 out of the sum of Rs. 2,000 evidenced by the receipt, Ex. 5, was advanced by Ananda Prasad as his share in the partnership concern and the remaining Rs. 1,000 was advanced by him as a loan, there would have been something in the receipt to differentiate between the two items. In other words, if Harnandan and Ananda were each contributing Rs. 1,000 as partners and a sum of Rs. 1,000 out of the sum of Rs. 2,000 was advanced by Ananda as a loan the receipt would not have been worded in the way in which it has been. The case of Ananda Prasad that he was one of the partners in the mill does not, for the reasons to be presently stated, appear to me to be true, and I have a suspicion in my mind that this receipt of Rs. 2,000 was forged with a view to support the argument that the receipt, Ex. 1, also evidenced a similar transaction. I however cannot make this suspicion the basis of my judgment and, accordingly, I shall leave it at that. On Ananda's own showing a sum of Rs. 1,000 was advanced by him as a loan to Harnandan and, as, there is nothing to differentiate between the two sums of Rs. 1,000 mentioned in the receipt, it appears to be likely that the entire sum of Rs. 2,000 was advanced by Ananda to Harnandan as a loan. The evidence as to the understanding or arrangement between Harnandan and Ananda as to this amount of Rs. 2,000 is far from clear, and therefore no positive inference can be drawn as to the nature of the advance made—if an advance was at all made—by Ananda Prasad.

The receipt, Ex. 1, has been the subject of much argument and it has been contended that the language of this receipt shows that the advocate and Trijugi Narain contributed Rupees 2,000 as partners. It has also been argued that if the advocate had advanced the sum of Rs. 2,000 as a loan he would have insisted on the execution of a promissory note or a bond and would not have been content with a receipt in the terms of Ex. 1. There is certainly great force in this contention, but the receipt must be considered along with the other evidence in the case and when so considered, it does not lead to the conclusion that the sum of Rs. 2,000 was by way of contribution to the capital of the mill. The advocate's case was that he was informed by Trijugi Narain that Harnandan Singh was a rich man and that he had ordered an engine for the mill. In January 1921 he was informed by Trijugi that Harnandan Singh could not take delivery of the engine because he was short of money and was requested to advance a sum of Rupees 2,000 as a loan. He refused at first to lend the money, but on being pressed by Trijugi Narain's mother and his other relations he agreed to advance the loan as he was told that Trijugi would share half the profits. He stated that when he found that the receipt was both in his favour and Trijugi Narain he was not satisfied, but he did not insist for a fresh receipt or for a promissory note as there was no risk of his money. If this explanation of the advocate stood by itself I would not have been prepared to accept it, but, having regard to the other facts that appear from the evidence, I consider this explanation to be true.

The case formulated in the plaint filed by Ananda was that Harnandan and the advocate were in collusion and that the decree in the Munsif's Court suit was a collusive decree obtained with a view to cause loss to Ananda. The case of the advocate, on the other hand, was that the suit in the Subordinate Judge's Court was a collusive suit and was filed by Ananda Prasad at the instance of Harnandan Singh simply with a view to avoid the payment of the decree passed by the Munsif. Harnandan and Ananda are near relations and it appears from the evidence in the case that Ananda and his mother were living with Harnandan in Ballia in 1921. There is not the faintest suggestion in the evidence about any hostility between Harnandan and Ananda that could have induced Harnandan to let a collusive decree be passed in the advocate's favour with a view to cause loss to Ananda. Ananda admitted in his evidence that "Harnandan is my sister's husband. Harnandan has no enmity with me." It is impossible to believe that Ananda was not aware of the

Munsif's Court suit till the attachment was effected in execution of his decree by the advocate. Ananda however did not file his suit till the attachment was effected and the mill was in peril of being sold. Harnandan though a defendant did not contest the suit. All this leads to the conclusion that Ananda was in the confidence of Harnandan and the suit in the Subordinate Judge's Court was filed at the instance of Harnandan. I therefore hold that the charge of collusion between the advocate and Harnandan was utterly untrue. The matter does not rest there. Ananda's claim was sought to be supported by fabricated documents and the genuine account book of the mill for the year 1921 which must have been under the control of Harnandan was not produced. Harnandan would have been a very important witness in Ananda's suit, but though summoned he was not examined. Similarly the evidence of Ananda and Harnandan was of great importance in the proceedings before the Bar Tribunal. These were the two persons who were in a position to give a lie to the advocate and Trijugi Narain, but though the last-named persons were examined before the Tribunal, both Ananda and Harnandan had not the courage to appear as witnesses. There is therefore no escape from the conclusion that the best possible evidence in rebuttal of the evidence of the advocate and Trijugi has been withheld and their evidence remains unrebutted.

It is not disputed that Harnandan is a man advanced in years and able to protect his own interest. It was apparent by June 1922, when the bond was executed in favour of the advocate, that the mill was a losing concern. If the sum of Rs. 2,000 advanced by the advocate was by way of contribution to the capital of the alleged partnership, Harnandan would have been the last person to agree to allow the amount to be treated as a debt due from him alone, and to execute a document with respect to the same stipulating to repay the amount with interest at 1 per cent. per mensem. The only reason that the learned advocate, who was holding the brief of the learned Government Advocate, could suggest in re-joinder for this curious conduct on the part of Harnandan was that he was in collusion with the advocate. The suggestion of collusion between the advocate and Harnandan is however as already observed, wholly unfounded. Again from the year 1922 to 1928, viz., for a period of six years, no objection was taken to the validity of the bond. Indeed some of the instalments were paid to the advocate and the defence of partnership was not raised till the advocate put the bond in suit for the amount remaining unpaid. Further there are letters of Harnandan on the record that show that he throughout recognised himself as a debtor, and expressed his obligation to the advocate for the indulgence shown by him in the matter of the realisation of the debt. All this supports the case of the advocate and is wholly inconsistent with the allegation that the advocate was a partner in the mills.

If there was a partnership between four persons I would have expected a duly registered partnership deed disclosing the terms of the partnership being executed by the partners. No such deed was however executed. The absence of a partnership deed lends strong support to the case of the advocate that Harnandan alone was the owner of the mill. Further if the adocate was a partner letters would have passed between the various partners about the affairs of the partnership, but no such letters are alleged to have been received either by Harnandan or Ananda and none are produced. Ananda stated in his evidence before the Subordinate Judge that "no correspondence regarding the partnership had ever to my knowledge taken place between B and other parties."

It is a matter of admission that the advocate and Trijugi had no connection with the mill after the same was removed to Ghazipur. It must therefore be taken for granted that if Trijugi and the advocate were partners they ceased to be so in the year 1922. That being so one would have expected a settlement of account so far as the outgoing partners were concerned. But no such settlement is alleged to have taken place.

The case that each of the alleged partners contributed a sum of Rupees 1,000 as his share of the capital of the partnership rests on the allegation that Ananda was one of the four partners, but this allegation appears to me to be wholly false. Ananda was examined as a witness before the Subordinate Judge in February 1929. He then stated that his age was 25 years. He must therefore have been 16 years of age and a minor in the year 1920. A minor cannot enter into a contract

of partnership. At any rate the advocate would never have consented to become a partner with a minor. This fact by itself demolishes the case that the partnership consisted of four persons one of whom was Ananda. If there were not four partners the whole of the case against the advocate goes by the board.

I may mention here that I am not concerned with the question as to whether Trijugi was or was not a partner with Harnandan. Possibly he was, but he did not advance any money and was to get remuneration for his services out of the profits. The fact that Trijugi was interested as a partner in the Mill is supported by the rent agreement, Ex. 33, printed at p. 35 of the High Court paper book.

Before leaving this part of the case I must notice an argument that was strongly pressed against the advocate. It was contended that if the sum of Rs. 2,000 evidenced by the receipt of February 1921 was advanced by way of loan the advocate would have charged interest on the same. The answer to this contention is furnished by the evidence of Dr. Preo Nath Chaudhri who stated that at the time of the execution of the bond the advocate agreed to forgo interest on the amount. The doctor was an impartial witness and I place implicit reliance on his evidence. Apart from this the advocate knew that Trijugi was to get a half share of the profits of the mills in lieu of his services and must have anticipated that the amount received by him would be far in excess of the interest on the sum of Rs. 2,000. There is no occasion for surprise therefore if he did not bargain for interest when he advanced the amount.

Having regard to the facts noted above I hold that the receipt is not inconsistent with the case put forward by the advocate and cannot be made the basis of a finding that the advocate was a partner in the mill.

It now remains to consider the sarkhat. Ex. 10. The sarkhat is signed by Trijugi Narain and Ananda Prasad and in the sarkhat Trijugi and Ananda are described as owners of the Lakshmi Flour Mills, Ballia. The explanation offered by Trijugi was that at the time of the execution of the sarkhat Harnandan was ill and Ananda therefore joined in the execution of the same. As Ananda was a near relation of Harnandan he, while signing the sarkhat, was shown as one of the owners of the mill. Having regard to the finding recorded by me that Ananda was not a partner in the mill, I have no hesitation in accepting the statement of Trijugi, the more so as it has not been rebutted either by Ananda or by Harnandan.

For the reasons given above I hold that the charges against the advocate were not made out and that he was not guilty of any misconduct.

By the Court.—The order of the Court is that Mr. B. be suspended for a period of six months from the date of this order.

B.D. *Order accordingly.*

A. I. R. 1935 Allahabad 1037

SULAIMAN, C. J.

In the matter of *B, an Advocate, Ghazipur.*

Civil Misc. Appln. No. 147 of 1933, Decided on 12th September 1935.

Letters Patent (Allahabad), Cls. 8 and 27 —Jurisdiction to deal with misconduct of Advocate vests with High Court—Opinion of majority of a High Court Bench dealing with misconduct of advocate prevails.

Jurisdiction to deal with advocates still vests in the High Court under Cl 8, Letters Patent, of the Allahabad High Court and the High Court in exercising that jurisdiction is performing a function directed by the Letters Patent, and its Benches are therefore governed by the rule as to the opinion of the majority mentioned in Cl. 27 of the Letters Patent. There is nothing in the Bar Councils Act or in any rules made thereunder which is inconsistent with the provision that the opinion of the majority of the Judges hearing the case should prevail. Indeed the fact that the Act is silent and so are the rules would suggest that the provisions of the Letters Patent have necessarily been retained. [P 1039 C 2]

K. Verma, A. P. Pandey, S. N. Verma, S. N. Misra and *Lalta Prasad*—for Applicant.

Govt. Advocate—for the Crown.

Order.—This is an application by an advocate who by an order of the majority of the Judges constituting a Full Bench has been suspended for a period of six months, and who prays that the High Court be pleased to hold that the said order is ultra vires and the Bar Council Tribunal's findings should be deemed to be operative and subsisting.

The learned advocate for the applicant has to concede that on the judicial side the Chief Justice would, of course, have no jurisdiction to hear an appeal from the decision of a Bench of three Judges. He is therefore compelled to urge that my authority has been invoked on the administrative side, and that the object of the application is

that I may, if the opinion that the order of the majority of the Judges is ultra vires, direct the office not to proceed under S. 10, Bar Councils Act, and that no record of this punishment be entered against his name in the roll of advocates.

The main contention urged on behalf of the advocate is that the finding of the Bar Council Tribunal can be reversed by a Bench of the High Court only when all the Judges constituting the Bench are unanimous, and that if a Single Judge dissents, the finding cannot be set aside. The argument is that prior to the passing of the Bar Councils Act, jurisdiction to deal with advocates for misconduct was conferred by Cl. (8), Letters Patent, and therefore the procedure laid down in Cl. (27), providing for the opinion of the majority to prevail, governed such cases; but the power is now exercised under the provisions of the Bar Councils Act, which contains no section laying down that the opinion of the majority alone will be sufficient. It is pointed out that in some other Acts like the Stamp Act, section 57 (2), Income-tax Act, S. 66-A, and the Indian Divorce Act, section 17, there are specific provisions that the opinion of the majority of the Judges shall prevail, whereas there is a significant omission of any such provision in the Bar Councils Act. It is accordingly contended that on the analogy of awards of arbitrators who, in the absence of a contract to the contrary, must be unanimous, the High Court has jurisdiction to reverse the finding of the Bar Council Tribunal when there is unanimity among all the Judges and not otherwise.

It has, of course, to be conceded that prior to 1st June 1928, when the Bar Councils Act came into force, this High Court was empowered under Cl. (8), Letters Patent, to remove or suspend from practice on reasonable cause an advocate, and that under Cl. 27 when the High Court was proceeding in such a matter, it must be deemed to have been performing a function directed by the Letters Patent within the meaning of Cl. 27, and that therefore the opinion of the majority of the Judges had to prevail. The question for consideration is whether the provisions of Cl. 27, Letters Patent, which are of general application and deal with powers of Single Judges and Division Courts, have been completely abrogated or repealed so far as proceedings under the Bar Councils Act are concerned. No doubt under Cl. 35, Letters Patent, the provisions of the said Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, etc., and that therefore the provisions of the Letters Patent can be modified by a subsequent enactment. The question however is whether the Bar Councils Act has modified this part of the provision of Cl. 27.

The argument based on an omission of all reference to the opinion of the majority in the Bar Councils Act, as compared to the provisions of other enactments mentioned above, has in my view no force. Those Acts themselves provided that the cases arising under them should come up for decision before a Bench of not less than three or not less than two Judges. That is to say, a minimum constitution of the Bench empowered to deal with such cases was prescribed, and therefore the legislature felt the necessity of providing further that the opinion of the majority should prevail. The Bar Councils Act, on the other hand, does not contain any provisions specifying that cases under the Act should be disposed of by even more than one Judge. It is on this ground that no necessity was felt to provide what is to happen when there is a difference of opinion.

Section 108 of the earlier Government of India Act, preserved the jurisdictions, powers and authority of the High Court as were vested in it at the commencement of that Act. That Act, therefore did not in itself repeal Cl. 27, Letters Patent. There is a similar provision in S. 223, Government of India Act, 1935. Under both these sections the High Court has been expressly empowered to make rules for regulating the practice of the Court. On the other hand, S. 12, Bar Councils Act, refers to the framing of rules to prescribe the procedure to be followed by Tribunals and by District Courts, and contains no reference whatsoever to the rules that may be framed for prescribing the procedure to be followed in the High Court itself. It is obvious therefore that the Bar Councils Act has left the jurisdiction of the High Court to frame rules for regulating its own procedure quite intact, except to the extent expressly mentioned therein. It is by the rules framed by the High Court (R. 12, Sub-R. (17), that it is provided that the findings of Bar Council Tribunals should come up for consideration before a Bench of three

Judges. This rule, in my opinion, should more appropriately have been framed under S. 108, Government of India Act, and possibly also under section 122, Civil P. C.; but certainly not under S. 12, Bar Councils Act. I would have no hesitation in holding that the High Court has power to frame a special rule prescribing that when the finding is put up before a Bench of three Judges for consideration, if the Judges are divided in opinion, the view of the majority should prevail.

No such rule however exists at present, and it is a matter for consideration whether it necessarily follows that the findings have got to be accepted, unless there is unanimity. The answer must depend on the interpretation of the relevant provisions of the Bar Councils Act. The preamble indicates the intention of the legislature to consolidate and amend the law relating to legal practitioners entitled to practice in such Courts. There is no section which confers special jurisdiction on High Courts for dealing with cases of misconduct. Nor is there anything in the body of the Act or in the Schedule appended thereto which would suggest that Cls. 8 or 27, Letters Patent, have been expressly repealed. The repeal can take place only by a necessary implication, if such a position were tenable. Now, the distinction between Cl. 8, Letters Patent, and S. 10, Bar Councils Act, is that under the former the High Court is "empowered to remove or suspend from practice on reasonable cause.....advocates", which undoubtedly confers jurisdiction on the High Court, while S. 10 merely provides that the High Court may

> in the manner herein provided reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct.

It seems to me that Cl. 8, Letters Patent, confers jurisdiction to remove or suspend advocates, whereas S. 10, Bar Councils Act, lays down the procedure according to which such jurisdiction should be exercised. In the matter of procedure the Bar Councils Act, being a later enactment must prevail. But as I read the various provisions of the Bar Councils Act, I am unable to hold that the Bar Councils Act has in itself conferred a jurisdiction on the High Court replacing the jurisdiction which had previously been conferred by the Letters Patent. Section 19 (2), Bar Councils Act, clearly provides that where Ss. 8 to 16 come into force in respect of any High Court, this Act shall have effect in any such Court:

> Notwithstanding anything contained in such Letters Patent, and such Letters Patent shall in so far as they are inconsistent with this Act or any rules thereunder, be deemed to have been repealed.

Thus the entire provisions of the Letters Patent have not been repealed, but only such provisions of it must be deemed to have been repealed as are inconsistent with the provisions of this Act or any rules made thereunder.

It seems to me that the jurisdiction to deal with advocates still vests in the High Court under Cl. 8, Letters Patent, and the High Court in exercising that jurisdiction is performing a function directed by the Letters Patent, and its Benches are therefore governed by the rule as to the opinion of the majority mentioned in that clause. There is nothing in the Bar Councils Act or in any rules made thereunder which is inconsistent with the provision that the opinion of the majority of the Judges hearing the case should prevail. Indeed the fact that the Act is silent and so are the rules would suggest that the provisions of the Letters Patent have necessarily been retained. As already pointed out, the provisions of Cl. 27 relating to the powers of Single Judges and division Courts are general in their nature, and unless there is something in the Bar Councils Act (which there is not) which would curtail that power, they must be considered to be still in force. When the legislature left it to the High Court to frame rules, including a rule that such cases should be heard by a Single Judge only, it could not have necessarily contemplated that there should be perfect unanimity before the finding of the Bar Council Tribunal is reversed. Nor can it be said that the High Court, when it framed the rules to regulate its own practice directing that cases of this kind should be put up before a Bench of three Judges, necessarily intended to lay down that it would have power to interfere with the finding of the Bar Councils Tribunal only if the Judges unanimously agreed. As Cl. 27 contains the general provision which prevails in all cases which are not governed by special provisions of other enactments like S. 98, Civil P. C., the necessary inference is that the intention at the time of the framing of the rule was to adhere to the existing procedure and not to depart from it without providing for some new rule of practice in its place. I am therefore of the opinion that it is im-

possible for me to hold that the order passed by the majority of the Judges on 20th August 1935 was altogether ultra vires and that it is my duty to direct the office not to give effect to it. On the contrary I hold that there was no option, but to direct that the opinion of the majority shall prevail.

Under the rules of this Court an advocate who has been suspended has a right of appeal to His Majesty in Council. The proper course for the applicant, if he feels aggrieved and considers that the decision was wrong, is to appeal to their Lordships of the Privy Council and not approach me as the Chief Justice. The application is accordingly dismissed.

B.D. *Application dismissed.*

A. I. R. 1935 Allahabad 1040

SULAIMAN, C. J. AND BENNET, J.

Ahmad Nazar Beg and *others*—Defendants—Appellants.

v.

Babu Brij Nandan Prasad—Plaintiff—Respondent.

Letters Patent Appeal No. 36 of 1934, Decided on 10th September 1935, against decree of Young, J., D/- 5th February 1934.

Tenancy—Agricultural plot converted into building tenancy—S. 108 (p), T. P. Act, has no application.

Land within S. 3 (2), Agra Tenancy Act (1926), does not include land for the time being occupied by dwelling houses or manufactories appurtenant thereto.

An agricultural plot which is used as an appurtenant to a building standing on it for a long time becomes a tenancy for building purposes and no longer remains an agricultural land. S. 108 (p), T, P. Act, has no application to such tenancy. [P 1040 C 2]

A. M. Khwaja—for Appellants.

Tej Bahadur Sapru, K. N. Katju and *S. N. Seth*—for Respondent.

Bennet, J.—This is a Letters Patent appeal by the defendants against the judgment and decree of a learned Single Judge of this Court. The facts are somewhat peculiar. The plaintiff brought a suit for demolition of certain constructions on plot No. 5 in the Civil Lines of Moradabad town. The plaint set out in para. 1 that the plaintiff was the owner in possession of resumed milak land, and it was claimed that four plots including plot No. 5 comprised an agricultural tenancy for which the defendants paid a rent of Rs. 35 per annum. The two lower Courts dismissed the suit of the plaintiff and the lower appellate Court found that this plot No. 5 was originally part of an agricultural holding which the defendants' predecessor held from the predecessor of the plaintiff, that the bungalow in question had been built many years ago by a person called Mr. John with the consent not of the landlord but of the defendants' predecessor who was a tenant, that subsequently the bungalow had been acquired by the tenant and that more recently in a suit in May 1912 for enhancement of rent brought by the plaintiff against the defendants it was held by the Revenue Court that the relation of landlord and tenant did not exist between the parties as regards plots Nos. 5 and 9 and these were held to be abadi lands. The Court then proceeded to find that:

> **The building of the kothi changed the nature of the tenancy of plot No. 5 from that of an occupancy holding to that of a holding for building purposes. The entire compound of the bungalow which stands on plot No. 5 is used as an appurtenant to the dwelling house.**

There is therefore a finding that plot No. 5 is appurtenant to the dwelling house which stands on it. The Court therefore found that as long as the plot was used for purposes of a dwelling house the defendants were not liable to ejectment, and the suit was dismissed. The learned Single Judge of this Court agreed with those findings to the extent that he held that the plot had lost its agricultural character. But he held that S. 108 (p), T. P. Act, applied and that therefore the buildings should not be made on the plot. We do not agree that this section would apply because this section applies to lessees in general, and if the plot has become a tenancy for building purposes the section in question will not apply to it. We note that the definition of land in Act 3 of 1926, S. 3 (2) states that:

> **Land does not include land for the time being occupied by dwelling houses or manufactories appurtenant thereto.**

Clearly therefore the lower Court was correct in holding that this plot No. 5 is not agricultural land. We see no reason to consider that there is anything wrong in the finding of the lower appellate Court that the entire plot No. 5 is used as appurtenant to a dwelling house and that the plot has become a holding for building purposes. On remand it has been found that the bungalow was built about the year 1875. For many years therefore this plot No. 5 has been a plot on which a bungalow has stood, and the lower Court therefore had evidence on

which it could arrive at the finding that the plot, although originally agricultural, had become a plot which was held for building purposes. We do not consider that this is a case of license, because the defendant has all along been in possession of the land as a lessee. The defendant therefore is entitled in our opinion to build on that plot. The lower Courts were therefore correct in dismissing the suit. We see no reason to differ and accordingly we allow this Letters Patent appeal and dismiss the suit of the plaintiff with costs throughout.

Appeal allowed.

B.D.

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* A. I. R. 1935 Allahabad 1041

SULAIMAN, C. J. AND BENNET, J.

L. Parsotam Saran — Plaintiff — Applicant.

v.

L. Bankey Lal—Defendant—Opposite Party.

Civil Revn. No. 590 of 1934, Decided on 5th September 1935, against decree of Judge, Small Cause Court, Moradabad, D/- 31st May 1934.

*** Negotiable Instruments Act (26 of 1881), Ss. 8 and 43—Assignee of negotiable instrument not a holder thereof and cannot enforce his rights under S. 43.**

A transferee under a sale-deed of negotiable instrument is not a holder of the negotiable instrument within the meaning of S. 8 and cannot enforce the rights conferred on such a holder by S. 43 of the Act : 1934 *Cal* 549, *Expl and Diss. from.* [P 1042 C 1]

S. N. Seth—for Applicant.

Panna Lal—for Opposite Party.

Sulaiman, C. J.—The facts of the case are given in our order in Civil Revision No. 589 of 1934. It is contended on behalf of the plaintiff that he was entitled to a decree not only against defendant 2, but also against defendant 1; because the instrument was a negotiable instrument governed by the Negotiable Instruments Act, and he has a right to recover the amount from the prior party thereto himself under S. 43 of that Act. Now under that section if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder may recover the amount due from any prior party thereto. The question then is whether the instrument has been transferred to the plaintiff as a holder thereof.

The instrument was not negotiated, but the amount due under the promissory note was transferred to the plaintiff under a sale deed, and a mere note was made on the back of the promissory note that the amount due under it had been transferred to the plaintiff by means of the sale deed. That is not the negotiation of a negotiable instrument contemplated by the Act. S. 14 makes it clear that when a promissory note is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated. It is obvious therefone that every transfer of a promissory note does not amount to a negotiation, and it is a negotiation only when the transfer is such as to constitute the person entitled to the instrument the holder thereof. A holder is defined in S. 8 as a person entitled in his own name to possession of the instrument and to receive and recover the amount due thereon.

Now the essence of a negotiable instrument is that the amount due under it should be payable unconditionally and that there should be no condition imposed under any separate document executed between the parties. So long as the document is negotiated, the holder thereof is entitled to recover the amount from his transferor as well as from every prior party thereto. But once the document is not negotiated but the rights under it are transferred by means of a sale deed, which embodies certain conditions and terms between the parties, the document ceases to be a negotiable instrument in the ordinary sense of the word, and the transfer of such an instrument cannot invoke the terms of S. 43 so as to make the transferor and all prior parties thereto liable inspite of the express terms agreed to by the parties and entered in the sale deed. If the terms of such a private contract were allowed to be ignored, it would be grossly inequitable; whereas if the instrument is negotiated and the rights under it are transferred unconditionally to the holder, he is entitled to make his transferor and any prior party thereto liable under the instrument.

The learned counsel for the applicant relies on some observations made in 61 Cal 425 (1), at p. 428, where it was remarked that an assignee under a deed of sale was nevertheless a holder of the instrument within the meaning of S. 8 of the Act, and that he could sue in his own name and was

1. Surathchandra Shaha v. Kripanath Chaudhury, 1934 Cal 549=150 I C 925=61 Cal 425 =38 C W N 465.

entitled in his own name to possession and to receive and to recover the amount due on the hand-note from the parties thereto. That observation was not necessary for the purposes of that case because the transferee of the instrument was certainly entitled to maintain the suit for recovery of the amount due on the promissory note on the strength of the sale deed in his favour when it was established that the promisor had not made the payment. It could not be doubted that payment by the executant of the promissory note to the transferee in the sale deed would have given him full discharge under the document. In any case we are unable to agree with the view that a transferee under a sale deed of such an instrument is a holder of the negotiable instrument within the meaning of S. 8 and can enforce the rights conferred on such a holder by S. 43 of the Act. Accordingly we dismiss this application with costs.

B.D. *Application dismissed.*

A. I. R. 1935 Allahabad 1042

HARRIES, J.

Administrator-General, U. P.—Petitioner.

v.

A. M. Bower—Opposite Party.

Testamentary Case No. 4 of 1935, Decided on 19th September 1935.

Will—Construction of—Intention of testator is to be inferred from what he wrote—Testament granting absolute estate in realty but restricting power over realty converted into personalty—Gift with repugnant condition—Condition is void.

Intention of the testator must be inferred from what he actually wrote and not from what a Court thinks the testator intended to write. The absolute bequest and the condition divesting of absolute interest in the event of a sale are wholly incompatible and cannot stand together. Where there is a gift with a condition inconsistent with or repugnant to such gift, the condition is wholly void and must be disregarded: *Roddy* v. *Fitzgerald* (1857); 6 *H L C* 823 and 1925 *P C* 105, *Ref*; 18 *W R* 359, *Appr*.

[P 1045 C 2; P 1046 C 1]

Where a clause in the will was that *X* was to get a house but in case the house was sold during the lifetime of such *X*, *X* will have to convert the sale proceeds into Government security and to enjoy only a life estate in the personalty:

Held: that *X* was to get the house absolutely and the restriction imposed on the power to sell was void. [P 1046 C 1]

O M. Chine and *D. N. Sanyal*—for Petitioner.

K. N. Katju and *Balmakund*—for Opposite Party.

Order.—This is a suit brought by the Administrator-General of the United Provinces for a grant of Letters of Administration de bonis non to the estate of James William Twalling, deceased with a copy of the will annexed. The opposite party denies the right of the petitioner to obtain such a grant alleging that the estate of James William Twalling deceased has been completely administered.

The material facts of the case and all the relevant documents have been admitted on the pleadings or by counsel for both parties before me during the hearing and that being so it was unnecessary to call any evidence on behalf of either of the parties. The issue involved in this case is a purely legal one, viz., the true construction to be given to a devise or bequest of certain real or immovable property contained in the will of James William Twalling deceased.

James William Twalling a Government Pensioner residing in the Cantonments at Meerut died on 4th September 1893 leaving a will dated 17th October 1887. He left surviving him his widow Mrs. Eliza Rebecca Twalling and three daughters, viz. Miss Grace Edith Twalling, Mrs. Walker and Mrs. Fink. The latter appears to have greatly displeased the testator during his lifetime and she is expressly deprived in the will of any share in the property left by the testator.

By the terms of this will the testator revoked all previous wills and appointed his widow sole executrix thereof. After a direction to the executrix to pay all just debts, funeral and testamentary expenses, the testator proceeds to dispose of his property dealing separately with his personal and real property. The bequests of his personal or moveable property read as follows:

I give, devise and bequeath all my personal property which I have acquired or may acquire by purchase or otherwise at any time before my decease, such as jewellery, silver plate, household furniture, fittings of carriages and horses and all and every sum or sums of money which may be in my house or due to me at the time of my decease as also all stock funds, Government promissory-notes, commonly called Company's paper, and other securities unto my beloved wife Eliza Rebecca Twalling who shall enjoy the income, dividends, interests and profits thereof during her lifetime only and after her decease shall pay and apply the same income, dividends, interests and profits towards the maintenance and support of such of my daughters as shall from time to time be sole and unmarried and after the marriage or decease of my last unmarried daughter shall divide my said personal property in equal shares among such of my daughters as shall then

be living except my daughter Alice Eliza Fink whom I exclude altogether from this will as her conduct has been most disgraceful.

With regard to his real or immovable property he makes the following provisions:

I also give, devise and bequeath to my said beloved wife Eliza Rebecca Twalling all that messuage tenement or dwelling house with outhouses, wells, rights of way and appurtenances purchased by me from the estate of the late George Beau of Saharanpur and being situate in Hill or Barrack Street No. 123 in the Cantonment of Meerut and butted and bounded as described in the deed of sale dated 16th December 1878 as also every other real property whether in reversion, remainder or expectancy. Should my said beloved wife Eliza Rebecca Twalling at any time wish to sell or dispose of the said house she is hereby authorised to do so at a reasonable price and without detriment or loss to the estate and to invest the whole of the sale proceeds of the said house in Government promissory-notes, commonly called Company's paper and the interest thereof shall be enjoyed by my said beloved wife Eliza Rebecca Twalling during her lifetime only and after her decease the same interest shall be paid and applied towards the maintenance and support of such of my daughters as shall from time to time be sole and unmarried and after the marriage or decease of my last unmarried daughter the amount of the said Government promissory-notes, commonly called Company's paper, shall be divided in equal shares among such of my daughters as shall then be living except my daughter Alice Eliza Fink who is mentioned in Cl. 2 of this will.

Probate of this will was granted to the widow Mrs. Twalling on 14th October 1893 and thereafter she continued to reside in the Meerut Cantonments in the house mentioned in the will (now referred to as "Park View") until her death on 14th July 1900. Mrs. Twalling left no will and Letters of Administration to her estate and to any unadministered portion of the estate of her husband the late James William Twalling were granted to the unmarried daughter Miss Grace Edith Twalling on 29th November 1900. The Letters of Administration to any unadministered portion of the estate of her late father were granted to Miss Twalling upon the assumption that her mother Mrs. Twalling deceased had only a life interest in the house in question and that after her decease Miss Twalling had a limited interest only in this house liable to be defeated in certain events. For the purposes of granting Letters of Administration to Miss Twalling it was not necessary to construe the will of James William Twalling deceased and it is not contended that any decision has been given on this will by the Court granting Letters of Administration which can in any way operate as res judicata between the present parties.

Miss Grace Twalling continued to reside in the old family residence "Park View", and it is now alleged that she spent large sums of money upon it to maintain it in a habitable condition. This fact however is not admitted by the petitioner and no evidence was called to establish it. No decision upon this issue however is necessary as it cannot affect my ultimate decision in this case.

Mrs. Walker died on 6th March 1920 and Mrs. Fink also died some time subsequent to the death of Mrs. Twalling and before the death of Miss Grace Edith Twalling which occurred on 20th November 1933. At the date of her death Miss Twalling resided at "Park View" and by her will dated 24th May 1932, bequeathed the whole of her property to the opposite party Mrs. Bower who obtained probate of the said will on 24th March 1934. Mrs. Bower, it is to be observed, is the eldest daughter of the late Mrs. Fink who had been expressly excluded from any share in her father's property.

It is the case for the petitioner that Mrs. Twalling and after her death Miss Grace Edith Twalling were only life tenants of the house now known as "Park View" and that on the death of the latter no interest in it could pass under her will to the opposite party. As I have pointed out previously Miss Twalling was the last surviving daughter of James William Twalling deceased and in the events that have happened it is contended that the bequest or legacy lapsed and that the house now forms part of the estate of James William Twalling deceased which has not been disposed of by his will. For that reason the present claim to a grant de bonis non with the will annexed is made.

On the other hand the opposite party contends that the will of James William Twalling deceased gave the widow Mrs. Twalling an absolute interest in the house which passed to Miss Twalling as her administratrix. As the latter at the date of her death had been in sole possession of the premises for 33 years it is contended that any rights vested in Mrs. Twalling's other children and their representatives are long since barred by limitation and that consequently at the date of her death Miss Twalling was the sole owner of the property and entitled to dispose of it by will.

If Mrs. Twalling was given an absolute interest in the property by the will under consideration, the property cannot now form part of any unadministered portion of the estate of her husband. On the other hand if a limited interest was only given to Mrs. Twalling and after her death to Miss Grace Edith Twalling it may well be that events that have happened there has been a lapse and that the house now remains undisposed of by the will of James William Twalling and is therefore a part of the latter's estate still unadministered. If the house is not disposed of by the will the petitioner is entitled to the grant prayed. It may be pointed out at this stage that the claim is limited to the house known as "Park View" as it is not now admittedly possible for the petitioner to trace and identify any of the personal property possibly undisposed of by the testator by this will.

The issues which were agreed between the parties are: (1) on a correct construction of the will of the testator, the late Mr. J. W. Twalling, did any portion of the estate of the late James William Twalling remain unadministered at the death of Miss Grace Edith Twalling? (2). Is the Administrator-General, U. P., entitled to Letters of Administration de bonis non?

The answers to the questions raised in these issues depend upon the true construction of the bequest of the immovable property contained in the will of the late James William Twalling the terms of which I have set out in an earlier portion of this judgment. As stated previously the will deals separately with the moveable and immovable property. The widow is in terms given only a life interest in the personal or immovable property and on her death detailed provisions are made for the devolution of the property. On the other hand the bequest of the real or immovable property differs very materially from that of the personal or immovable property. The house is devised and bequeathed to the widow "as also every other real property whether in reversion, remainder or expectancy." If the terms of the devise or bequest stopped there, the will would clearly confer upon the widow an absolute interest in their realty or immovable property, as it is provided by S. 95, Succession Act, of 1925 that where property is bequeathed to any person such person is entitled to the whole interest of the testator therein unless it appears from the will that only a restricted interest was intended for him.

The matter is however complicated by the provisions which follow this bequest. By these provisions the testator imposes limitations on the widow's right to sell or dispose of the property and the wording of these provisions is somewhat strange. The testator does not in terms say that the widow cannot sell except upon certain definite conditions, but what he does say is. that should she at any time wish to sell or dispose of the said house she is authorised to do so at a reasonable price and without detriment or loss to the estate and in such case the proceeds of sale are to be invested and disposed of in precisely the same way as the personalty or moveable property is disposed of in the earlier portion of the will. It is to be observed that these provisions dealing with a possible sale by the widow apply only to the house and not to any other real or immovable property whether in reversion, remainder or expectancy which might pass under this devise or bequest. The actual bequest to the widow covers the whole of the property, whereas the limitation sought to be imposed upon her power of sale is confined only to the house.

It has been strongly urged by counsel for the petitioner that the will only gave the widow a life interest in this house. It is argued that the provisions as to the devolution of the proceeds of sale of the house show a clear intention on the part of the testator to give the widow not an absolute interest, but a limited interest, that is an interest for her life only. It is expressly provided by S. 82, Succession Act, 1925, that the meaning of any clause in a will is to be collected from the entire instrument and all its parts must be construed with reference to each other. That being so it is argued that it is clear that what the testator intended was that the real or immovable property should pass in the same way as the personalty, that is, to the widow for her life then to such daughter or daughters as were unmarried and upon the marriage or decease of the last unmarried daughter to the surviving daughters equally, always excluding Mrs. Fink. It is urged that in construing the bequest of the house regard must be had to the terms of the previous bequests. In short it is contended that when the will is regarded as a whole it is clear that the testator never intended his widow to have any-

thing more than a life interest in the immovable property or in any event in the house in question. If that was the intention of the testator it is extremely strange that he did not expressly say so. He had in an earlier portion of this will disposed of his personalty and had expressly created limited interests. He was careful to say that his widow was to have the income dividends, interest and profits of his personal property during her lifetime only, but he makes no such provision when dealing with his realty or immovable property. It is true that he gives her a life interest only in the proceeds of sale if and when the house is sold, but he does not in terms limit her interest in the event of the house not being sold. If he intended his immovable property why did he not use the same language as he had actually used earlier in the will to create limited interests in the personalty or moveable property? The fact, that he uses different language to dispose of two kinds of property strongly suggests that his intentions with regard to the moveable and immovable property were not the same. However, he does make provisions for the devolution of the real property similar to those for the devolution of the personal property, once the realty is converted into money or moveable property and that suggests that he only intended the limited interests to take effect if the house was actually sold.

Further, it is to be observed that the only restriction imposed on the widow's right to deal with the immovable property bequeathed to her is a restriction on her power of sale or disposition in her lifetime. Nothing is said as to what is to happen if the property remains unsold and there is nothing which expressly restricts her power to dispose of the property by will if not sold in her lifetime. In fact the will does not contain even an express prohibition against alienation. All it says is that if the widow desires to sell or dispose of the said house she may do so without loss to the estate in which event she is expressly given a life interest and provision is made for the devolution of the proceeds of sale after her death. From this it may, I think, be legitimately inferred that the testator intended to take away the widow's unrestricted right of alienation inter vivos, but it is difficult to infer anything more from these provisions.

From the language used by the testator his intention is, in my judgment, tolerably clear. He intended his wife to take the house and other realty (if any) whilst at the same time imposing a restriction upon her power of selling or disposing of the house during her lifetime. In short, he intended to give her an absolute interest in the house and at the same time to take away from her one of the rights of an absolute owner, that is, the unrestricted right to dispose of the property at any time during such owner's lifetime. To construe the provisions of the will dealing with the house as granting the widow a life estate only in it, will, in effect, be creating a new will for the testator. As the will stands the gifts in remainder and gifts over only arise in the event of sale, whereas I am asked by the petitioner to read this part of the will as granting the widow in every event a life interest only and after her death as creating interests similar to those granted in the case of the personal or immovable property. To construe the will in this way is to do violence to the words used in the will. The intention of the testator must be inferred from what he actually wrote and not from what a Court thinks the testator intended to write. This is clear from the speech of Lord Wensleydale in (1857) 6 H L C 823 (1):

> These rules are perfectly plain and clear. The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper enquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator.

This dictum has been approved of by their Lordships of the Privy Council in 48 Mad 312 (2). In my judgment the only construction which does no violence to all the terms of this will is the construction contended for by the opposite party which is that the devise or bequest of the house to the widow is a devise of an absolute interest, but with a limited restriction on alienation inter vivos annexed to it.

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1. Roddy v. Fitzgerald, (1857) 6 H L C 823.
2. Venkatadri Appa Rao v. Parthasarathi Appa Rao, 1925 P C 105=87 I C 324=48 Mad 312=52 I A 214 (PC).

In the event of alienation inter vivos only is the widow's absolute interest cut down and as she retained the property throughout her life she was at the date of her death the absolute owner of it.

In my judgment the will of James William Twalling deceased conferred upon his widow an absolute interest in the house which in the events that happened was never taken away from her and that being so, she was the absolute owner of the premises at the date of her death. Consequently the absolute interest vested in Miss Grace Edith Twalling as administratrix of her mother's estate and the house could never form part of any unadministered portion of the estate of James William Twalling deceased. As the present claim of the petitioner is expressly confined to the house it must fail as there is no unadministered portion of the estate in existence to which letters of administration can be granted. Had there been any traceable moveable property which belonged to James William Twalling deceased, different considerations would of course have arisen. Further, the provisions depriving the widow of her absolute interest in the house in the event of her selling the property are, in my opinion, repugnant to the devise or bequest itself and must be disregarded. In the words of Willes, J. in 9 Beng L R 377 (3), at p. 395:

> If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognise.

The absolute bequest and the condition divesting her of her absolute interest in the event of a sale are wholly incompatible and cannot stand together. Where there is a gift with a condition inconsistent with or repugnant to such gift the condition is wholly void and must be disregarded. That being so, the condition divesting Mrs. Twalling of her absolute interest in the property bequeathed to her in the event of sale is void. Other bequests were made upon the happening of this condition and the fact that these ulterior gifts are not valid does not and cannot affect the validity of the prior bequest or gift, see S. 133, Succession Act.

In my view the petitioner has wholly failed to show that this house is now a part of the estate of James William Twalling deceased left undisposed of by his will and for the reasons which I have given above, I dismiss this suit with costs. Two further points have been argued on behalf of the opposite party, but it is unnecessary for me to express any opinion upon them as the points do not arise having regard to the construction which I have given to the bequest or devise in question.

Firstly, it was argued that assuming the will did not give Mrs. Twalling an absolute interest, it gave her a life interest and in the events that happened no interest was given to Miss Twalling as no sale of the property ever took place. Consequently it was argued that upon the death of Mrs. Twalling the house was undisposed of by the will and consequently formed part of James William Twalling deceased's estate which remained unadministered. As I have stated previously letters of administration to any unadministered portion of her father's estate were granted to Miss Twalling in 1900 and therefore it is said that all claims to this property have long since been barred by reason of Art. 123, Limitation Act. Secondly, it was contended that even assuming the will gave Miss Twalling a limited interest only during her spinisterhood, that interest in the events that happened became an absolute interest. In the event of her death unmarried the property was to go to Mrs. Walker, but as she predeceased Miss Twalling it is contended that Miss Twalling's limited interest became at that moment an absolute interest.

As it is not necessary for the decision of this case to decide these points, I merely stated them in order to keep them open for the opposite party to urge them elsewhere if necessary. The record together with the will was sent for at the request of the petitioner. By the rules of this Court the record together with the will must be returned by the clerk who was entrusted with their production and the petitioner must of course bear all the costs connected with the production and return of the record and the will.

B.D. *Order accordingly.*

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3. Jotendra Mohan Tagore v. Ganendra Mohan Tagore, (1872) I A Sup Vol 47=9 Beng L R 377=18 W R 359=3 Sar 82 (PC).

A. R. 1935 Allahabad 1047

BAJPAI, J.

Jagannath—Appellant.

v.

Bhikam Singh—Respondent.

Second Appeal No. 1095 of 1933, Decided on 30th August 1935.

Agra Tenancy Act (3 of 1926), S. 197 — Person becoming grove-holder of land held rent-free — Land ceasing to be grove land, person holding it becomes non-occupancy tenant — Rights acquired by grove-holder under S. 187 or S. 188 become inconsistent with liability of non occupancy tenant.

Under Cl (h), S. 197 when a person becomes a grove-holder in respect of land of which he is a rent free grantee he shall hold such land as grove-holder in supersession of all subsisting rights and liabilities so far as they are inconsistent therewith, and under Cl (a) it will be presumed that a grove-holder holds the land in respect of which he is a grove-holder as a non-occupancy tenant when the land ceases to be a grove land. The rights and liabilities which the defendant might have acquired under S. 187 or S. 188, Tenancy Act, are inconsistent with the liability which the defendant has incurred by reason of the fact that the land has now ceased to be a grove and he necessarily will be presumed to be a non-occupancy tenant under Cl. (a), S. 197. [P 1048 C 2]

G. S. Pathak—for Appellant.

S. B. Johari and *Man Singh* — for Respondents.

Judgment.—This is a plaintiff's appeal. His suit was decreed by the Court of first instance, but dismissed by the lower appellate Court. The facts which have given rise to this appeal may be briefly stated. The plaintiff brought a suit for ejectment of two defendants Bhikam Singh and Ram Chandar Singh from plot No. 321 on the allegation that the defendants were non-occupancy tenants of the said plot. It was further distinctly mentioned in the plaint that the defendants held the land claimed as grove-holders and as the grove had been cut down therefore the defendants as non-occupancy tenants were liable to be ejected. Ram Chander pleaded that the possession of the defendants was that of a proprietor. Bhikam Singh pleaded that the land in dispute was muafi given in charity to the contesting defendant which was purchased at a sale by public auction by Nand Lal Singh, the maternal grandfather of the contesting defendant, and after the death of Nand Lal Singh, the contesting defendant became the owner as an heir of his maternal grandfather, Nand Lal Singh and has up to this time been the owner thereof. It was also alleged that the defendant had legally acquired a right of ownership to the said muafi given in charity and therefore the provisions of S. 86, Act 3 of 1926 did not apply to the case.

At a later stage Ram Chandar stated that he had been ejected by the other defendant, namely Bhikam Singh, and Ram Chandar was therefore exempted. The controversy therefore remains with the plaintiff on the one side who alleged the defendant to have been a grove-holder, but who had become a non-occupancy tenant as the grove had been cut down and the defendant Bhikam Singh who alleged himself to be a proprietor. It was clear that the plaintiff was trying to obtain the benefit of S. 197, Cl. (a), Agra Tenancy Act. The defendant Bhikam Singh nowhere alleged in his written statement that the land was not a grove, but he must be deemed to have alleged that he was a rent free grantee to whom S. 186, Tenancy Act, applied and who thus had become the proprietor. The revenue Court sent an issue on the question of proprietary title to the civil Court, and the civil Court after taking such evidence as was produced before it came to the conclusion that the defendant was not a proprietor. At this stage it is necessary to mention that the defendant himself was not present before the civil Court, but his father was, who put in some documentary and oral evidence. The civil Court came to the conclusion that the defendant was not proprietor. On receipt of this finding the revenue Court held that the defendants were non-occupancy tenants and were liable to be ejected. It started its judgment by saying that the suit was for the ejectment of grove-holders which grove had been cut and removed and it observed that Bhikam Singh was not a muafi khidmati holder of the land in dispute.

The defendant appealed and it was nowhere pleaded that the land was not a grove, but it was once more alleged that the defendant had become a proprietor. The learned District Judge on appeal confirmed the finding of the trial Court that the provisions of section 186, Agra Tenancy Act, did not apply, but he went on to observe that it did not follow therefrom that the provisions of S. 184, Agra Tenancy Act, also did not apply and from two extracts of the patwari's papers it appeared that the land was held rent free and therefore the only remedy open to the plaintiff was either to have the rent fixed on the land under section 187, or to sue for an ejectment

under S. 188, Agra Tenancy Act. An attempt was made before the lower appellate Court to produce some additional evidence in appeal. On this point the learned Judge says that the defendant's father appeared in the civil Court below and

> put in some documentary evidence and also an oral statement on oath. It is not open to the defendant to argue now that as he himself was not present the evidence that ought to have been produced could not be produced and I cannot allow him at this late stage to produce further evidence in the case. His application for admission of further evidence has therefore been rejected by me.

It would therefore appear that no attempt was made for the admission of some further evidence after the documentary evidence filed by the plaintiff's father and the oral statement given in the trial Court and the learned District Judge therefore was of the opinion that fresh evidence should not be admitted in appeal. I have mentioned this aspect of the case in some detail because even before me the respondents' counsel suggested that the case should be sent back for production of fresh evidence and for the determination of one issue which I shall mention presently, but I am of the opinion that under the circumstances of the case the defendant should not be given this indulgence, the indulgence of being allowed to tender further evidence.

The position now is, the learned counsel argues, that the defendant must be deemed to be a non-occupancy tenant and the decree of the Court of first instance was correct. His contention is that the defendant having been held to be a person to whom the provisions of Ss. 185 and 186 did not apply can be nothing but a grove-holder. A grove-holder is defined in S. 196, and even a rent-free grantee may be a grove-holder provided the provisions of S. 185 or S. 186, did not apply and to whom land has been let or granted by a landlord for the purpose of planting a grove or who has planted a grove subsequently after permission by the landlord. There is a proviso that if the permission was granted prior to the commencement of the Act the permission need not have been in writing and may have been either express or implied. The result is that on the findings of the lower appellate Court which findings have not been challenged before me in appeal by the defendant, the defendant can at best be said to be a rent-free grantee to whom the provision... 133, tion 185 or S. 186 did not ap... whom the land was either granted... a landlord for the purpose of plantin... a grove or who planted a grove with the implied permission of the landlord.

It was contended by the respondent that I should remit an issue on this point, but I am not prepared to do so because on the materials on the record it is quite clear that the defendant cannot be anything but a grove-holder as defined in S. 196. The plaintiff specifically stated in the plaint that the defendant was a grove-holder and the grove had been cut down. This fact was not expressly denied by the defendant in the written statement. He filed a sale certificate of the year 1901 which he alleged to be the basis of his title and in that sale certificate the land is stated to be a grove. The learned Assistant Collector held that the suit was for the ejectment of a grove-holder the grove having been cut down and removed, and this statement was not challenged in appeal before the lower appellate Court by the defendant. Further on the findings of the Courts below it is clear that the defendant having been held to be a rent free grantee to whom the provisions of S. 185 or S. 186, did not apply, the defendant is a grove-holder and it is common ground that the land is not covered by trees now. The position therefore is that under Cl. (h) of S. 197, when a person becomes a grove-holder in respect of land of which he is a rent free grantee, he shall hold such land as grove-holder in supersession of all subsisting rights and liabilities so far as they are inconsistent therewith, and under Cl. (a) it will be presumed that a grove-holder holds the land in respect of which he is a grove-holder as a non-occupancy tenant when the land ceases to be a grove land. The rights and liabilities which the defendant might have acquired under S. 187 or S. 188, Tenancy Act, are inconsistent with the liability which the defendant has incurred by reason of the fact that the land has now ceased to be a grove and he necessarily will be presumed to be a non-occupancy tenant under Cl. (a) of S. 197.

For the reasons given above, I allow this appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance. Leave to file an appeal by way of Letters Patent is granted.

Appeal allowed.

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